THE INDIAN DECISIONS, NEW SERIES.

MADRAS, VOL. III.

THE

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(NEW SERIES)

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JUDGES OF THE HIGH COURT OF MADRAS DURING 1885—1887.

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8 M. 1.

APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Brandt.

1884
SEP. 18.

APPEL-LATE CIVIL.

8 M. 1.

STRINIVASA (*Second Defendant*), *Appellant v.* NARAYANASAMI (*Plaintiff*), *Respondent.** [18th September, 1884.]

Rent Recovery Act, Sections 7, 9—*Demand of patta.*

The Rent Recovery Act does not require that a tenant demanding a patta shall apply in writing to the landholder specifying the lands and the fasli for which the patta is required.

[R., 12 M. 253.]

THE plaintiff, Narayanasami Nayakan, sued the defendant, Strinivasa Nayakan, under the Rent Recovery Act to compel him to grant a patta for certain land.

A patta had been applied for, but refused.

The suit was dismissed by the Deputy Collector of Salem, but on appeal the District Judge of Salem (E. N. Overbury) decreed in favour of plaintiff.

The defendant then appealed to the High Court on the ground, *inter alia*, that the plaintiff was not entitled to sue, because the demand for a patta was not made in writing and accompanied by a draft muchalka.

Ramasami Mudaliar, for appellant.

Hon. *Rama Rau* and *Varada Rau*, for respondent.

The Court (HUTCHINS and BRANDT, JJ.) delivered the following

JUDGMENT.

We consider that there is nothing in the Rent Recovery Act which requires that a tenant demanding a patta shall [2] make an application in writing accompanied by a statement showing the lands for which he requires a patta and the fasli for which it is required. The case quoted—*Sayud Chanda Miah Sahib* v. *Laksmana Aiyangar* (1)—is no authority for the

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* Second Appeal 576 of 1884.

(1) 1 M. 45.

1884 SEP. 18. — APPELLATE CIVIL. — 8 M. 1.

contention of the appellant's pleader. The learned Judges who decided that case seem to have admitted that Section 7 did not govern Section 9, and the decision really amounts to no more than this: that a demand made by a landlord for the exchange of patta and muchalka must be accompanied by a copy of the patta, or of something showing definitely all the terms offered or required. In the present case the landlord must have known very well for what lands a patta was demanded and that the respondent only required that it should embody the same terms as that formerly granted to his vendor. Section 7 has no bearing on the case whatever. The Judge has found as a fact that the demand for a patta was duly made at the time when the sale under the Act took place; the tenant for whose arrears the land had been attached had no saleable interest in the land, he having conveyed the same to the respondent; and the appellant had notice of that transfer before he proceeded to sell the supposed interest of the former tenant.

The only question for decision in this case was whether the respondent was entitled to the patta claimed by him for fasli 1291, and we think the District Judge was right in holding that he was entitled to such patta.

The appeal is dismissed with costs.

---

8 M. 2.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

THE COURT OF WARDS (*Plaintiff*), *Petitioner* v. DARMALINGA (*Defendant*), *Respondent*.* [5th September, 1884.]

Rent Recovery Act, Section 7—Tender of patta.

When a Collector in a suit brought under the provisions of the Rent Recovery Act has decided that a tenant is to accept a patta on certain terms, the landholder [3] is not bound to tender such patta for acceptance before suing to enforce the terms thereof.

[**Diss.**, 25 M. 613 (619); 27 M. 4=13 M.L.J. 469; **F.**, 23 M. 616; **Cons.**, 23 M. 623; **D.**, 17 M. 225.]

THIS was a suit brought by the Court of Wards on the Small Cause side of the Subordinate Judge's Court at Tanjore to recover rent due for fasli 1290 (1880-81) from the defendant, a raiyat of the Gandrakottai zamindari.

The defendant having refused to accept a patta and execute a muchalka for fasli 1290, proceedings were taken against him in the Revenue Court, which decided that he should accept a patta as settled by that Court.

The defendant pleaded that no patta had been tendered.

The Subordinate Judge (T. Ganapati Ayyar) held that, as there had been no actual tender of a patta, the plaintiff could not recover.

The plaintiff then applied to the High Court under Section 622 of the Code of Civil Procedure to set aside this decree.

Mr. *Shephard*, for petitioner.

Respondent was not represented.

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* Civil Revision Petition 172 of 1884.

The Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.) delivered the following 1884 SEP. 5.

APPELLATE CIVIL.

8 M. 2.

JUDGMENT.

The judgment of the Collector amending the patta and informing the defendant of the terms on which he is to execute a muchalka constitutes a sufficient tender to entitle the landlord to enforce the terms of the patta.

The law nowhere imposes on the landlord the obligation to make a tender after judgment, on the other hand it does declare the tenant liable to ouster if he fails to execute a muchalka within ten days from the date of the Collector's decision. The decree is set aside, and the Subordinate Judge is directed to pass a fresh decree.

The costs of this application will abide and follow the result.

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8 M. 4.

[4] APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

VENKATRAMAYA (*Plaintiff*), *Petitioner v.* VIRAYA (*Defendant*), *Respondent.** [3rd October, 1884.]

Small Cause Court—Jurisdiction—Water-cess—Payment by landholder—Implied contract by tenant to recoup.

If a landholder pays to Government water-cess which his tenant is legally bound to pay, a Small Cause Court constituted under Act XI of 1865 has jurisdiction to decide a suit brought by the landholder against the tenant to recover the amount so paid by the landholder.

THIS was an application to the High Court under Section 622 of the Code of Civil Procedure to set aside the decree of N. Raghavulu Nayudu, District Munsif of Bezvada, in Small Cause suit No. 701 of 1883.

The plaintiff, Raja Venkatramaya Appa Rau, a zamindar, sued his tenant, Avatapalli Viraya, to recover Rs. 20-5-2, alleging that the Collector had levied water-tax from him and that defendant was bound to contribute his share of the tax.

The Munsif held that plaintiff had no cause of action, as defendant had not cultivated his land during the period for which tax was paid.

Sadagopacharyar, for petitioner.

Respondent was not represented.

It was contended for the plaintiff that there was an implied contract by the defendant to recoup the plaintiff for the payment of tax made on his behalf, and that such suit was cognizable by a Small Cause Court.

JUDGMENT.

The judgment of the Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.) was delivered by

TURNER, C.J.—Where water-cess is due, it may be recovered in the same manner as Government revenue, *i.e.*, the land may be [5] sold and the rights of all parties other than the Government destroyed. The land-owner is therefore entitled to pay such cesses whether a personal liability

* Civil Revision Petition 273 of 1884.

1884 OCT. 3. — APPELLATE CIVIL. — 8 M. 4.

for them has been contracted by his tenants or by himself, and if his tenants are liable to pay the cess, he is entitled to claim from them reimbursement in virtue of what is known as an implied contract. If the claim cannot be described as one founded on contract, it can be described as arising out of a right to compensation; in other words, it would be a claim for damages.

The suit is cognizable on the Small Cause Court side of the Munsif's Court, and the Munsif should have determined whether or not the tenant was legally bound to pay in whole or in part the amount claimed and have passed a decree in accordance with his finding. The decree of the Munsif is set aside and a new trial ordered. The costs of this application will abide and follow the result.

---

8 M. 5=1 Weir 330.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar.

QUEEN-EMPRESS *v.* RAMAKKA.*

[22nd September and 11th October, 1884.]

Penal Code, Section 309—*Attempt to commit suicide—Intention*—Locus pænitentiæ.

R, with the intention of committing suicide by throwing herself into a well, ran to the well, where she was arrested. She was convicted under Section 309 of the Indian Penal Code of having attempted to commit suicide:

Held, that the conviction was illegal.

[**D.**, 32 C. 292 (294)=9 C.W.N. 547.]

THIS was a case submitted for the orders of the High Court by W. A. Happell, District Magistrate of Kistna.

The facts appear from the judgment of the High Court (MUTTUSAMI AYYAR, J.).

Counsel were not instructed.

JUDGMENT.

The accused quarrelled with her father and brother and ran to a well saying that she would fall into it. The [6] first witness for the prosecution, who was at the well, heard the alarm raised by the second witness, caught the accused, and delivered her into the custody of the Village Munsif. Upon these facts, the Second-class Magistrate of Palnad (V. Subramaniam) convicted her of an attempt to commit suicide and sentenced her to four months' simple imprisonment. There is no doubt that the accused intended to commit suicide and that she prepared to carry out that intention and proceeded to the well. She might have, however, still changed her mind, and she was caught before she did anything which might be regarded as the commencement of the offence of which she is convicted. I set aside the conviction and direct that the accused be discharged from custody.

---

* Criminal Revision Case 539 of 1884.

8 M. 6.

1884 OCT. 9. APPELLATE CIVIL. 8 M. 6.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Kernan.

PALANI (*Defendant*), *Appellant v.* SIVALINGA (*Plaintiff*), *Respondent.** [9th October, 1884.]

Rent Recovery Act, Section 33—Sale—Adjournment for want of bidders to next day, invalid—Duty of officer conducting sale.

A sale of land for arrears of rent under the provisions of the Rent Recovery Act having been advertised for a certain day, was, owing to the absence of bidders on that day, adjourned and held on the day following by the officer empowered to sell.

Held, that the sale was invalid.

THIS was an appeal from the decree of E. N. Overbury, District Judge of Salem, reversing the decree of V. Vaithi Ayyar, District Munsif of Namakal, in suit 212 of 1882.

The plaintiff, Sivalinga Goundan, sued the defendant, Pallikudathu Palani Goundan, to recover possession of certain land which he alleged he had purchased at an auction sale held under the provisions of the Rent Recovery Act (Madras Act VIII of 1865) on the 16th November 1880.

[7] The Munsif dismissed the suit on the ground that the date fixed for the sale under Section 33 of the Rent Recovery Act was the 15th, not the 16th of November.

On appeal the District Judge found that the property was advertised for sale on the 15th, but, as there were no bidders on that day, the sale was held on the 16th November; held that Section 33 of the Act did not require fresh notice to be issued under the circumstances, and decreed for plaintiff.

Defendant appealed.

Bhashyam Ayyangar, for appellant.

Ramasami Mudaliar, for respondent.

The Court (TURNER, C.J., and KERNAN, J.) delivered the following

JUDGMENT.

The officer deputed to hold the sale reported that on the date of the sale the tom-tom was beaten, but that no persons collected to enable him to put up the property for sale. He therefore adjourned the sale to the following day.

Although the officer deputed to make a sale under the Civil Procedure Code has power to adjourn a sale, there is no power to do so given to the officer making a sale under the Rent Act. We need not now consider whether, if a sale of several lots was commenced on the appointed day and for want of time could not be concluded on that day, the officer might not be competent to continue the sale on the following day. But, whereas in this instance no persons attended, it was the duty of the officer to report to the Court the failure to sell, and a fresh order might have been issued with a new proclamation. The sale must be set aside and the decree of the Appellate Court reversed and that of the Munsif restored, but, as the appellant took no steps to set aside the sale, without costs.

* Second Appeal No. 596 of 1884.

1884
OCT. 16.
APPELLATE CIVIL.
8 M. 8.

8 M. 8.

[8] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

KAHANARAMA (*Decree-holder*), *Appellant v.* RANGA (*Judgment-debtor*), *Respondent.** [16th October, 1884.]

Act XI *of* 1865, *Section* 20—*Civil Procedure Code, Section* 223—*Small cause decree of Subordinate Judge—Execution against immoveable property—Co-ordinate jurisdiction of Subordinate Judge and District Munsif—Execution by District Munsif.*

The Court of a Subordinate Judge and that of a District Munsif had jurisdiction over certain immoveable property.

A small cause decree of the former Court having been sent by the Subordinate Judge to the Court of the District Munsif for execution against the said property under the provisions of Section 20 of Act XI of 1865, the application for execution was rejected by the Munsif on the ground that this procedure was illegal.

Held, that Section 20 of Act XI of 1865 was not modified by Section 223 of the Code of Civil Procedure, and that the Munsif's Court was, therefore, bound to execute the decree.

[R., 11 M. 130.]

THIS was a case stated under Section 617 of the Code of Civil Procedure by M. Cross, Subordinate Judge of Kumbakonam.

On the application of Kahanarama Bhagavathar, decree-holder in Small Cause suit 53 of 1882 in the Subordinate Court, the decree was sent under Section 20 of Act XI of 1865 to the District Munsif's Court at Valangiman, for execution against the immoveable property of the judgment-debtor, Ranga Solagan.

The District Munsif rejected the application for execution on the ground that, the Subordinate Court itself having jurisdiction over the immoveable property against which the decree was to be executed, the decree could not be transferred to the Munsif's Court for execution.

The question whether the procedure of the Subordinate Court, which had been followed since 1862, was correct, was submitted to the High Court for decision.

Counsel were not instructed.

JUDGMENT.

[9] The judgment of the Court (MUTTUSAMI AYYAR and BRANDT, JJ.) was delivered by

MUTTUSAMI AYYAR, J.—Under Section 20 of Act XI of 1865, any Court having general jurisdiction in the place in which the immoveable property is situated is bound to execute the decree. Although the Small Cause Judge has in this case been invested with the general jurisdiction of a Subordinate Judge, Section 20 has not been repealed, and the power conferred by it upon the District Munsif having general jurisdiction has not been taken away. In *Gopal* v. *Nanku* (1) it was only held that the Subordinate Judge having general jurisdiction was entitled to execute his own decree as a Small Cause Judge under Section 20. As Act XI of 1865 is a special enactment, we are not prepared to hold that it is modified by Section 223 of the Civil Procedure Code.

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* Referred Case 12 of 1884.

(1) 1 A. 624.

The language of Section 20 does not restrict it to cases in which the Small Cause Judge has no general jurisdiction. There may be cases in which the decree-holder may find it more convenient to execute the decree against immoveable property in a Munsif's Court than in the Subordinate Court. We are of opinion that the District Munsif is bound to proceed with the execution of the decree as directed by Section 20 of Act XI of 1865.

1884 OCT. 16. — APPELLATE CIVIL. — 8 M. 8.

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8 M. 9.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Kernan.

SUBBA (*Plaintiff*), *Appellant v.* VENKATA (*Defendant*), *Respondent.**
[9th October, 1884.]

Rent Recovery Act, Sections 1, 2—*Landholder—Distraint.*

V leased certain fields to S at a single rent. Of these fields, some were held by V under a raiyatwari patta, but the patta for the rest stood in the names of V's vendors. V distrained for arrears of rent under the provisions of the Rent Recovery Act:

[10] *Held*, that V was not a landholder within the definition in the said Act in respect of the latter fields, and, therefore, that the distraint was illegal.

THE plaintiff, Subbayyar, sued the defendant, Yellari Venkatarayar, for Rs. 1,027-2-8, damages caused by an alleged illegal distraint under the Rent Recovery Act (Madras Act VIII of 1865).

The Subordinate Judge of Cuddalore (Adiappa Chettiar), to whose Court the case had been transferred from that of the District Munsif of Chidambaram, held that the distraint was illegal and gave the plaintiff a decree for Rs. 261-1-0.

On appeal, the District Judge of South Arcot (J. Hope) reversed this decree and dismissed the suit.

The plaintiff appealed to the High Court.

Balaji Rau, for appellant.

Gopalacharyar, for respondent.

JUDGMENT.

The facts necessary for the purpose of this report appear from the judgment of the Court (TURNER, C.J, and KERNAN, J.) which was delivered by

TURNER, C. J.—This suit was brought to recover damages for a distraint for arrears of rent, which the plaintiff asserts was illegal. It appears that he held 65 kanis of land under the defendant at a single rent of 850 kalams of paddy and 300 bundles of straw, and that he had executed a muchalka. The defendant held 57 kanis out of the land leased under a raiyatwari patta, as to the residue of the land the patta stood in the name of the defendant's vendors; but the defendant had paid revenue due in respect of one plot of this land from 1873 and that due in respect of another plot from 1876.

On the part of the plaintiff, it is contended that, in respect of the land in excess of 57 kanis, the defendant was not a *landholder* within the definition of that term in the Rent Act, and that inasmuch as the whole

* Second Appeal 805 of 1883.

1884 Oct. 9. — Appellate Civil. — 8 M. 9.

65 kanis were held on a single rent, the defendant was not at liberty to distrain. We are obliged to hold that the objection is well founded.

When the rent is payable in one sum in respect of land of which the landlord is the registered owner, or otherwise subject to the payment of revenue direct to Government, as well as of land in respect of which he has no such direct liability, we cannot allocate the rent and say that the distraint was good in respect of so much of the balance due and that it was illegal and [11] unauthorized in respect of the residue. The decree of the Lower Appellate Court must be set aside and that of the Court of First Instance restored with costs in all Courts.

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8 M. 11 (F.B.) = 1 Weir 902.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

REFERENCE UNDER STAMP ACT, SECTION 46.* [†7th October, 1884.]

Stamp Act, Sections 61, 64—*Receipt—Acknowledgment by letter.*

Where the receipt of money exceeding twenty rupees, in satisfaction of a debt, is acknowledged by letter without a receipt stamp being affixed, the writer is liable to punishment under Section 61 of the Indian Stamp Act, 1879.

THIS was a case referred, for the decision of the High Court, by the Board of Revenue under Section 46 of the Indian Stamp Act, 1879. The circumstances which led to this reference were as follows:—

In calendar case 21 of 1884 on the file of the Deputy Magistrate of Salem, Viramuttu Padiachi, mittadar of Chekkadipatti, was tried for an offence against the Stamp Law in having written and sent, without affixing thereto a receipt stamp, the following letter:—

"I am doing well through your wishes, and request that you will kindly communicate about your welfare. I received through your peon, Padsha, son of Karutha Routhen, Rs. 100, being the balance left after payment of Rs. 100 made by you out of the sale-value of my pony sold to you for Rs. 200. I also learnt that you want the saddle and bridle, &c. If you want them, come over immediately and take them. Their value is Rs. 50. Please write to me for any other thing that you may want me to do for you."

The Deputy Magistrate being of opinion that the mention of a receipt of money in a letter could not make the letter liable to stamp duty, discharged the accused.

On the 12th of August 1884, this case was referred, under Section 438 of the Code of Criminal Procedure, for the orders of the [12] High Court by C. W. W. Martin, Acting District Magistrate of Salem, on the ground that the order was illegal.

On the 19th of August the case was disposed of by HUTCHINS, J., who delivered the following

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* Referred Case 7 of 1884.

† Another reading is "October 1."

JUDGMENT.

1884
Oct. 7.
FULL BENCH.
8 M. 11 (F.B.) = 1 Weir 902.

The neglect to give a stamped receipt is dealt with by a special section of the Stamp Act, *viz.*, the 64th. It is only punishable if there has been a demand under Section 58, or if the sum is fraudulently understated. There is no ground for this Court to interfere.

On the 30th August the Collector of Salem (G. McWatters). being of opinion that this judgment conflicted with a ruling of the Board of Revenue, dated 13th November 1883, brought the matter to the notice of the Board of Revenue.

On the 20th September, the Board of Revenue passed the following Resolution :—

"This decision of the Honorable Mr. Justice Hutchins is opposed to the opinion of the Board and to the instructions which they have issued to Collectors. The Board, therefore, under Section 46 of Act I of 1879, resolve to state this case for the opinion of the High Court, in order that it may be decided by a Full Bench.

"Any person who writes a receipt for a sum exceeding Rs. 20. without affixing a stamp, commits an offence under Section 61 of the Stamp Act, for the receipt is an instrument chargeable with duty (*vide* Section 3 (17) and Schedule 1, Art. 52), and until a one-anna stamp is affixed the instrument is not duly stamped.

"It is true that there are other offences connected with receipts. Section 58 directs that a person receiving more than Rs. 20 shall, on demand, give a duly stamped receipt, and Section 64 provides a penalty for the refusal to give a receipt and for fraudulent under-statement of the amount ; but these special offences created by Sections 58 and 64 in no way alter the fact that an unstamped receipt is an instrument chargeable with duty and not duly stamped within the meaning of Section 61.

"A parallel may be found in regard to insurances. Sections 65 and 66 create special offences in respect of insurance policies, but if a Collector ordered a prosecution under Section 61 in the case of an insurance policy not duly stamped, it would be no defence to urge that the offences contemplated by Sections 65 and 66 had not been committed.

[13] "The Board, therefore, are of opinion that, whether or not a demand was made, a receipt for more than Rs. 20 is an instrument chargeable with duty of one anna, and, if such receipt is not duly stamped, the person executing it is liable to a penalty under Section 61.

"The acting Third Member of the Board is not a party to these proceedings, and has recorded a minute of dissent to the effect that a receipt defined in Section 3 (17) of the Act becomes such for the penal purposes of the Act, only when it is given in answer to the demand made under Section 58."

The Government Pleader (Mr. *Shephard*) appeared on behalf of the Board of Revenue.

The judgment of the Full Bench (TURNER, C.J., KERNAN, MUTTUSAWMI AYYAR, HUTCHINS, and BRANDT, JJ.) was delivered by

TURNER, C.J.—Assuming that this is a matter in which a reference may be made, we reply that the accused could not be convicted under Section 64 of the Act, for no one of the offences constituted by that Section were committed by him. He did not refuse nor neglect to give a receipt, nor did he with intent to defraud the revenue give a receipt for less than Rs. 20 when he had received more, nor did he with the like intent separate or divide the money or property paid or delivered.

1884 Oct. 7. — Full Bench. — 8 M. 11 (F.B.). 1 Weir 902.

But the accused was liable to conviction under Section 61, for the letter was a receipt and as such chargeable with duty, and the accused signed it otherwise than as a witness without its being properly stamped.

HUTCHINS, J.—I only wish to add that, although I have now no doubt that my reason for declining to interfere on the Criminal Reference was wrong, I am equally sure that it was not a case in which this Court ought to have interfered to the prejudice of the accused by ordering a new trial. If I had been overruling any judicial order, I should have given the point now referred to us better consideration, but being satisfied that I ought not to interfere I disposed of the matter somewhat hastily.

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8 M. 14 (F.B).

[14] APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

IN THE MATTER OF THE PETITION OF PARTHASARADI.*

[7th October, 1884.]

Stamp Act, Sch. I, Art. 27 ; Sch. II, Art. 11 (a)—Vakil—Entry on roll of advocates—Exemption from duty.

By Article 11 (*a*) of Schedule II of the Indian Stamp Act, 1879, (which exempts from duty the entry of an advocate, vakil or attorney on the roll of any High Court when he has previously been enrolled in a High Court established by royal charter), a vakil on the roll of the High Court, Madras, who applies to be entered on the roll of advocates, is exempted from the duty prescribed by Article 27 of Schedule 1 of the said Act.

[R., 36 C. 645=9 C.L.J. 621 (622).]

ON the 6th of October, Mr. *Grant* moved before the Appellate Court (TURNER, C. J., and BRANDT, J.) that M. O. Parthasaradi Ayyangar be entered on the roll of advocates of the High Court.

The petitioner claimed exemption from stamp duty, leviable under Article 27, Schedule I, of the Indian Stamp Act, 1879, by virtue of Article 11 (*a*), Schedule II, inasmuch as he had already, in April, 1880, been enrolled as a vakil of the High Court and his name was still upon the roll of vakils.

The question—Whether the petitioner was liable to duty on enrolment as an advocate—was referred to a Full Bench.

Mr. *Grant* for petitioner.—The stamp fee under the Stamp Act, 1879, for entry on the rolls, whether as advocate, vakil or attorney, is Rs. 500. (The attorney pays Rs. 250 on his articles of clerkship and Rs. 250 on enrolment.) When once the name of a person appears on the roll, he cannot be required to pay a fee for entry either in the High Court in which he is enrolled or in any other Court, whether he desires to be enrolled in the same or any other character than that in which he has been enrolled. A second entry fee could be claimed only if the words "as such" had been introduced after the word "enrolled" in the exemption clause (article [15] 11 (*a*), schedule II, of the Stamp Act). The petitioner has fully satisfied the language of the clause, as it stands, to entitle him to the exemption.

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* C.M.P., 509 of 1884.

1884 OCT. 7. FULL BENCH. 8 M. 14 (F.B.).

JUDGMENT.

The judgment of the Full Bench (TURNER, C.J., KERNAN, MUTTUSAMI AYYAR, HUTCHINS and BRANDT, JJ.) was delivered by

TURNER, C.J.—In our judgment the petitioner is within the terms of the exemption. He has been already enrolled in a High Court and he has paid Rs. 500 for entry on the roll. The tax is one which is peculiar to the profession of the law, and it may be that the legislature considered it sufficient to demand from a member of the profession the payment of a single fee, whether such member was first enrolled as an attorney, or as a vakil, and then proceeded to qualify as an advocate.

However this may be, we are bound to give effect to the terms of the exemption, unless it can be collected from the context that they are intended to bear a sense other than their ordinary sense; and here no such inference can be so collected.

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8 M. 15 (F.B.)

APPELLATE CIVIL.—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, and Mr. Justice Brandt.

REFERENCE UNDER STMAP ACT, SECTION 46.* [23rd September, 1884.]

Stamp Act, s. 4 (*c*), *Sch.* I, *Art.* 5— *Court Fees Act, Sch. II, Art.* 1 (*b*)—*Petition to withdraw suit—Agreement—Bond.*

A petition, stamped as an agreement, having been presented to a District Court by the parties to a suit, informing the Court that they had entered into an agreement, whereby, *inter alia*, the defendant was bound to deliver to the plaintiff certain wood, and requesting that the suit might be removed from the file, the District Judge impounded it, levied a sum for insufficient stamp duty and a penalty, on the ground that it was a bond, and forwarded it to the Collector.

Upon a reference made by the Board of Revenue at the instance of the Collector.

Held, that the duty leviable was a Court-fee stamp under Article 1 (*b*) of Sch. II of the *Court Fees Act*, 1870.

THIS was a case stated by the Board of Revenue under Section 46 of the Indian Stamp Act, 1879.

[16] The facts are set out in the following letter from the Collector of Chingleput (J. F. Price) to the Board of Revenue, dated 18th April 1884:—

"I have the honor to submit a translation of document, a copy of which was sent to me, under Section 35 of the Stamp Act, by the District Judge, as I consider that Stamp duty and penalty have been improperly levied upon it.

"I cannot make this reference under Section 45 of the Stamp Act, but Section 46 provides that the Board of Revenue can refer any case coming to its notice in any way soever to the High Court. This, I consider, warrants my bringing this one forward. The document is clearly a razinama, or deed setting forth that the parties have compromised and that the plaintiff withdraws. In it, it is stated, that the defendant having agreed to deliver certain wood within a certain time, in accordance with an agreement made, and to receive Rs. 60, the parties have settled matters and request the dismissal of the suit.

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* Referred Case 4 of 1884.

1884 Sep. 23. — Full Bench. — 8 M. 15 (F.B.).

"The District Judge impounded this document, which bore a stamp of As. 8, and levied Rs. 1-8-0 as deficient Stamp duty and Rs. 15 as penalty.

"On my asking him the ground for this, he replied that the document is a bond, inasmuch as it is an agreement to deliver '40 tons of casuarina wood, being agricultural produce.' But this does not seem to be the case, for there was evidently another prior agreement and the document says, that, as there has been an agreement made to a certain effect, the suit should be dismissed; and the paper is signed by both parties. Further, if the document was one binding the defendant to deliver 40 tons of casuarina wood, I do not think that this would be 'agricultural produce' within the meaning of the Stamp Act. One would hardly call teak logs from the Nilambur plantations 'agricultural produce,' and if one would not, why should casuarina logs be included under that head?

"It appears to me that the instrument under reference is merely an agreement and nothing more. There are hundreds of these filed every year in Civil Courts, and they all, as far as I know, bear an eight-anna stamp. If the learned Judge's view is correct, the majority of these, where they contain any mention of the agreement upon which a compromise is based, are incorrectly stamped. It seems to me, therefore, desirable, both in the interests [17] of the public and those of the stamp revenue, that an authoritative decision should be obtained as to what they should be considered."

The resolution of the Board of Revenue, dated 10th May 1884, was as follows:—

"The Board do not consider that timber is agricultural produce within the meaning of Section 3, Clause 4 (*c*), Act 1 of 1879. The District Judge of Chingleput appears to have held that the fire-wood mentioned in the document was agricultural produce because it was the produce of casuarina plantations, but there is nothing in the document about casuarina wood, and the terms of the documeut would be satisfied if defendant delivered junglewood.

"Moreover, the Board consider that the document is an agreement and not a bond obliging the defendant to deliver the wood. As the District Judge, however, has taken a different view, and as the question is one of general importance, it will be referred to the High Court."

Counsel were not instructed.

JUDGMENT.

The judgment of the Full Bench (Turner, C.J., Kernan and Brandt, JJ.) was delivered by

Turner, C.J.—The document is a petition to the Court, informing the Court of an agreement into which the parties have entered for the compromise of the suit, and praying for the removal of the suit from the file. As such, it is a petition to the Court chargeable with a stamp under the Court Fees Act, Schedule II, Article 1 (*b*).

The sums improperly levied by the Judge should be returned.

8 M. 18 (F.B.)=9 Ind. Jur. 73=2 Weir. 540.

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FULL BENCH.

8 M. 18 (F.B.).= 9 Ind. Jur. 73 = 2 Weir 540.

[18] APPELLATE CRIMINAL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Muttusami Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

IN THE MATTER OF THE PETITION OF PADMANABHA.*

[3rd and 18th October, 1884.]

Criminal Procedure Code, Ss. 17, 435, 437—District Magistrate—Power to revise proceedings of Sub-Divisional Magistrate of the first class—"Inferior," "Subordinate" Magistrates—Reason of distinction.

Under section 435 of the Code of Criminal Procedure, a District Magistrate has power to call for, and examine, the record of a proceeding before a Sub-Divisional Magistrate of the first class.

Nobin Kristo Mookerjee v. *Russick Lall Laha* (I.L.R. 10 Cal. 268) dissented from.

[R., 12 C. 473 (475); 9 Cr.L.J. 104 (105).=25 P.R. 1908, Cr.]

AN application under Section 435 of the Code of Criminal Procedure having been made to District Magistrate of Nellore (J. GROSE,) by one Nidamanuri Padmanabha Setti to call for, and examine, the record of a case in which a complaint of cheating had been dismissed by the Naidupet Sub-Divisional Magistrate of the first class, the District Magistrate rejected it on the ground that he had no jurisdiction, following the decision of the High Court at Calcutta in *Nobin Kristo Mookerjee* v. *Russick Lall Laha* (1).

The records of the case were called for by the High Court, and the case was referred to a Full Bench by TURNER, C.J., and MUTTUSAMI AYYAR, J., on the 3rd of October.

Counsel were not instructed.

JUDGMENT.

The judgment of the Full Bench (TURNER, C.J., MUTTUSAMI AYYAR, HUTCHINS and BRANDT, JJ.) was delivered by

TURNER, C.J.—An application was made to the Magistrate of the District to call for, and examine, the record of a case in which a complaint of the offence of cheating, punishable under Section 417 of the Indian Penal Code, had been dismissed by a First-class Magistrate under Section 203 of the Code of Criminal Procedure. The Magistrate of the District entertaining some doubt as to his power in consequence of the decision of the High Court, Calcutta, in *Nobin Kristo Mokerjee* v. *Russick Lall Laha* (1), applied to this Court for instructions. As the Court does not give extra-judicial opinions on questions so submitted, he was directed to pass orders [19] and submit his proceedings for revision, that the point might be duly determined.

We have considered the decision to which our attention has been called, and, with the highest respect for the learned Judges by whom it was passed, we feel constrained to a conclusion different from that at which they have arrived.

It appears to us that the group of Sections 435 to 439 of the Code of Criminal Procedure must be read together. Section 435 empowers the

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* Criminal Revision Case 574 of 1884.

(1) 10 C. 268.

1884 OCT. 18. — FULL BENCH. — 8 M. 18 (F.B.). 9 Ind. Jur. 73=2 Weir. 540.

Courts therein named to call for the proceedings of any inferior Criminal Court within the local limits of their jurisdiction, and goes on to declare what course is to be pursued by one of the Courts to whom the power is given, the Court of the Sub-Divisional Magistrate, when the Court conceives that further action is necessary. The following sections indicate what course is to be taken by the Courts superior to that of the Sub-Divisional Magistrate :—Under Section 437 the District Magistrate may direct any Subordinate Magistrate to make further inquiry into any complaint which has been dismissed under Section 203, &c. This power, it is obvious from the first words of the section, the Magistrate of the District may use on examining any record under Section 435. Hence we see that the term "subordinate" is comprised in the term "inferior" used in Section 435. The reason for the employment of the latter term in Sections 435 and 436 was that in both those sections the Court of Session and the District Magistrate are combined, and the Magistrates (other than the District Magistrate) though subordinate to the District Magistrate are not so generally to the Court of Session. It was necessary, therefore, in Sections 435 and 436 to employ a term applicable to the relations of the magistracy both to the supervising authority and the appellate tribunal.

When we come to Section 437, in which the District Magistrate is dealt with separately from the Court of Session, the use of the term "inferior" is no longer necessary and accordingly we find the term used is "subordinate." Reading Sections 435 and 437 with Section 17, we hold that the District Magistrate had jurisdiction to entertain the application, and, setting aside his order, we direct him to restore the application to the file and dispose of it on the merits.

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8 M. 20.

[20] APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

KRISHNASAMI (*Plaintiff*), *Petitioner v.* G. A. ENGEL (*Defendant*), *Respondent.** [7th November, 1884.]

Civil Procedure Code, Sections. 483, 484, 648—*Attachment before judgment—Property not in jurisdiction.*

Under the provisions of Sections 483 and 484 of the Code of Civil Procedure 1882, property of the defendant, which is not within the jurisdiction of the Court, cannot be attached before judgment.

[F., 5 Bom. L.R. 570 (573, 574) ; 14 Bur. L.R. 138=U.B.R. (1907) II Qr. C.P.C. 648 ; L.B.R. (1893—1900) 56 (57) ; 3 L.B.R. 255 (256) ; R., 39 C. 104 (118)=14 C.L.J. 228=16 C.W.N. 402=11 Ind. Cas. 417 (422) ; 24 M.L.J. 70=13 M.L.T. 207=18 Ind. Cas. 498=(1913) M.W.N. 136 (137) ; 1 L.B R. 310 (311).]

THIS was a petition to the High Court, under Section 622 of the Code of Civil Procedure, to set aside an order of J. W. Handley, Chief Judge of the Presidency Small Cause Court, rejecting an application made by the plaintiffs, Krishnasami Chetti and others, in suit 19216 of 1884, to attach before judgment a sum of money belonging to the defendant in the said suit in the hands of the Chief Engineer of the Madras Railway at Bellary.

* Civil Revision Petition 385 of 1884.

The Chief Judge in rejecting the application stated that it had been ruled by the Full Court that the Court had no jurisdiction to attach before judgment, under Sections 483, 484, and 648, property out of the jurisdiction of the Court.

1884 Nov. 7. — APPELLATE CIVIL. — 8 M. 20.

Laing, for petitioner.

Respondent was not represented.

JUDGMENT.

The judgment of the Court (TURNER, C.J., and HUTCHINS, J.) was delivered by

TURNER, C.J.—We agree with the learned Judges of the Presidency Small Cause Court that Sections 483 and 484 warrant the attachment before judgment only of property within the jurisdiction of the Court. The plaintiff, it is provided, may apply to the Court to direct that any portion of the property of the defendant within the jurisdiction of the Court shall be attached. This limitation of the application governs the proceedings which follow it and regulates the power of the Court. The words " within the jurisdiction [21] of the Court" were introduced into the Code for the first time by the Act of 1879 and appear to embody the result of rulings which had been passed before Section 648 was a part of the Code.

The Section 648 does not authorize the Court to attach any property which it is not authorized to attach by any other sections of the Code, though it permits it to transmit its order where such an order may be made for execution beyond the local limits of its jurisdiction. The words are "where any Court desires...that any property shall be attached under any provision of this Code."

There are sections of the Code other than Sections 483 and 484, which authorize the attachment of property without qualification as to its location, and when it has made orders under these sections, the Court can avail itself of the powers given by Section 648, namely, as has been pointed out by the learned Second Judge, Section 168 of the Code in the case of all Courts, and in the case of Courts other than Small Cause Courts, Section 493.

We affirm the order of the Small Cause Court and reject the petition.

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8 M. 21.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

SUBBA (*Judgment-creditor*), *Appellant v.* VENKATA (*Judgment-debtor*), *Respondent.** [16th October, 1884.]

Civil Procedure Code, Section 341—Decree—Execution—Arrest—Non-payment of Subsistence money—Discharge—Re-arrest.

The discharge of a judgment-debtor before imprisonment on account of the non-payment of the sub-sistence-money for the debtor is no bar to the debtor being re-arrested.

[F., 26 A. 317=A.W.N. (1904) 22 ; 23 C. 123.]

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* Appeal against appellate order, No. 29 of 1884.

1884 Oct. 16. — Appellate Civil. — 8 M. 21.

THIS was an appeal against an order of E. N. Overbury, District Judge of Salem, confirming an order of P. A. Lakshmana Chetti, District Munsif of Hosur, dismissing an application made by Kotha Subba Chetti, judgment-creditor, for execution of the decree in suit No. 18 of 1875 by arrest of the person of the debtor, Namala Venkataramana Ayyan.

[22] The application was opposed on the ground, *inter alia*, that it was barred, inasmuch as the debtor had been arrested on a former occasion and discharged from custody because the creditor had not deposited subsistence-money.

The District Judge held that the creditor had, by his conduct, waived his remedy against the person of the debtor.

Ramasami Mudaliar, for appellant.

Respondent was not represented.

JUDGMENT.

The judgment of the Court (MUTTUSAMI AYYAR and BRANDT, JJ.) was delivered by

MUTTUSAMI AYYAR, J.—The respondent was discharged after arrest on the ground that no subsistence-money was deposited by the appellant. It does not appear that he was discharged from jail. It is only when he has been imprisoned in, and discharged from, jail that he cannot be re-arrested under the decree, in execution of which he was once imprisoned.

We set aside the order of the Lower Courts. We shall make no order as to costs.

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8 M. 22.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

KAMARAJA (*Appellant*) *v.* THE SECRETARY OF STATE FOR INDIA (*Respondent*).* [16th October and 6th November, 1884.]

Madras Forest Act, Section 10—*Appeal to the District Court*—*Court Fees Act, Sch.* II, *Art.* 11 (*a*), *Art.* 17, *cl. VI.*

An appeal to the District Court from the rejection of a claim by a Forest Settlement officer under Cl. II of Section 10 of the Madras Forest Act, 1882, falls under Art 17, Cl. VI, and not under Art. 11 (*a*), of Sch. II of the Court Fees Act, 1870.

THIS was a case referred, for the decision of the High Court, under Section 617 of the Code of Civil Procedure by the District Judge of Madura (E. Turner).

The case was stated as follows :—

"Mr. Pole, counsel on behalf of the appellant, presents this appeal against the decision of F. E. Robinson, Forest Settlement [23] officer, under Act V of 1882, and pays Court-fee of As. 8 for the appeal, urging that no provision has been made about Court fees either in the Court Fees Act VII of 1870, or Madras Forest Act V of 1882.

"This is an appeal preferred to this Court in respect of a rejected claim under Cl. II, Section 10 of Madras Forest Act V of 1882. No provision was made in the Court Fees Act, 1870, about Court fees payable on such appeals, as the Forest Act came into force long after it. The appeal

* Referred case 10 of 1884.

involves a claim to an intended reserve under the Forest Act and it is not possible to estimate the subject-matter at a money-value. I am, therefore, of opinion that the Court fee payable on this appeal is Rs. 10 as provided for in art. 17 (VI) of sch. II, Court Fees Act, 1870.

1884 Nov. 6.

APPELLATE CIVIL.

8 M. 22.

"Under these circumstances, the question I propose to submit for the opinion of their Lordships is—Whether Court fee payable on this appeal is Rs. 10 or As. 8?

"The question is an important one, because similar questions may arise. The appellant's counsel also wished that I should refer the question."

Mr. *Grant*, for appellant.

Respondent was not represented.

The judgment of the Court (MUTTUSAMI AYYAR and BRANDT, JJ.) was delivered by—

JUDGMENT.

BRANDT, J.—A notification having been published by Government under Section 4 of the Forest Act (Madras Act V of 1882), declaring that it is proposed to constitute certain land a reserved forest, the zamindar of Bodinayakanur put in a claim before the Forest Settlement officer to the Thambiran forest, included in or constituting such proposed reserved forest.

The claim was wholly rejected, and the zamindar preferred an appeal to the District Court in respect of the rejection of his claim.

The appeal was presented with an eight-anna Court fee stamp affixed thereto.

The District Judge refers to this Court the question—What is the Court fee stamp leviable on such an appeal? expressing an opinion that the Court fee payable is Rs. 10, as provided in sch. II, art. 17, cl. VI, as on an appeal in a suit where it is not possible to estimate at a money-value the subject-matter of the suit, and not otherwise provided for in the Act.

[24] It is contended before us that the memorandum of appeal is correctly stamped, having regard to art. 11, sch. II, of the Court Fees Act; this being an appeal not from an order rejecting a plaint or from a decree or from an order having the force of a decree.

We think that the decision of the Forest Settlement officer upon the claim must be regarded as a decision in proceedings in the nature of a suit. The jurisdiction of the civil Courts is entirely excluded between the dates of the publication of the notification under Section 4 and of the notification declaring the forest to be reserved, except as specially provided, and the decision of the District Court in appeal under Section 10 of the Act in the case of a claim to a right in or over any land, other than rights of the kind specified in clauses (*a*), (*b*), (*c*) and (*d*) of Section 10, is no doubt final in so far as proceedings under the Act are concerned—and the procedure prescribed in Sections 8 and 9 of the Act appears to indicate that the inquiry is to be conducted in the manner prescribed in the case of a suit in an appealable case.

We are of opinion then that the stamp duty payable in respect of the appeal to the District Court is Rs. 10 under art. 17, cl. VI, sch. II, of the Court Fees Act.

1884
JULY 21.

FULL BENCH.

8 M. 24
(F.B.).

8 M. 24 (F.B.).

FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, and Mr. Justice Hutchins.

IN THE MATTER OF THE PETITION OF JOHN WALLACE.
[21st July, 1884.]

Jurisdiction—Complaint against Governor and Council of Madras—21 *Geo. III*, c. 70, *Section* 5; 39 *and* 40 *Geo. III*, c. 79, *Section* 3; 4 *Geo. IV*, c. 71, *Section* 17.

Section 3 of 39 and 40 Geo. III, c. 70, which provides that the Governor and Council at Madras shall enjoy the same exemption and no other from the authority of the Supreme Court at Madras as is enjoyed by the Governor-General and Council from the jurisdiction of the Supreme Court at Calcutta, did not confer on the Supreme Court at Madras a jurisdiction over the Governor and Council of Madras similar to that conferred by 21 Geo. III, c. 21, Section 5, on the Supreme Court at Calcutta over the Governor-General and Council.

THIS was an application to the High Court under Statute 21 Geo. III, c. 70, Section 5.

[25] The petitioner appeared in person.

THE facts and argument appear sufficiently for the purpose of this report from the judgments of the Full Bench (TURNER, C.J., KERNAN and HUTCHINS, JJ.).

JUDGMENTS.

TURNER, C.J.—Mr. Wallace has made a complaint to this Court of certain acts of the Governor and of a past and the present Members of Council of this Presidency, which he alleges to be oppressive and injurious; and has applied to this Court to take evidence, to be hereafter used by him in the prosecution of his complaint in a competent Court in Great Britain. The question arises whether we have power to entertain the application.

Mr. Wallace founds it on the fifth section of Statute 21 Geo. III, c. 70, which enacted that, in order to prevent all abuse of the powers given to the Governor-General and Council, in case any person . . . . . should make a complaint to the Supreme Court in the manner prescribed by the Statute of any oppression or injury charging the same to have been committed by the Governor-General or any Member or Members of the Council . . . . . and should comply with the conditions required . . . . ., the party complaining should be enabled to compel, by order of the Court, the production in the Supreme Court of a true copy or copies of the order or orders of Council complained of, and to have the same authenticated by the Court, and to examine witnesses on the matter of the said complaint and also on the part of the person or persons complained of.

At the time this Statute was passed the Government of the Presidency of Madras was administered by a President and Council subject to the control of the Governor-General.

By Statute 33 Geo. III, c. 52, the civil and military government of the Presidency was vested in a Governor and three Members of Council.

By Statute 39 and 40 Geo. III, c. 79, the Crown was authorized to erect a Supreme Court at Madras, and it was provided (Section 3) that the Governor and Council of Madras and the Governor-General of Fort William should enjoy the same exemption and no other from the jurisdiction

of the Supreme Court to be erected at Madras as was enjoyed by the Governor-General and Council at Fort William from the jurisdiction of the Supreme Court there already by law established.

[26] Mr. Wallace contends that, inasmuch as the Governor and Council of this Presidency were to enjoy "the same exemption and no other" from the authority of this Court as were enjoyed by the Governor-General and Council of Fort William, the power conferred on the Supreme Court of Fort William by the fifth section of 21 Geo. III, c. 70, was conferred on this Court, and the Governor and Council of this Presidency are subjected to the provisions of the same section.

These contentions are, in my judgment, unsound.

The provisions of Statute 21 Geo. III, c. 70, Section 5, did not create any exemption in favour of the Governor-General and the Members of his Council, nor did they confer on the Court a general power to be exercised in all cases and in respect of all persons. They subjected the Governor-General and the Members of his Council to an extraordinary liability, and conferred on the Supreme Court of Fort William an extraordinary power to be exercised on a complaint made against the Governor-General or any Member of his Council. A provision of a Statute declaring that certain persons shall enjoy the same exemptions from jurisdiction and no others as are enjoyed by a certain other person, cannot be construed as exposing the persons exempted to the exercise of an extraordinary jurisdiction to which such other person may be subjected.

Again, the terms of Section 3 are intended to declare what exemptions certain persons are to enjoy, not what powers the Court is to possess. In terms they certainly do not confer any powers on the Court, and they cannot be construed as necessarily conferring on the Court by implication any extraordinary power.

A study of the Acts and Letters Patent regulating the Government of India and the jurisdiction of the Courts may, I think, explain the reasons for the creation of the special power and for the restriction of its exercise; and will show that this Court is not authorized to exercise the power on a complaint made against the Governor or any Member of the Council of this Presidency.

Statute 10 Geo. III, c. 47, declared that, if any persons whatsoever employed in the service of the United Company in any civil or military station, officer or capacity, or deriving or claiming any power, authority or jurisdiction from the United Company, were guilty of oppressing any of His Majesty's subjects beyond the seas within their respective jurisdictions . . . . . such oppressions **[27]** might be inquired of, heard and determined in the Court of King's Bench in England, and punishment inflicted on such offenders.

Statute 13 Geo. III, c. 63, known as the Regulating Act, in the thirty-ninth section enacted that if any Governor-General, President or Governor in Council of any of the Company's principal or other settlements in India should commit any offence against that Act or had been or should be guilty of any crime, misdemeanour or offence committed against any of His Majesty's subjects or any inhabitants of India (an addition, it will be seen, to the terms of the preceding Statute) within their respective jurisdictions, such crimes, misdemeanours or offences might be inquired into and determined by the Court of King's Bench, and the punishments prescribed by the Act inflicted if the offender had not been before tried for the offences in India.

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This Statute empowered the Crown to establish a Supreme Court at Fort William, but it exempted the Governor-General and Council from the criminal jurisdiction of the Court in respect of any offence other than treason or felony; and it exempted the persons of the Governor-General and of the Members of Council from liability to arrest or imprisonment in any action, suit or proceeding.

The thirty-fourth paragraph of the Charter of 26th March 1774, which established the Supreme Court of Fort William, was intended to declare and give effect to these exemptions.

It is well known that contentions arose between the Governor-General and Council and the Judges of the Supreme Court touching the jurisdiction of the Court, and led to the passing of Statute 21 Geo. III, c. 70.

The first section of that Act exempted the Governor-General and Council of Bengal from the jurisdiction of the Supreme Court in respect of any act, order, matter or thing committed, ordered or done by them in their public capacity and acting as Governor-General and Council. The second section practically enabled the Governor-General and Council to exercise powers uncontrolled by the Supreme Court in respect of all persons other than British subjects; for it enacted that if any person were impleaded in any action or process, Civil or Criminal, for any act done by the order of the Governor-General and Council in writing, he might plead the general issue and give the order in evidence.

[28] The third section excepted orders affecting British subjects; the fourth declared the Governor-General and Council nevertheless answerable to competent Courts in England; and then followed the fifth section, on which the present application is based, conferring on the Supreme Court the extraordinary power of holding an inquiry before the institution of proceedings where a complaint was made of oppression committed by the Governor-General or by any Member of his Council, and an undertaking given to prosecute it in England.

It will be noticed that although the provisions of 13 Geo. III, c. 63, Section 39, authorized the indictment not only of the Governor-General and Council but of the Presidents or Governors of any of the Company's settlements in the Court of King's Bench, in 21 Geo. III, c. 70, no provision is made for the taking of evidence in anticipation of the institution of proceedings in the case of any person other than the Governor-General and Council of Fort William.

There may be three explanations of this. The first is that the extraordinary power is the sequel of the removal by Sections 1 and 2 of the control that would have been exercised by the Court if those sections had not been enacted. The second explanation is that the Governor-General and Council at Fort William had been constituted the supreme authority in India. By the ninth section of the Regulating Act the Governor-General and Council at Fort William were authorized to superintend and control the government and management of the Presidencies of Madras, Bombay and Bencoolen, "except in such cases where the Presidents and Councils should have received special orders" from the Company, and the Presidents and Councils were bound to obey the orders of the Governor-General and Council of Fort William. If, therefore, a Governor, President, or Member of Council at Madras, Bombay or Bencoolen, were guilty of oppression, the party affected might seek the intervention of the Governor-General and Council at Calcutta.

A third explanation may be that a Supreme Court had been established at Fort William and not elsewhere; and that, although the Legislature empowered the Mayor's Courts of Bombay and Madras to execute commissions and take evidence in proceedings in Parliament or in the King's Bench respecting offences committed **[29]** in India after the institution of proceedings (13 Geo. III, c. 63, Sections 40 and 42; 24 Geo. III, c. 25, Section 78; 26 Geo. III, c. 57, Section 28), it thought it inexpedient to confer on those Courts the extraordinary power of taking evidence before the institution of proceedings.

The Statute 33 Geo. III, c. 52, established further regulations for the government of the territories of the East India Company, and provided for the appointment of Governors and Counsellors at Fort Saint George and Bombay; but it invested the Governor-General in Council at Fort William with full power to superintend, control and direct the Governments and Presidencies of Fort Saint George and Bombay, &c., (*inter alia*) on all points relating to the civil and military government of the said Presidencies (Section 40) and declared the Presidencies and Governments bound to obey the orders and directions of the Governor-General in Council except only where they should have received positive instructions from the Court of Directors or from the Secret Committee which were not known to the Governor-General and Council at the time of despatching their orders (Section 41). Failure to obey the orders of the Governor-General in Council exposed the Governors and Counsellors of the other Presidencies to liability to be suspended and dismissed by the Governor-General, and to be sent to England, and subjected them to penalties (Section 43).

The Statute 37 Geo. III, c. 142, empowered the Crown to erect Courts of judicature at Madras and Bombay and to appoint to them Recorders (Section 9). It was declared that the new Charter which the Crown was empowered to grant and the jurisdiction to be established should extend to all British subjects residing within the factories dependent on the Governments of Madras or Bombay respectively, and that the Courts according to their respective jurisdictions should have power to try all and all manner of complaints against any of the subjects of the Crown for any crimes, misdemeanours and oppressions committed in the territories, &c., and to try all suits and actions against subjects of the Crown. But the Statute expressly provided that the Courts should not be competent to try any indictment against the Governor or any of the Council not being treason or felony (Section 10), that nothing in the Act should extend to subject the persons of the Governor or any of the Council to be arrested or imprisoned in any suit or proceeding, and that it should not be competent for the Courts to **[30]** hear or determine or to entertain and exercise jurisdiction in any suit or action against the Governor or any of the Council for or on account of any act or order or any other act, matter or thing whatsoever committed, ordered or done by them in their public capacity or acting as Governor and Council (Section 11).

We next come to the important Statute 39 and 40 Geo. III, c. 79. After reciting the Charter of George II which constituted civil and criminal Courts in the Company's territories and that the Charter had been altered in so far as it respected the administration of justice in Madras by Statute 37 Geo. III, c. 42, and in so far as it respected the administration of justice in Bengal by Statute 13 Geo. III, c. 63 (it will be noticed that no reference is made in the recital to Statute 21 Geo. III, c. 70), it authorized the Crown by Letters Patent to erect a Supreme Court at

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Madras and to empower the Court to exercise such . . . . . jurisdictions, to be invested with such power and authorities and subject to the same limitations, restrictions, and control within Fort Saint George and the Town of Madras and the factories subordinate thereto, and the territories then or thereafter dependent upon the Government of Madras, as the Supreme Court at Fort William was invested with or subject to by virtue of any law then in force and unrepealed, or by that Act should be invested with and subject to within Fort William or the kingdoms and provinces of Bengal, Behar and Orissa (Section 2). Then follows the proviso on which Mr. Wallace relies, "provided always that the Governor and Council at Madras and the Governor-General of Fort William shall enjoy the same exemption and no other from the authority of the Supreme Court of Judicature to be there erected as is enjoyed by the said Governor-General and Council at Fort William aforesaid from the jurisdiction of the Supreme Court of Judicature there already by law established."

The Act, it will be observed, did not itself create the Supreme Court, but authorized the Crown to create it and to invest it with powers. Whether it was competent to the Crown to erect a Court with less powers than those possessed by the Supreme Court at Bengal, we need not consider. The Court derived its powers from the combined effect of the Act and the Charter, and if in the Charter less powers were given to it than were enjoyed by the Supreme Court, the Charter might have been in that respect an [31] incomplete or defective exercise by the Crown of the authority declared by the Statute, but I apprehend the Court would not have enjoyed the omitted powers.

If I am in error in so holding and, immediately on the exercise by the Crown of the authority conferred on it to erect a Court, there attached to the Court in virtue of the Act all the powers of the Court at Fort William, the extraordinary power enjoyed by the Court at Fort William was exercisable only in the case of the Governor-General or of his Council.

The Letters Patent issued by the Crown in pursuance of the Act were dated 26th December 1800. They constituted a Supreme Court for this Presidency, and, in express terms, declared the jurisdiction and powers to be exercised and enjoyed by it, and they also declared expressly the restrictions to which its jurisdiction and powers are subject, and the exemptions which are to be enjoyed by the Governor and Council. They made no reference to the extraordinary power conferred by the Statute 21 Geo. III, c. 70, on the Supreme Court at Fort William; on the other hand, they expressly declared exemptions from the jurisdiction of the Court to be enjoyed by the Governor-General of Fort William and the Governor and Council of Madras. Thus clause 23 exempted from arrest and imprisonment the persons of those officers and pronounced the Court incompetent to hear or determine or entertain or exercise jurisdiction in any suit or action against the Governor-General or the Governor or any of the Council of Madras for or on account of any act or order or any other act, matter or thing whatsoever committed, ordered, or done by them in their public capacity. It declared also that the Court should not have or exercise any jurisdiction in any matter concerning the revenue . . . . . or concerning any act done according to the usage and practice of the country or the regulations of the Governor and Council. Although 21 Geo. III, c. 70, was not referred to in the preamble to Section 2, 39 and 40 Geo. III, c. 79, it was, of course, competent to the Crown to have regard to it in the exercise of its authority to confer on the Supreme Court at Madras

the same powers as were enjoyed by the Supreme Court at Fort William, and in drafting clause 23 of the charter, it is clear that the provisions of 21 Geo. III, c. 70, were considered. The prohibition to take cognizance of matters affecting the revenue is in part taken [32] *verbatim* from the Statute. The provisions of the clause respecting landholder and farmers and persons employed by the Company nearly follow the terms of Sections 9 and 10 of the Statute. The provisions respecting suit against judicial officers are analogous to and expressly incorporate the provisions of Sections 24—26 of the Statute. Here, then, we might expect to have found reference made to the extraordinary power of the Supreme Court of Fort William to take evidence against the Governor-General of Fort William, and here we should have found the extraordinary power conferred on the Supreme Court of Madras to take evidence in anticipation of proceedings against the Governor and Council of Madras, if it had been thought the Statute warranted the conference of such power on the Court, and there had been an intention to confer it.

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Clause 35 of the Letters Patent declared the Court incompetent to hear, try or determine any indictment or information against the Governor-General of Fort William or the Governor or any of Council of Fort Saint George except for treason or felony.

These exemptions from the civil and criminal jurisdiction of the Court were, in my judgment, intended to express the proviso enacted in 39 and 40 Geo. III, c. 79, and fully satisfy its terms.

In conferring on the Governor and his Council the same exemptions as were enjoyed by the Governor-General and his Council, the Legislature did not subject them to the same liability to inquiry.

The Statute 4 Geo. IV, c. 71, which sanctioned the establishment of the Supreme Court at Bombay, expressly authorized and required the Supreme Court to be there established and the Supreme Court at Madras within their local jurisdictions "to execute, perform and fulfil all such acts, authorities, duties, matters and things whatsoever," as the Supreme Court at Fort William was or might be lawfully authorized or empowered or directed to do, execute and perform within its local jurisdiction (Section 17).

The extraordinary power conferred on the Supreme Court at Fort William by 21 Geo. III, c. 70, Section 5, was exercisable only in the case of a complaint made against the Governor-General and his Council; and in conferring on the Supreme Courts of Madras and Bombay "such" powers as were conferred on the Supreme [33] Court at Fort William, the Statute 4 Geo. IV, c. 71, authorized and required this Court to exercise the extraordinary power created by 21 Geo. III, c. 71, Section 5, only when a complaint was made against the persons named in that Act.

The administration of the territories of the Crown in India was again dealt with by 3 and 4 Wm. IV, c. 85, which authorized the division of the Presidency of Fort William and the appointment of Governors and Councils to Presidencies of Fort William and Agra.

This Statute declared that the Governors and Members of Council appointed under the Act should severally have all the rights, powers and immunities which the Governors and Members of Council of Fort Saint George and Bombay then had in their respective Presidencies.

Although the Directors were authorized by subsequent Statutes to suspend the execution of the contemplated division of the Presidency of Fort William, the provisions enabling the creation of the Presidency of Agra remained in force for some years; but I do not find that any

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provision was made for subjecting the Governors and Council of Fort William and Agra (if one should be appointed) to liability to the extraordinary power conferred on the Supreme Court by 21 Geo. III, c. 71, Section 5.

The Act again recognized the supreme authority of the Governor-General in Council, investing him with full power to control the Governors and Governors in Council of Fort William, Fort Saint George, Bombay and Agra in all points relating to the civil or military administration of the Presidencies respectively, and declared the Governors and Governors in Council bound to obey the orders and instructions of the Governor-General in Council in all cases whatsoever (Section 65).

No instance is cited in which the Supreme Court or this Court has taken evidence in anticipation of the institution of proceedings on a complaint made against the Governor or any Member of the Council of the Presidency.

The conclusion then at which I have arrived is that the Legislature has not conferred on the Court power to entertain such an application as Mr. Wallace has made.

It is hardly, I think, to be desired that the state of the law were other than I take it to be. The extraordinary power created [34] by 21 Geo. III, c. 70, is obviously attended with this inconvenience, that it must be exercised before there can be any certain knowledge what issues will require determination, and therefore what evidence is material. Moreover, the probable reason for the creation of the power, the risk of the loss of testimony owing to the delay entailed by an application to the Court in England is now greatly modified, and the provision has practically become obsolete. In the present case Mr. Wallace, had he been so advised, might have commenced proceedings in England some months ago. A late Member of Council, whose conduct and motives he principally impugns, has now left India, and Mr. Wallace, although he has included this gentleman in the application, admits it could not proceed against him until he had been served with notice. It would be inconvenient that such evidence as might be admissible should be taken twice over.

As I hold the Court is not competent to entertain the application, it is unnecessary that I should advert to its substance or terms.

KERNAN, J.—Section 5 of the Act 21 Geo. III, c. 70, applies in terms to the Governor-General in Council and to the Supreme Court at Fort William (Calcutta) only.

That Section 5 has not been in terms extended to any President or Governor and Council in Madras or to any of the Courts established in Madras. When the Act 21 Geo. III, c. 70, was passed, the Mayor's Court existed in Madras and there was then a President and Council who governed Madras subject to the Governor-General. At that time also the Governor-General and Council and the President and Council of Madras were liable to indictment, information or action in the King's Bench in England for any acts of oppression done in India, 10 Geo. III, c. 47, Section 14, and 13 Geo. III, c. 63, Section 39. As the power contained in Section 5 did not apply to Madras, there would appear to have been some special reason why it was confined to Calcutta, and probably the reason is to be found in the recital in that Act of the dissensions between the Governor-General and Council and the Supreme Court at Calcutta. No doubt the power given by Section 5 might be used in aid of any proceeding in England against the Governor-General and Council and Governor and Council of Madras such as above referred to. But as it

was not given in terms to any Court [35] in Madras, this Court has no jurisdiction to apply it here unless the jurisdiction has been conferred on the Court by necessary implication arising from some Act or Charter.

The power is an extraordinary one and not one which in its ordinary jurisdiction the Court would possess.

It is contended that this power is, by necessary implication arising from the provisions of 39 & 40 Geo. III, c. 79, Sections 2 and 3, given to the Supreme Court, Madras, and therefore to this Court. The Chief Justice has already shown that the Act 39 & 40, Section 2, did not extend all the powers of the Calcutta Supreme Court, to the Madras Supreme Court, and that the Charters granted to the Madras Supreme Court did not, nor did the Act of 24 & 25 Vict., c. 25, or the Charters granted under it, extend all the powers of the Calcutta Supreme Court to the Madras Supreme Court or to the High Court. Therefore Section 2 of 39 & 40 Geo. III does not create the implication contended for.

Section 3 of 39 & 40 Geo. III, c. 79, is mainly relied on by Mr. Wallace. That section provides that the Governor-General and Council and the Governor and Council of Madras shall enjoy the same exemption and no other from the authority of the Supreme Court of Madras as is enjoyed by the Governor-General and Council from the jurisdiction of the Supreme Court at Calcutta.

The question then is, what was the exemption from the jurisdiction of the Supreme Court at Calcutta enjoyed by the Governor-General and Council. Certain exemptions are stated in Sections 15 and 17 in the Act 13 Geo. III, c. 63, and in 21 Geo. III, c. 70.

The Act 13 Geo. III, c. 63, Section 15, provides that the said Court (Supreme Court, Calcutta) shall not be competent to hear, try or determine any indictment or information against the Governor-General or any of the Council for the time being for any offence, not being treason or felony, which the Governor-General or any of the Council may be charged with having committed in Bengal, Behar or Orissa.

Section 17 of the same Act provides that nothing in the Act shall extend to subject the Governor-General or any of the Council, Chief Justice and Judges to be arrested or imprisoned upon any action or suit or proceeding in the said Court.

The Act 21 Geo. III, c. 70, by Section 1 provides that the Governor and Council of Bengal shall not be subject to the jurisdic-[36]tion of the Supreme Court in Bengal for or by reason of any act or order, or any matter or thing whatsoever committed, ordered or done by them in their public capacity only and acting as Governor-General and Council.

This last Act, it is remarkable, uses the same words "jurisdiction of the Supreme Court" as Section 3 of the 39 & 40 Geo. III. The exemptions given by these Acts appear to me to be "the exemption" from the jurisdiction of the Supreme Court that is referred to in the 39 & 40 Geo. III, Section 3.

But it is argued that under Section 5, 21 Geo. III, c. 70, the Governor-General and Council were not exempt from the jurisdiction of the Supreme Court of Bengal as regards a complaint, and the power given thereby to the Supreme Court, and that therefore the Governor of Madras is not exempt from the jurisdiction of this Court.

Recollecting the positive provision in Section 1 of 21 Geo. III, c 70, it cannot be contended, I think, that Section 5 creates general jurisdiction in the Supreme Court over the Governor-General and Council in respect of any of those acts done by them in their public capacity.

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The provision in Section 5 merely gave the Supreme Court a power to a complainant to compel production of copies of orders and to take evidence. If the orders were in possession of the Governor-General and Council no doubt the Court could compel the production of copies, and so far the Governor should be subject to that special jurisdiction. But this power in Section 5 did not subject the Governor and Council to the general jurisdiction of the Supreme Court, which is the jurisdiction that Section 3 of 39 & 40 Geo. III seems to me to contemplate. The Act 21 Geo. III, c. 70, is not specially referred to in the Act 39 & 40 Geo. III, though the Acts 13 Geo. III, c. 63, and 37 Geo. III, c. 142, constituting Governors in Madras and Bombay are thereby referred to.

But even if the Governor-General was not exempt from the jurisdiction of the Supreme Court under Section 5, does it follow by necessary implication that under the Act of 39 and 40 Geo. III, the Supreme Court of Madras and this Court became invested with the special power given by Section 5 ?

In my judgment it does not so follow. No doubt acts in *pari materia* must be read and construed together, but without express words in an Act, or an implication much stronger than exists in this case conferring the special power of Section 5 on the Supreme [37] Court of Madras, I do not think that Court or this Court could or can exercise such powers. I agree that the powers given by 4 Geo. IV, c. 71, would not authorize this Court to entertain a complaint against the Governor of Madras under 21 Geo. III, c. 70, though they would authorize the exercise of them as regards the Governor-General and Council.

I think the complaint of Mr. Wallace cannot be entertained by this Court for want of jurisdiction.

HUTCHINS, J.—I am of the same opinion, and as my reasons are in the main those which have been given by my learned colleagues, I shall not recapitulate them at length.

The power which we are asked to exercise is not one incidental to our own jurisdiction, but one which, if it exists at all, would be merely ancillary to the jurisdiction of the Court of Queen's Bench. It was not vested even in the Supreme Court of Bengal as against local Governments, and I think the reason must have been that they were subject to the control of the Governor-General. There was never the same danger of their acting in an arbitrary manner and refusing copies of their orders, and therefore not the same necessity for compelling them to furnish the aggrieved party with the means of satisfying the Court of King's Bench as to his having an apparent cause of action. It may perhaps be open to argument that under the Statute 13 Geo.III, c. 63, Section 9, the Governor-General's control was only to be exercised in matters of peace and war, but the latter part of the section required the local Government to keep the Governor-General acquainted with all transactions and matters whatsoever, and would at all events have authorized the Governor-General to call for copies of all the proceedings in case of a complaint to him by any person oppressed by the local Government. And long before a Supreme Court had been erected at Madras, 33 Geo. III, c. 52, had declared the local Governments bound at their peril to obey all orders passed by the Governor-General in Council. There was then no occasion to confer on the new Supreme Court the extraordinary power given by 21 Geo. III, c. 70, Section 5, and I am satisfied that it was not given by 39 and 40 Geo. III, c. 79, Section 3 while the Letters Patent most certainly did not confer it.

If I had thought that this Court ever possessed the power, I should have wished to consider whether we are still bound to exer-[38] cise it. As the Chief Justice has pointed out, it has practically become obsolete. It is in no way necessary to enable Mr. Wallace to obtain complete justice, for copies of all the papers are already in his possession and he has all the materials necessary for his commencing proceedings, if so advised, in England.

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ORIGINAL CIVIL.

Before Mr. Justice Kernan.

J. C. SHAW AND OTHERS (*Plaintiffs*) v. H. BILL AND OTHERS (*Defendants*).* [16th October, 1884.]

Contract—Executory sale—Delivery order—Appropriation of goods to contract—Substitution of liability—Condition precedent—Delivery in certain months—Payment in advance—Refusal to deliver—Damages.

In January 1883, W. & Co. of Madras contracted to deliver to P. & Co. of Madras certain goods of a certain quality, subject to survey before shipment, at a certain price " f.o.b. Cocanada, delivery in April and May ; terms, full advance and local exchange ⅝ per cent payable at Madras."

This contract was contained in bought and sold notes. It was further agreed that the goods were to be delivered on board any ship P. & Co. might direct at the port of Cocanada.

P. & Co. paid the full amount of the purchase money in January.

On the 31st Mârch P. & Co. wrote to W. & Co requesting that the goods might be marked in a certain way.

On the 18th May W. & Co. wrote to P. & Co. enclosing a letter from W. & Co. to S.N. & Co. of Cocanada requesting S.N. & Co. to hold the goods (which were said to have been purchased by W. & Co. from S. N. & Co. and to be in godown) at the disposal of P. & Co. In the letter to P. & Co. from W. & Co. the goods were also said to be in godown at that date. On the same day P. & Co. wrote to S.N. & Co. enclosing a delivery order for the goods (which P. & Co. stated they believed to be in godown), requesting that they might be marked in a particular way.

On the 25th May, S.N. & Co. wrote to P. & Co. informing them that they held the goods at P. & Co.'s dispcsal.

On the 28th May, P. & Co. received this letter. On the 31st May, P. & Co. chartered a ship to take on board the said goods and other goods bought by P. & Co. from S.N. & Co. and others, and wrote to S.N. & Co. informing them that the ship would arrive about the 12th June.

On the 5th June P. & Co. wrote to S.N. & Co. acknowledging receipt of a letter which stated that only a portion of the goods to be shipped was ready. On the 9th [39] June P. & Co. received a letter from S. N. & Co., stating that all the goods were ready. On the 17th June the ship arrived at Cocanada. On the 21st June S. N. & Co. stopped payment and ceased to carry on business. No goods were delivered according to the contract. S. N. & Co. never had the goods to deliver between 18th May and 17th June.

In a suit by P. & Co. to recover from W. & Co. the price paid and damages for breach of contract to deliver the goods, it was contended for W. & Co.—

I.—That the transfer of the delivery order of the 18th May amounted to a delivery of the goods.

Held, that as S. N. & Co. had neither had possession of the goods to be delivered nor had appropriated any goods to the contract, the delivery order was inoperative.

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II.—That the acceptance of the delivery order by P. & Co. amounted to an agreement that S. N. & Co. should deliver to P. & Co. the goods when ready, and that the liability of S. N. & Co. was substituted for that of W. & Co.

Held, that such an agreement could not be inferred.

III.—That as S. N. & Co. by accepting the delivery order were estopped from denying that they had possession of the goods as against P. & Co., S. N. Co. were discharged as against W. & Co., and therefore P. & Co. had no remedy against W. & Co.

Held, (1) that S. N. & Co. were not discharged as against W. & Co., as S. N. & Co's representations were false; (2) that even if S. N. & Co. were discharged, this could not affect P. & Co.

IV.—That as P. & Co. had not supplied a ship in May, they had failed to perform their part of the contract and could not recover.

Held distinguishing *Bowes* v. *Shand* (L. R., 2 App. Ca. 455) and *Reuter* v. *Sala* (L.R., 4 C.P.D., 239), that the presence of the ship in May was not a condition precedent to P. & Co. recovering.

V.—That W. & Co. had rescinded the contract on the 29th June by refusing to deliver, and therefore P. & Co. were only entitled to recover the price paid.

Held, that W. & Co. were not entitled to rescind the contract.

Held, also that P & Co., having paid in advance, were entitled to a reasonable time after the 29th June to prepare to purchase other goods, and were entitled to the difference between the contract price and the market price on the 1st of July as damages for the breach to deliver.

THE facts and arguments in this case appear sufficiently for the purpose of this report from the judgment of the Court.

The *Advocate-General* (Hon. *P. O. Sullivan*), and Mr. *Tarrant*, for plaintiffs.

Mr. *Shephard* and Mr. *Grant*, for defendants.

JUDGMENT.

KERNAN, J.—The plaintiffs, Messrs. Parry & Co., merchants at Madras, sue Messrs. Wilson & Co., also merchants of Madras, for repayment of the purchase money, Rs. 30,295-5-5, paid to the **[40]** defendants for 500 tons of palmyra jaggery which the defendants failed to deliver, with interest thereon at 9 per cent. per annum from the date of sale, and also payment of damages sustained by the plaintiffs by reason of the defendants' breach of contract to deliver the 500 tons, amounting in all, as detailed in the schedule to the plaint, to Rs. 48,236-9-1. There is no dispute as to the facts of the sale and purchase, or of the terms of the same. The sales and purchases were made between the parties through the medium of a broker, who signed for both parties bought and sold notes, Ex. E.

The first sale and purchase was made on the 11th of January 1883, by the said bought and sold notes, in the following form:—"200 tons palmyra jaggery, fair average of the season, subject to survey before shipment, at 17-6 per candy f.o.b. Cocanada, delivery in April and May. Terms: full advance and local exchange ¾ per cent. payable at Madras." The second sale and purchase was made on the 16th of January 1883, of 100 tons palmyra jaggery, in exactly the same form as the former. The third sale and purchase was made on the 19th of January 1883, for 200 tons, also in the same form. The bought and sold notes do not state which party should provide shipping on which the goods were to be delivered f.o.b., but the plaint in paragraph 2 states that the contract was that such goods were to be delivered on board "any ship the plaintiffs might direct at the port of Cocanada," and defendants admit that such was the contract

On the 12th, 17th and 28th of January 1883, the plaintiffs paid the defendants the full amount for the goods in advance at the contract price, and local exchange at $\frac{3}{4}$ amounting in all to Rs. 39,295-5-5.

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On the 31st March 1883, plaintiffs wrote to defendants a note of that date requesting the jaggery to be marked $\frac{\text{P. \& Co.}}{\text{W.}}$. Except that letter, there was no communication between the plaintiffs and defendants on the subject of the contract until the 18th of May 1883, on which date the defendants wrote and sent to the plaintiffs the following letter :—

"PALMYRA JAGGERY CONTRACT.

"Enclosed you will find letter addressed to Messrs. Stephenson, Nixon & Co., Cocanada, requesting them to hold at your disposal the 500 tons sold to you, which are now in godown at Cocanada. [41] Please instruct Messrs. Stephenson, Nixon & Co. as to marks and shipment."

The letter of defendants to Stephenson, Nixon & Co. enclosed is as follows :—

"Please hold at disposal of Messrs. Parry & Co. 500 tons palmyra jaggery purchased by you on our account, which we learn from your telegram of to-day's date is now ready in godown. Messrs. Parry & Co. will instruct you direct regarding shipment."

The plaintiffs on the 18th of May wrote to Stephenson, Nixon & Co. a letter of that date as follows :—

"We enclose delivery order for 500 tons jaggery from Messrs. Wilson & Co., which we understand you have in godown, regarding the shipment of which we will address you again shortly.

"*P.S.*—Please mark the bags P. & Co."

The delivery order of the 18th of May, addressed to Stephenson, Nixon & Co., was enclosed in that letter. On the 25th of May 1883, Stephenson, Nixon & Co. wrote to the plaintiffs a letter of that date as follows :—

"We are in receipt of your letter of the 18th instant, enclosing delivery order from Messrs. Wilson & Co., for 500 tons palmyra jaggery, which, as requested, we hold at your disposal."

That letter was received by the plaintiffs in Madras on the 28th of May.

On the 31st of May 1883, the plaintiffs chartered the ship *Mofussilite* to take on board the 500 tons sold by the defendants, and also other jaggery purchased by the plaintiffs from Stephenson, Nixon & Co. and others. On the 31st May plaintiffs wrote to Stephenson, Nixon & Co. a letter of that date :—

"We are in receipt of yours of 25th, the contents of which are noted. We have chartered the *Mofussilite* to take full cargo jaggery to Cuddalore. You may expect her on the 9th to 12th ; we will wire departure. We send her to your consignment. The *Mofussilite* will carry 1,300 tons, on account of which we have shipping orders for 600 tons. Please see this is pushed off sharp, and fill up balance from 900 tons you hold of ours."

On the 5th June plaintiffs wrote to Stephenson, Nixon & Co. acknowledging a letter which stated only 500 tons were ready. The ship sailed on the 15th of June, and arrived off Cocanada in ballast on or about the 17th, consigned to Messrs. Stephenson, [42] Nixon & Co. The plaintiffs received telegram from Stephenson, Nixon & Co. dated the 9th of June, stating that all the palmyra jaggery was ready for *Mofussilite*, and by

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letter of the 12th of June plaintiffs acknowledged that telegram. Messrs. Stephenson, Nixon & Co. stopped payment on the 21st of June 1883, and ceased then to carry on trade, and no jaggery had been then or was afterwards delivered f. o. b. the *Mofussilite* or at Cocanada by the defendants in fulfilment of their contracts of January 1883, and they were not ready to do so. On the 21st of June 1883 the defendants, by telegram of that date, requested Innes & Co., Cocanada, to act for them and to take possession from Stephenson, Nixon & Co. of 500 tons of palmyra jaggery sold to plaintiffs, if not already shipped, and also of 500 other tons of palmyra jaggery of theirs and other goods. Innes & Co., by telegram to the defendants dated the 21st of June, stated "produce nearly all ready, but in hands of the original sellers, who had been paid 10 per cent., but nothing was shipped." On the 22nd June, by telegram of that date to the defendants, Innes & Co. stated that 800 tons jaggery were ready, and defendants would have to pay about Rs. 19-8 per candy for delivery. On the 22nd June, Stephenson, Nixon & Co. gave a delivery order on Mr. Phillips of Cocanada for 600 tons to Innes & Co., for defendants, and on the 23rd of June, Stephenson, Nixon & Co. gave a delivery order to Simpson & Co., for plaintiffs for 400 tons. Neither lot was paid for. After the failure of Stephenson, Nixon & Co. becoming known in Madras, J. C. Shaw, one of the plaintiffs, and R. S. Turnbull, one of the defendants, had two interviews on the subject of the 500 tons sold to the plaintiffs. At one interview they arranged that the question of their rights and liabilities should be referred to their lawyers. However, as the plaintiffs required 500 tons to replace the amount sold by the defendants, and as the defendants had not jaggery to deliver, and as the question of their liability to deliver was unsettled, it was agreed between the said Shaw and Turnbull that the plaintiffs should pay to the original sellers the price required, *viz.*, Rs. 19-8 per candy for other 500 tons to be delivered f. o. b., the *Mofussilite*. The plaintiffs accordingly paid Rs. 45, 115-2-6 on the 7th of July 1883 and obtained 500 tons of palmyra jaggery f. o. b., the *Mofussilite*. A second interview took place between Messrs. Shaw and Turnbull in reference to **[43]** the 500 tons sold to the plaintiffs, but both of them state that there was no agreement come to.

On the 28th of June, whilst the *Mofussilite* was off Cocanada, the plaintiffs wrote and sent to the defendants a letter as follows :—

"Messrs. WILSON AND CO., Madras.

"DEAR SIRS,—The *Mofussilite*, now at Cocanada, is waiting for the 500 tons palmyra jaggery purchased by us from you, and the ship will shortly be on demurrage. As Messrs. Stephenson, Nixon & Co., your agents, have failed to deliver the 500 tons as per your order, we will feel obliged by your advising us what arrangements in substitution you propose. Please send us an exact copy of the delivery order given by you to us on Messrs. Stephenson, Nixon & Co.

"Yours faithfully,
"(Signed) PARRY & CO."

To that letter the defendants on the 29th of June wrote and sent to plaintiffs' a letter as follows :—

"Messrs. PARRY & CO., Madras.

"DEAR SIRS,—We are in receipt of your letter of yesterday. We are not now prepared to deliver you 500 (five hundred) tons of jaggery for the *Mofussilite*. On the 18th May last we gave you a delivery order on Messrs. Stephenson, Nixon & Co., for the 500 tons of palmyra jaggery

which we sold to you for May delivery. You accepted such order and yourselves arranged with Messrs. Stephenson, Nixon & Co. to take delivery, and we must therefore refer you to them for the jaggery. But if you have not already taken delivery of the jaggery, it is no fault of ours. The contract was, as already mentioned, for delivery in May, and if our delivery order and your subsequent arrangements with Messrs. Stephenson, Nixon & Co. did not amount to a delivery—which we contend they did—then you have committed a breach of contract by failing to take delivery in May, and we are not bound now to deliver. As requested, we enclose a copy of our delivery order.

"We are, dear Sirs,

"Yours faithfully,

"MADRAS, 29th June 1883. (Signed) WILSON & CO."

[44] " DEAR SIRS,—Please hold at the disposal of Messrs. Parry & Co., 500 tons of the palmyra jaggery purchased by you on our account, which we learn from your telegram of to-day's date is now ready in godown.

" Messrs. Parry & Co. will instruct you direct regarding shipment.

"We are, dear Sirs,

"Yours faithfully,

"MADRAS, 18th May 1883. (Signed) WILSON & CO."

This suit was filed on the 19th of October 1883. The plaint stated the contracts and payment by the plaintiffs, and the letter of 18th of May from the defendants, and the delivery order and acceptance of it, and the chartering of the ship and the letters of the 27th and 28th of June, and also stated on belief "Stephenson, Nixon & Co., defendants' agents, had not on the 18th of May 1883, or at any time subsequent to that date, 500 tons of palmyra jaggery in their godown as alleged ready for delivery."

Defendants filed their written statement, and admitted the contract as in the plaint mentioned, and that plaintiffs paid the price therefor. They state as follows: Stephenson, Nixon & Co. were not the agents of the defendants, but were independent merchants. The letter of the 18th May, forwarding the delivery order on Stephenson, Nixon & Co., constituted a delivery of the 500 tons of jaggery by the defendants, and plaintiffs accepted the delivery order as a delivery of the 500 tons and as fulfilment on the part of the defendants of their contract. According to custom, the delivery order, if accepted by the purchaser, is a constructive delivery of the goods to exonerate the defendants and substitute Stephenson, Nixon & Co., in their place, and plaintiffs acted on that custom and accepted the order as delivery. Stephenson, Nixon & Co. were, on the 1st of May, able and in a position to deliver the 500 tons, and they attorned to the plaintiffs and ceased to be responsible to the defendants for the 500 tons, and became responsible to the plaintiffs. Plaintiffs failed to take delivery from Stephenson, Nixon & Co., within the time, and if the letter of 18th May and action thereon was not delivery, then in consequence of plaintiffs not taking delivery in time they committed breach of the contract and the defendants are free from liability. If plaintiffs [45] had arranged to take delivery in time, then the contract for delivery would have been performed, and it is therefore plaintiffs' own fault that delivery did not take place. The plaintiffs were guilty of laches in not receiving the goods in time, and retained the delivery order and led the defendants to believe

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that the contract was fulfilled, and prevented defendants from taking measures to protect their interests with Stephenson, Nixon & Co., in respect of the 500 tons (for which defendants had paid Stephenson, Nixon & Co.) and insure delivery, and thereby caused a loss equal in amount to plaintiffs' claim.

The issues settled were as follows:—

i. Were Stephenson, Nixon & Co., the agents of the defendants in regard to the delivery of jaggery?

ii. Did the delivery order of 18th May 1883 amount to a delivery, and was it accepted by plaintiffs as a fulfilment of the contract?

iii. Is there a custom, as alleged in paragraph 4 of the written statement, and was such custom acted on?

iv. Did the plaintiffs accept Stephenson, Nixon & Co., as the persons responsible to them, and exonerate defendants?

v. Were Stephenson, Nixon & Co., in a position to deliver the jaggery, and had they the jaggery available in their godowns at any time between the 18th May and 17th June 1883?

vi. Are the defendants exonerated by plaintiffs' neglect or failure to take delivery before 17th June 1883?

vii. Have the plaintiffs, by their laches or conduct, caused loss to defendants, and are defendants entitled to set off such loss to any and what extent against plaintiffs' claim?

viii. To what amount of damages, if any, are plaintiffs entitled?

ix. Are they entitled to recover back the amount paid to defendants?

x. Did the cause of action arise on the 7th July 1883, or on what date?

The first issue for consideration is the second part of the fifth issue, whether Stephenson, Nixon & Co. had the jaggery available [46] in their godowns at any time between the 18th of May and the 17th of June 1883. It is quite clear, on the evidence of Nixon, that Stephenson, Nixon & Co. never had the jaggery or any part of it, or any jaggery available in their godowns or in their custody or possession at any time during 1883. Though they had rented a godown, they did not use it, but let it out to Ramakrishnaya. They entered into contract with other merchants to buy f.o.b. In June 1883 they had contracts with Mr. Phillips for the supply to them of 600 tons of jaggery in the end of June, and a contract with Ramakrishnaya for the supply to them of 700 tons of jaggery in June 1883, and a contract with Messrs. Gill, Deane & Co., for a supply of 200 tons to them in June 1883. But in all these cases the several vendors retained in their own possession and custody the goods agreed to be sold, the prices therefor not having been paid in any instance by Stephenson, Nixon & Co., although in the case of Phillips, 10 per cent. had been paid by them. In some cases the vendors to Stephenson, Nixon & Co., had not themselves possession between the 18th of May and the 17th of June of all the goods agreed to be sold, as their vendors had not delivered to them. The 500 tons of jaggery referred to in the delivery order was non-existent. The allegation in the plaint that Stephenson, Nixon & Co. had not possession of the 500 tons was not denied by the defendants in their written statement. The defendants early in 1883 contracted to buy from Stephenson, Nixon & Co., 1,000 tons of jaggery, not specific jaggery, but unspecified; and on the 18th of May Stephenson, Nixon & Co. telegraphed to the defendants that 600 tons were ready, and deliveries recommencing next week. The defendants inferred from that telegram

that Stephenson, Nixon & Co. had the possession of the 600 tons jaggery in godowns, but the fact undoubtedly was not so. The main ground put forward as defence is mentioned in the first part of the second issue, which is "Did the delivery order of the 18th of May amount to a delivery?" To give an answer to this question, it is necessary to bear in mind that the contracts of January 1883 by the defendants, were sales of 500 tons of jaggery, fair average of the vendors, f.o.b. at Cocanada, delivery in April—May. No particular goods were specified, and defendants were at liberty to supply any 500 tons corresponding to the description. The defendants' contracts were executory. The defendants were **[47]** bound, in order to fulfil their contract, to give the plaintiffs the property in and possession, actual or constructive, of 500 tons of jaggery specified and identified.

In Benjamin on Sales, Bk. II, ch. V, it is said: "After an executory contract has been made, it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or, in legal phrase, by the *appropriation* of specific goods to the contract. The sole element deficient in a perfect sale is thus supplied. The contract has been made in two successive stages instead of being completed at one time." In that chapter of Benjamin many decisions are referred to. In *Campbell* v. *Mersey Docks and Harbour Board* (1), Erle, C.J., says that it has been established by a long series of cases (some referred to), that the purchaser of an unascertained portion of a larger bulk acquires no property in any part until there has been a separation and an appropriation assented to by vendor and vendee. *Sparks* v. *Marshall* (2) was a case where Bamford sold to the plaintiff 500 to 700 barrels of oats to be shipped by Thos. John and Son, Youghal, to be delivered at Portsmouth. Some days after, Bamford informed plaintiffs that Messrs. John and Son engaged room on board the *Gibraltar* packet "to take 600 barrels of oats on your account." Plaintiff insured, and in an action against the under-writers, Tindal, C.J., said that Bamford's letter to plaintiffs was an appropriation of the oats on board the *Gibraltar* packet.

In *Bryans* v. *Nix* (3) plaintiffs accepted a bill against two cargoes of oats, represented by two receipts signed by the masters of two boats, Nos. 604 and 54, whereby the masters acknowledged to have received on board their respective boats a number of barrels. These receipts, dated 31st January, were received by the plaintiffs on the 7th of February in a letter from the owner Tempany, dated the 2nd of February, and they thereupon accepted the bill. The owner Tempany, on the 6th of February, gave orders to his agent to deliver the cargoes of both boats to the defendant, who afterwards obtained possession of the cargoes. The loading of boat No. 604 was complete on the 31st of January, but the loading of boat No. 54 only began on the 1st February. As to the cargo of No. 604 the Court held that the intention **[48]** of the consigner was to vest the property in the consignees, the plaintiffs, from the moment of delivery of the goods to the boat master. Parke, B., says if the intention of the parties to pass the property in certain ascertained chattels is established, and they are placed in the hands of a depositary, and the chattels are so placed on account of the person who is to have that property, and the depositary assents, that is enough, and it matters not by what document this is effected. As to boat No. 54, Parke, B., says that at the time of the agreement, proved by the boat receipt of the 31st of January, to hold the 500 barrels for plaintiffs, there

(1) 14 C.B. N.S. 412. (2) 2 Bing. N.C. 761. (3) 4 M. & W. 775.

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were no such oats on board, and consequently no specific chattels were held for them. The undertaking of the boat master had nothing to operate on, and though Tempany, the owner, had prepared a quantity of oats to put on board, those oats were still his property ; he might have altered their destination, and sold them to any one else ; the master's receipts no more attached to them than to any other quantity of oats belonging to Tempany. But before the 530 barrels were shipped, and before any appropriation or complete delivery of the oats to the plaintiff had taken place, Tempany was induced to enter into an agreement with the defendant. Until the oats were appropriated by some new act, both contracts (with defendant and plaintiffs by Tempany) were executory. On the 9th of February the appropriation took place by a new boat receipt then given for the oats then on board. There was judgment for the plaintiffs as to boat No. 604, and for the defendant as to boat No. 54. In the course of the case, Parke, B., says: "In order to pass the property, the specific chattels must be ascertained which are to pass. Now here the oats loaded in boat No. 54 at the time when the receipts were transmitted were still in Tempany's premises, and he might have performed the contract with the plaintiffs by supplying any other oats of the same quality and amount." Alderson, B., says, "the goods he (defendant) describes in his letter of 2nd February are in truth non-existing."

Like this case, in *Rohde* v. *Thwaites* (1) plaintiff bought 20 hogsheads of sugar out of a lot of sugar in bulk. Four hogsheads were filled and taken away; sixteen other hogsheads were filled by the vendor, and he gave notice to the purchaser to remove them, **[49]** and defendant agreed to do so. As to these sixteen it was held there was appropriation, and the property passed to the defendant. Bayley, J., says that where a man sells part of a larger parcel of goods, and it is at his option to select part for the vendor, as soon as he appropriates part for the benefit of the vendor, the property in the article sold passes to the vendor, though the vendor is not bound to part with it until he is paid his. Applying these principles to this case, the defendants, in order to pass the property in 500 tons of jaggery under the contract, should have appropriated specific existing 500 tons to the plaintiffs' contract. and until that was done, no property in any 500 tons passed to the plaintiffs. Stephenson, Nixon & Co. had not possession of even the 600 tons, or any part of it, and therefore there was no jaggery on which their letter of the 25th of May could operate. A delivery order does not pass the property mentioned in it as a bill of lading would do.

If Stephenson, Nixon & Co. had had 500 tons belonging to the defendants in their possession as agents, or depositaries, or appropriated to them, then the delivery order would be evidence of appropriation by the defendants of the 500 tons, and the receipt by the plaintiffs would be evidence of appropriation by defendants and of plaintiffs' consent, and the property would have passed, and any one taking that property out of Nixon's possession without the consent of the plaintiffs would get no title to or property in the goods. Then the plaintiffs, independent of the consent of Stephenson, Nixon & Co., if they had not a lien on it, would be entitled to possession of the goods. Admittedly plaintiffs never got actual possession, nor did Stephenson, Nixon & Co.; as the latter never had actual possession, plaintiffs could not have had constructive possession through Stephenson, Nixon & Co. Constructive possession takes place only when the owner entitled to possession of property is not

(1) 6 B. & C. 688.

himself in actual possession, but the property is in the possession of an agent or depositary for and on behalf of the owner or person entitled to the possession. Apart from this, if Stephenson, Nixon & Co. had 600 tons in their possession, the 500 tons were not identified or ascertained, and therefore no property passed. It is not necessary to consider the further question arising on plaintiffs' right to see that the goods were average quality of the season, or the right of survey. A very singular [50] feature in this case is that neither defendants or Stephenson, Nixon & Co. ever had the property in or possession of any 500 tons. They merely had executory contracts for the sale and delivery of 500 tons not completed, and neither of them could give property or possession which they had not. The contract with the plaintiffs never was completed or performed by the defendants by giving the property in or the possession, actual or constructive, to the plaintiffs, if the above views are correct; and on this ground plaintiffs are entitled to a decree. But the defendants contend that by giving to the plaintiffs the delivery order, who accepted it, and by the acknowledgment of Stephenson, Nixon & Co. to the plaintiffs, the defendants passed to the plaintiffs the property in the 500 tons, and also constructive possession, and that the plaintiffs are thereby discharged from further performance of this contract. The terms of the delivery order are: "Please hold at the disposal of Messrs. Parry & Co. 500 tons of palmyra jaggery purchased by you on our account, which we learn from your telegram of to-day's date are now ready in godown. Messrs. Parry & Co. will instruct you direct regarding shipment." Now the express terms of the delivery order state that the defendants learn that the goods are in godown. Plainly the defendants and the plaintiffs then believed that the goods were then in the possession of Stephenson, Nixon & Co. The delivery order directs Stephenson, Nixon & Co. to hold the goods at the disposal of the plaintiffs. How could Stephenson, Nixon & Co. do so unless they had possession? This delivery order is nothing more than the very usual order given by an owner of property to his agents, who has possession of it, to deliver it to or hold at the disposal of a third party. The owner has not the actual possession, but another person has for him, and for convenience sake the party with whom the owner deals accepts the delivery order on the agent, who is to give possession instead of requiring the owner himself to do so. As the owner is not in actual possession, nor is his agent's possession actual or constructive, it cannot be delivered at all. The delivery order therefore is inoperative. The agent or depositary to whom the delivery order is given, cannot give what he has not got. If the possession by Stephenson, Nixon & Co. was immaterial or unnecessary, as contended by defendants' counsel, why were the defendants so careful to state in [51] the order that they learn "from to-day's telegram the goods were ready in godown," clearly meaning, in possession of Stephenson, Nixon & Co.? No witness examined stated that he ever knew a delivery order given when the goods were not in possession of the party on whom the order was given. If plaintiffs and defendants knew the real fact that Stephenson, Nixon & Co. had not possession of the goods, is it probable the delivery order would ever have been offered or accepted? It is of the essence of a delivery order that the person on whom it is passed should be in actual possession of the goods mentioned in the order; what is its value as an authority to deliver if there is nothing in possession to deliver? It cannot be acted on. In *McEwan* v. *Smith* (1) the subject of delivery

(1) 2 H.L. 309.

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order was discussed, and it was held that an order for delivery of goods by an owner to his agent, who was not in the actual possession of the goods, though the latter accepted the delivery order, did not complete an executory sale by delivery of constructive possession, or take the goods out of the possession of the unpaid vendor, in whose name they were warehoused. There Smith was the owner of sugar warehoused in Little & Co.'s warehouse in the name of J. and A. Smith as received from James Alexander. Alexander was an agent for Smith, who afterwards sold the sugar to Bowie & Co., to whom a delivery order was given addressed to Alexander: "Please deliver to the order of Messrs. James Bowie & Co., the undernoted 42 hogsheads of sugar *ex St. Mary* from Jamaica in bond." Bowie did not present the delivery order, and Alexander informed Smith of the fact. On the 25th September McEwan & Co., to whom Bowie sold the sugar, presented at Alexander's office the original delivery order transferred by Bowie. and an entry was made in Alexander's book, " Delivered to the order of McEwan and Sons this date 42 hogsheads of sugar *ex St. Mary*. James Alexander *per* J. Adams." Afterwards, on the same 5th September, Alexander, under order of Smith, who heard a rumour of Bowie's failure, caused the goods to be removed to Kerr's warehouse; on the 27th of September the removal was complete.

The plaintiff brought suit against Smith to recover, and the case was heard on appeal by the House of Lords. It was con-[52]tended that a delivery order acknowledged by a warehouseman is a complete transfer of the property. It was ruled that the transfer order did not pass property, like a bill of lading endorsed. It was further contended that the delivery on the 25th September of the delivery order to Alexander operated to take the goods out of the possession of the defendants. It was held, however, that Alexander was only agent for Smith, and the goods were in the warehouse of Little, with whom they remained on the 25th of September. It was argued that the possession of the goods was changed by what took place with Alexander on the 25th of September. But the Lord Chancellor (Lord Cottenham) said: " It is clear to my mind that Alexander was not in actual possession of the goods, and what he did at that time could not change the possession. He was only agent of the vendors, and was so named in the books of Little & Co." Lord Brougham said: "Alexander was not in *custody* of the goods; he was not authorized to deal with them in any way." Lord Campbell said: "Alexander was not on the 25th of September in custody of the sugar; he was the mere agent of the owners; he was not the warehousekeeper of the owners, and the goods were not in his possession, but in the custody of the warehousekeeper, who alone could actually change the possession, and therefore the very foundation for the argument as to change of possession fails."

In *Bryans* v. *Nix* (1) it will be recollected Parke, B., referring to the boat receipt (No. 54), said it had nothing to operate on. None of the goods were on board. So the acknowledgment of Stephenson, Nixon & Co. had nothing to operate on as they had not the 500 tons in their possession. Therefore the delivery order acknowledged by Stephenson, Nixon & Co. was inoperative to pass either property in, or constructive possession of, the 500 tons to the plaintiffs, and in this view the defendants had not performed their contract with the plaintiffs. There was no objection in point of law to parties—say, the plaintiffs and defendants here—making an

(1) 4 M. & W. 775.

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agreement if they so thought fit, on the footing that Stephenson, Nixon & Co. had not the possession of the goods, but expected to have possession, and that when they obtained possession plaintiffs were then to obtain from them possession. But [53] this is not the agreement plaintiffs and defendants made. The agreement stated that the goods were then in godown, ready and held by defendants. Again, there would be no objection in point of law if the plaintiffs and defendants, with the assent of Stephenson, Nixon & Co. agreed that the defendants' contract and liability should be assigned by them to and accepted by Stephenson, Nixon & Co., thus substituting the latter for the defendants. But this was not done. This is in effect what I am asked (by counsel) to believe was done. There is no evidence whatever of such agreement in fact. But I am asked to construe the delivery order and the acceptance of it, and the acts of the plaintiffs thereunder, as amounting to such an agreement. It is impossible for me to do so. The proposal of the defendants by the delivery order and the accompanying letter is merely in reference to the delivery by Stephenson, Nixon & Co. of the goods, and that they should attend to plaintiffs' order as to shipping. The order and letter treat Stephenson, Nixon & Co. as then being defendants' agent having possession, and not as a person to whom the contract and liability of the defendants was to be assigned; not a word is said referring to an assignment of defendants' contract and liability to Stephenson, Nixon & Co., or to substituting them for the defendants or discharging them from liability, and no such proposal was assented to by Stephenson, Nixon & Co. There was no reason why the plaintiffs should be asked to depart from the original contract, or why they should do so: they got no consideration or benefit by so doing. The defendants were bound and willing to fulfil their contract. The quality of the goods had to be verified with the description in the contract, and if they turned out not of the quality, plaintiffs might reject them or claim reduction. Then the defendants were bound to pay the cost f. o. b., that is, of putting the goods on board (between 2,000 and 2,500 rupees according to Nixon's evidence). The agreement suggested by defendants does not provide for any of these circumstances. But it is argued that Stephenson, Nixon & Co. were, by their contract with defendants, bound to deliver f. o. b., and they would have to pay the charge, f.o.b., as between them and defendants. But the defendants did not inform the plaintiffs that Stephenson, Nixon & Co. were so bound to the defendants. Nothing was written or said on the subject between plaintiffs and defendants, and plain-[54]tiffs were not aware that Stephenson, Nixon & Co. sold the goods to the defendants. One would expect an agreement to transfer the defendants' contract would have referred to all these matters. Then it is said that all goods sold on the East Coast for export are sold f. o. b., and that plaintiffs, who traded in that market, should be held to trade subject to that custom. But the evidence does not exclude the making of a contract, even on the East Coast, except f. o. b. Moreover, the delivery order treats the 500 tons in terms as purchased for or on account of defendants, *i.e.*, for them. I may mention here that Mr. McLintock and other witnesses were asked, on reading the delivery order, to say who, according to any mercantile custom, should pay the charge of putting on board. He said that if Stephenson, Nixon & Co. were treated as the sellers to the defendants, then Stephenson, Nixon & Co. should pay the charges; but if Stephenson, Nixon & Co. are not treated as such sellers to defendants, the defendants should pay.

Now here the plaintiffs knew nothing of Stephenson, Nixon & Co.

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having been defendants' vendors, and therefore that fact does not enter into the consideration as between plaintiffs and defendants. On the question of who, according to custom, was bound to pay the charges, I may mention here that Mr. Arbuthnot and other witnesses were asked.—Was there a custom on the coast and in Madras to deliver possession of goods by delivery orders? To which their answer was Yes. (I think it is a universal usage of trade.) But no witness said it was the custom to do so when the goods were not in possession of the vendor. No reliable evidence was given of any custom such as alleged in the fourth paragraph of the plaint, *viz.*, that when a delivery order is given and accepted, the giver is discharged from all liability, and the person on whom the order is given is substituted for the giver in such a contract as this.

It is argued that as Stephenson. Nixon & Co. accepted the delivery order, they were estopped from denying, as against the plaintiffs, that they had the possession of the goods, and the case of *Knights* v. *Wiffen* (1) was cited on this point. There is no doubt that this is so in the case of a holder of goods or other persons in possession of them, who attorn to a third party under a **[55]** delivery order from the owner of the goods, and Stephenson, Nixon & Co. may be treated as estopped as regards the plaintiffs. From this it is argued that Stephenson, Nixon & Co. were discharged as against the defendants, who could not maintain an action for non-delivery to them. I am unable to agree to this latter proposition, recollecting that it was the wilfully untrue and therefore fraudulent misrepresentation of Stephenson, Nixon & Co. of possession by them to the defendants that induced the defendants to make the incorrect representation to the plaintiffs that Stephenson, Nixon & Co. had such possession. But even if the defendants lost their remedy against Stephenson, Nixon & Co. by reason of the estoppel binding them as regards plaintiffs, I am unable to see how the plaintiffs can be affected by such circumstances. The defendants chose to trust to the representations of Stephenson, Nixon & Co., whether the latter were their agents or not; and on their own responsibility, both in the delivery order and in the letter of the same date accompanying, represented to the plaintiffs, as the basis of the delivery order, that Stephenson, Nixon & Co. had then possession of the goods in godown. On this representation the plaintiffs acted; how then can the defendants set up an incorrect representation of their own (take advantage of their own wrong), or the consequence of that representation, to the prejudice of the plaintiffs? In my judgment they cannot; for two reasons the delivery order cannot be set up against plaintiffs—first, that the representation was the basis of the contract in the delivery order, though made under a mistake by defendants, *Behn* v. *Burness* (2); second, there was a mutual mistake, and the contract was voidable (Benjamin, p. 323; Contract Act, s. 18).

Again it is said that after the acceptance of the delivery order some time in June, the defendants paid Stephenson, Nixon & Co. Rs. 1,000, the balance due to them on a purchase of 1,000 tons of jaggery including the 500 sold to plaintiffs, and also advanced to Stephenson, Nixon & Co. Rs. 25,000 on other accounts, which they would not have done if they were informed by the plaintiffs that Stephenson, Nixon & Co. had not possession of the 500 tons of jaggery. The answer appears to me to be this, that **[56]** the loss, if any, sustained by the defendants, is not caused by the omission by plaintiffs to do any act they were in duty bound to towards the defendants. Plaintiffs relied on defendants'-delivery order and letter;

(1) L.R. 5 Q.B. 660. (1) 3 B. & S. 751.

plaintiffs did not owe any duty to the defendants to discover whether the representation of either Stephenson, Nixon & Co. or the defendants was true or not. It was the duty of the defendants to see that their own representation was correct, and that the representation of Stephenson, Nixon & Co. was correct. The loss to the defendants is the result of their own confidence in Stephenson, Nixon & Co. and want of care of their own interest. The plaintiffs, who also placed confidence in Stephenson, Nixon & Co. are so far in the same position, and I do not see why defendants should be excused for placing confidence in Stephenson, Nixon & Co. and the plaintiffs not so excused. Stephenson, Nixon & Co. were under contract, no doubt, with plaintiffs for 400 other tons of jaggery to be delivered, but they (Stephenson, Nixon & Co.) were under contract to deliver the 500 tons for plaintiffs, and 500 tons besides to defendants. Moreover, the defendants had other large contracts with Stephenson, Nixon & Co. in respect of which—so great was defendants' confidence—they paid Stephenson, Nixon & Co., according to Mr. Turnbull's evidence, Rs. 25,000 in June. It is said plaintiffs did not enquire after the 6th of May whether Stephenson, Nixon & Co. had the jaggery ready; why should they? Already they were informed so. But plaintiffs were in constant conversation with Stephenson, Nixon & Co. by telegram and by letter; see ex. L. M. Nos. 1 and 13, if that is of any importance. It is also argued that the loss to the defendants, as above mentioned, was caused by the neglect of the plaintiffs to supply a ship by the 31st of May to take the 500 tons on board. The argument is that if the ship arrived in due time, then it would have been discovered that Stephenson, Nixon & Co. had not the goods to deliver, and defendants could then have compelled Stephenson, Nixon & Co. to deliver, and would not have paid them the large sum which they did. This argument as regards compelling delivery is inconsistent with the prior one for defendants, in which it is maintained that the defendants were discharged from liability, and Stephenson, Nixon & Co. substituted by virtue of the delivery order and of its acceptance; and as regards the payment of the sums of Rs. 7,000 and Rs. 25,000, such **[57]** loans cannot be in any way held to be connected with defendants not supplying the ship by the 31st of May, however remotely; but even if remotely, such loss should be held to be too remote, and I need not notice this part of the alleged loss further. Assuming, for argument, for the present that the plaintiffs were bound to have had the ship ready by the 31st of May, and that plaintiffs are open to the allegation of laches in that respect, it is necessary to see whether Stephenson, Nixon & Co. were, after the 31st of May, in a position to supply 500 tons of jaggery, recollecting their obligation to deliver other jaggery, *viz.*, 400 tons to the plaintiffs and 500 tons to the defendants, in all 1,400 tons. Upon the evidence it appears that Stephenson, Nixon & Co. had contracted with Phillips for the purchase of 600 tons (paying 10 per cent. on account), to be delivered in the end of June. Phillips had not possession of the jaggery if he had bought it from Gopalan, who again, as unpaid vendor, had mortgaged it to Messrs. Binny & Co. and Innes & Co. Gopalan says he could have got that or other jaggery and given possession to Phillips or to Stephenson, Nixon & Co. on payment. The amount does not appear clearly, but it was at all events Rs. 30,000 to 40,000. Further, Stephenson, Nixon & Co, had contracted to buy 700 tons from Ramakrishnaya for delivery in the end of June, and he had only possession of 300 tons ready by the middle of June, and this was not paid for and would amount to about

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Rs. 20,000. Further, Stephenson, Nixon & Co. had contracted to purchase 200 tons from Gill, Deane & Co., for delivery at the end of June, which probably might have been got on payment of Rs. 15,000 or so. The probability is that if Stephenson, Nixon & Co. were pressed to deliver the 500 tons sold to plaintiffs by defendants, they would have been also pressed to deliver the 400 tons to plaintiffs and 500 to the defendants. If so, Stephenson, Nixon & Co. could not, I am inclined to believe from the evidence, have supplied 1,400 tons, and paid therefore a sum of probably Rs. 60,000 to 70,000 to obtain the goods, in their circumstances. No doubt, they had large credit in June with the Madras Bank, and drew in January Rs. 60,000 or 70,000 within a few days, but on the 14th of June their credit was temporarily stopped by the Madras Bank until Ramakrishnaya guaranteed a large debt for them. Their account with the Chartered Mercantile Bank, it appears in the proceedings in insol-[58]vency filed in this matter, was then overdrawn. Though these receipts were large, their payments were up to the same amount; their debts remain. The conclusion I arrive at is, that if Stephenson, Nixon & Co. had been pressed at any time after the 18th of May to deliver the 500 tons sold to plaintiffs—taking into consideration the necessary consequence that plaintiffs and defendants would also press for their other goods—Stephenson, Nixon & Co. could not deliver the 500 tons or pay the market value, but would have submitted to insolvency. When Stephenson, Nixon & Co. failed, only 800 tons of jaggery could be found ready to be delivered to Stephenson, Nixon & Co. in the fulfilment of contracts made with them, and except 10 per cent. paid to Phillips, the whole 800 were unpaid for and in the hands of the sellers to Stephenson, Nixon & Co., who never had possession, actual or constructive, of any part of it.

On the seventh issue, the question was raised by the defendants at the hearing, whether the plaintiffs were entitled to maintain this suit while their own side of the contract was not performed, inasmuch as they did not supply a ship by the 31st of May. The defendants' counsel contends that it was a condition precedent or concurrent to the delivery of jaggery f.o.b. in the contract between the defendants and plaintiffs that the latter should have a ship ready to receive the jaggery on the 31st of May. *Bowes* v. *Shand* (1) was cited. The facts of that case were quite different from those of this case. The point decided then was not decided for the first time, but the question was the application of well-known principles to the facts. These principles are that the construction of a contract, unless affected by a custom of trade, is for the Court, and that the words must be construed according to their plain ordinary sense.

There the agreement was to ship rice at Madras in March or April. Some of the goods were shipped before March, and it was held that the contract meant the whole of the goods were to be shipped in March and April, and therefore the purchaser was not bound to accept delivery. *Reuter* v. *Sala* (2) was also cited. In that case, the contract for October and November for pepper bound the plaintiffs to declare within sixty days from bill of lading the [59] name of the ship and marks. Five tons were shipped in December, therefore not according to contract. It was held that time was of the essence of the contract, and defendants might repudiate it. The universal rule in considering contracts, if in writing, is according to the language used, and the intention of the parties as expressed by them. Where the

(1) L. R. 2 App. Ca. 455. (2) L.R. 4 C.P.D. 239.

whole of a contract is not in writing, then the intention and agreement of the parties is to be made out partly by the writing and partly by evidence, so far as evidence is not in conflict with the writing. See what the contracts were. Defendants sold and plaintiffs bought 500 tons jaggery, fair average of the season, f.o.b. at Cocanada; delivery, say May; terms, full advances, exchange $\frac{3}{4}$. That is all the writing. It is agreed that the defendants were to supply the ship.

If the delivery was by the terms of the contract to be made on board a ship before the end of the 31st of May, then, as the plaintiffs were to provide a ship, the presence of the ship at Cocanada before the end of the 31st day of May, would be a condition precedent to the shipping on the 31st of May; otherwise the defendants could not deliver and the plaintiffs would have broken their contract. This would appear to come within s. 54 of the Contract Act and the second rule stated in the notes to *Pordage* v. *Cole* (1), and which are also referred to in 2 Smith's L. C. in the notes to *Cutter* v. *Powell*, p. 12. But rule 3 provides that when the promise goes only to part of the consideration, and a breach thereof may be paid for as damages, it is an independent covenant or promise. See *Franklin* v. *Miller* (2), *Boone* v. *Eyre* (3), referred to in *Franklin* v. *Miller*. Lord Mansfield says: "The distinction is very clear, when mutual promises go to the whole consideration on both sides. They are mutual conditions one precedent to the other. If they only go to part of the consideration when the breach may be paid for in damages, the defendant has his remedy on the covenant or promise, and shall not plead it was a condition precedent." (See this principle fully discussed in *Behn* v. *Burness* (4), Benjamin on Sales, Bk. IV, Part I.)

Now here the promise of the plaintiffs to have the ship ready to take the goods by the 31st of January, did not go to the whole **[60]** consideration, for the rest of the consideration was the payment of the price in advance. Therefore the promise in the case was an independent contract, and the plaintiff may maintain his suit against the defendants for their breach of contract, and the defendants may have a remedy by action against the plaintiff for that breach of the contract. But if plaintiffs' contract came within s. 55 of the Contract Act and is a contract to supply a ship by the 31st May, still, on looking to the whole contract, I do not think that time, as regards the supply of the ship, was of the essence of the contract (for reason see afterwards in referring to the evidence of witnesses); therefore the contract was not voidable. But there is another well known rule of law, that where the performance of the promise of one party is a condition precedent to the promise of another, if the latter has received substantial portion of the consideration, or part performance of the promise, he cannot set up the condition precedent as a defence (Benjamin, Bk. IV, Part I; Chitty, 671·2; and *Behn* v. *Burness, supra*). Here defendants received the full purchase money, therefore, the objection that this suit cannot be sustained when the promise of the plaintiffs to supply a ship at a particular time has not been performed, is not good. I do not find that this point is expressly included in the Contract Act, but it is not, I think, excluded. Section 51 of the Contract Act applies to this case, as the defendants were not ready to perform the promise to deliver on 31st of May, assuming the purchases were to be performed simultaneously. Independent of the above views, there is distinct evidence of merchants that in

(1) 1 Wm. Saund. 548. (2) 1 H. B 473. (3) 1 H. Bl. 273 n. (4) 3 B. & S. 751.

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respect of such a contract as in this case, time for supplying the ship is not, according to mercantile custom, of the essence of the contract, as the seller has been paid in full, and, after the expiration of the time limited for performance of the contract, the goods, if ready, will remain at the risk of the vendee, who has the option either to take delivery on shore, receiving refund of the ordinary charges to put f.o.b., or he may require the goods to be put on board, he paying all warehouse rent and all charges caused by his being late with the ship. But the goods should be ready at the time limited. Mr. Turnbull, one of the defendants, said that the absence of the ship for some reasonable time after the limited time would not cause any difficulty according to his experience, but the goods should be ready for delivery at the time. The result is **[61]** that the time for the supply by the plaintiffs of the ship is estimated to be a reasonable time after the limited time. Instances were given by one witness where the ship did not arrive until after six weeks, and that such delay was not unreasonable. The substance of the reason is sound, *viz.*, it is immaterial to the seller, as his goods were ready in time and he has been paid; he runs no risk, as the risk is on the vendee after the limited time. In this case, therefore, when the ship arrived on the 17th or 18th of June, I hold that the plaintiffs supplied within reasonable time, and that the objection to the plaintiff's suit on the ground of delay is not good.

As to damages, the ordinary rule where a vendor has failed to supply goods and the vendee has not paid beforehand, is to give the vendor the difference between his contract price and the market price on the day of breach, as he is supposed to have his money to be able to purchase in the market. But when a vendee has paid in advance, as his money is already paid, he is entitled to a reasonable time after the breach to prepare to purchase other goods.

I do not see that plaintiffs should be allowed commission to their agents, Messrs. Simpson & Co., as against the defendants as part of the damages. It was contended by counsel for the defendants that, by their letter of the 29th of June, they had rescinded the contract. If they were entitled to do so, they should abide the consequences, which under Section 64 of the Contract Act would be to repay to the plaintiffs the amount of the advance. This is the lowest right the plaintiffs could claim, but, as I have above stated, the defendants are not entitled to avoid the contract.

Being of opinion that the contract of the parties did not make time, the essence of the contract for the plaintiffs to supply the ship (and the evidence as to custom supporting this view), I do not see that any loss was caused to defendants by the absence of the ship from the 31st of May. The damages that defendants may have to pay in this action are not loss by reason of the delay of plaintiffs in providing the ship, and no other loss is suggested. Upon the whole, I think :

1. No property in the goods ever passed, as no goods were appropriated to the contract.
2. The delivery order was inoperative as Stephenson, Nixon and Co. had not possession of the goods; plaintiffs never received either actual or constructive possession of them.

[62] 3. The defendants were not ready to deliver the 500 tons of jaggery on the 31st of May or any time after that, and defendants refused by their letter of 29th June to do so.

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4. There was no discharge by the plaintiffs of the defendants' liability to perform the contract, nor were Stephenson, Nixon and Co., substituted in the contract for the defendants.
5. The plaintiffs are not prevented from bringing this action by reason that they did not supply the ship by the 31st of May.
6. Plaintiffs paid Rs. 43,684-10-10 contract price given to the defendants, and they are entitled to the price of the market on 500 tons within a reasonable time after the 29th of June, that is, the price on the 1st of July, which it may be assumed was the same as it was on the 22nd of June, Rs. 19-8 per candy, and local exchange.

Decree for Rs. 44,023-0-8 and costs, and interest on debt and costs at 6 per cent.

Solicitor for plaintiffs : *Wilson.*

Solicitors for defendants : *Barclay & Morgan.*

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8 M. 62.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

KANDU (*Plaintiff*), *Appellant*, v. KONDA AND OTHERS (*Defendants*), *Respondents.** [14th October, 1884.]

Civil Procedure Code, Section 57—Suit filed in wrong Court—Return of plaint.

In a suit filed in a District Munsif's Court to recover certain land, the defendants alleged that the value of the land was understated by the plaintiffs and exceeded by far the pecuniary limit of the Court's jurisdiction.

Upon enquiry the Munsif found this allegation to be true and directed the plaint to be returned to the plaintiff for presentation in a superior Court.

[63] The plaint having been presented in the Subordinate Court, the Subordinate Judge, on the authority of *Jagjivan Javerdhas Seth* v. *Magdum Ali* (I.L.R., 7 Bom. 487) dismissed the suit.

Held, that the procedure adopted by the Munsif was correct.

THIS was an appeal from the decree of E. K. Krishnan, Subordinate Judge at Calicut, dismissing a suit brought by Kandu Panikar, Karnavan of the Maunathur tarwad, against Konda Paniker and two other members of the tarwad.

The facts appear sufficiently for the purpose of this report from the judgment of the Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.)

Sankaran Nayar, for appellant.

Sankara Menon, for respondents.

JUDGMENT.

The plaintiff claimed a declaration of his right, as karnavan of a tarwad, to the exclusive management of its properties, and for an injunction restraining the defendants, who, he alleged, were anandravans, from interfering with the management, and for an order directing the delivery to him of certain property appertaining to the tarwad which he alleges is in their possession. The plaintiff valued the suit at Rs. 1,746-15-5 and filed

* Appeal 33 of 1884.

1884 OCT. 14. — APPELLATE CIVIL. — 8 M. 62.

his plaint in the Munsif's Court. Exception was taken to the jurisdiction on the ground that the value was under-estimated.

A commissioner was appointed to make a valuation of the property in the possession of the anandravans; he reported that the value was Rs. 6,400.

The Munsif accepted the commissioner's valuation, and, holding that the value of the subject-matter was in excess of the pecuniary limits of his jurisdiction, returned the plaint for presentation in a superior Court. The Subordinate Judge, considering that the deficiency in valuation was so great as to disclose fraud on the part of the plaintiff, and that the insufficiency of the value asserted had only been detected after investigation, held that the Munsif should have dismissed the suit, and in support of his ruling he referred to *Jagjivan Javerdhas Seth* v. *Magdum Ali* (1). That decision has subsequently been overruled by a Bench of three Judges at the same Court—*Prabhakarbhat* v. *Vishwambhar Pandit* (2), who have decided the point in accordance with the decision in this **[64]** Court—*Jivaraju* v. *Purushotam* (3). The decree of the Subordinate Judge is set aside, and he is directed to try the suit on the merits.

The costs will abide and follow the result.

NOTE.—See *In re Bái Amrit*, I.L.R. 8 Bom. 380.

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8 M. 64=9 Ind. Jur. 71.

APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Brandt.

HANUMAYYA (*Plaintiff*), *Appellant v.* N. A. ROUPELL, PRESIDENT OF MUNICIPAL COMMISSION, ANANTAPUR (*Defendant*), *Respondent.**
[15th and 21st October, 1884.]

Towns Improvement Act, 1871, *Sections* 138, 139—*Street—Encroachment—Possession—Private property*—Onus probandi.

H owned a house in the town of A, to which the Towns' Improvement Act, 1871, was extended in 1879.

In 1882, the Municipal Commissioners, professing to act under Sections 139 of the said Act, removed a pial which projected beyond the main walls of H's house and abutted on a lane which was used by the public.

H proved that the pial had existed for fifty years:

Held, that the action of the Municipal Commissioners was illegal.

[R., 11 P.R. 1904=66 P.L.R. 1904.]

THIS was an appeal against the decree of V. Gopal Rau, Subordinate Judge of Bellary, confirming the decree of T. Ramachandra Rau, District Munsif of Gooty, in Suit 121 of 1883.

The facts and arguments in this case are set out in the judgments of the Court (HUTCHINS and BRANDT, JJ.)

Hon. *Rama Rau*, for appellant.

Bhashyam Ayyangar, for respondent.

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* Second appeal 538 of 1884.

(1) 7 B. 487. (2) 8 B. 313. (3) M. 171.

JUDGMENT.

1884 Oct. 21.

Appellate Civil.

8 M. 64 = 9 Ind. Jur. 71.

HUTCHINS, J.—The plaintiff owned a house in a small lane in the town of Anantapur to which the Towns' Improvement Act, 1871, was extended in 1879. In front of this house were three pials and under one of them a cess-pool. The Municipal Commissioners resolved that these pials were "an obstruction or encroachment in a public street" within the meaning of Section 139, and, after giving the notice required by that Section, they caused the pials to be removed and the cess-pool filled up on the 25th October, 1882.

[65] The plaintiff at once gave notice of suit to the defendant, the President of the Municipality, and in March, 1883, he filed this suit to recover the ground occupied by his pials and cess-pool with Rs. 35 damages.

The encroachment, assuming it to be one, was in existence before the Act was extended to Anantapur, and under Section 139 the plaintiff was entitled to reasonable compensation. It was not, however, till the end of May, 1883, that this compensation was fixed and Rs. 15 tendered to the plaintiff.

The District Munsif found that the pials had been in existence for at least forty or fifty years, but that the ground below them was not proved to be private property, and that the contrary ought to be inferred from their projecting into the lane. It does not appear whether he meant that they merely projected beyond the main wall of the plaintiff's house or beyond other adjacent houses. It is, however, stated that there are no pials projecting from the other houses in the lane, but that, nevertheless, the width of the lane was greater opposite the plaintiff's pials than in some other places. Finally, the Munsif held that Section 139 covered the action of the Municipality, and that the Rs. 15 was reasonable compensation, though it might cost Rs. 20 or 21 to replace the pials; and he gave plaintiff a decree for Rs. 15 only, but directed the defendant to pay his costs on account of the delay made in settling the amount of compensation

On appeal by the plaintiff, the Subordinate Judge held that the burden of proof had been wrongly thrown on the plaintiff, that it was not incumbent on him to prove how the land was acquired by his ancestors; that, in the absence of any evidence that the ground belonged to the public, and in view of the plaintiff's long enjoyment, it was "beyond all doubt the private property of the plaintiff." He, nevertheless, held that the Municipality were empowered by Section 139 to remove the pials as obstructions to the public, and he dismissed the appeal with costs, disallowing also the defendant's objections as to damages and costs.

The plaintiff has now appealed to this Court, and it is conceded by the respondent that, if the Subordinate Judge was right in finding that the ground was the private property of the appellant, he was wrong in holding Section 139 applicable. That section and the one preceding it deal with obstructions or encroachments in a [66] public street; the wall must be built, or the fence erected, or the other obstruction or encroachment made to exist, in the street. The interpretation clause defines "a street" and the definition makes it to comprise (1) a roadway over which the public have a right of way, together with (2) such land (not being private property), whether covered or not by a pavement, pial or other structure, as may be between the roadway and the main wall of any house adjacent thereto. The very terms of the definition exclude ground which is private

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property. If, therefore, the Subordinate Judge was right in finding that the soil under the pials was vested in the plaintiff as private property, there was no obstruction erected in the street, and Section 139 did not empower the Commissioners to interfere. Their proper course, if they wished to widen or straighten up the lane at that particular spot, was that indicated by Sections 18 and 19 of the Act—to take up the ground under the Land Acquisition Act.

The respondent, however, seeks to support the Subordinate Judge's decree by showing that he was wrong in holding the ground to have been the appellant's private property. The argument is that under the definition, "a street" must be presumed to comprise all the ground between the main walls of the houses abutting on the roadway, and that these pials, projecting beyond the main wall of the appellant's house, must be presumed to be part of the street unless they are proved to have been built on private land. In other words, it is contended that the onus of giving complete proof must always lie on the person claiming to retain such projections.

It seems to me that this proposition cannot be supported. The rights of the Commissioners over the streets of the town are given them by Section 13 of the Act, which says that "all public streets (not being private property) existing at the time this Act comes into operation...... shall vest in and belong to the Commissioners and their successors." It lies on the Commissioners, who have assumed the right to interfere with pials which were *prima facie* in the plaintiff's possession as his private property, to justify their action by showing that they were not really private property. If they had proved that the lane in question was used as a lane before the pials were built, it is possible that this might have been sufficient to shift the burden of proof on to the appellant, and the question would then have arisen, since appellant admits he [67] cannot prove a title otherwise, whether he had made out a title by prescription. But the Commissioners have not established anything beyond the bare fact that the public use the lane. The appellant's house may have been the first built in that locality, and the lane may have been formed by others building opposite it. In my judgment it was not incumbent on the appellant to make out more than a *prima facie* case, and I am of opinion that he has done so. He has proved that the pials were in existence beyond living memory, for forty or fifty years at least, and I agree with the Subordinate Judge that this is quite enough, in the absence of any kind of evidence on the other side. The District Munsif inferred that the appellant had encroached on the lane because the pials were projections, but I have already mentioned that there are no other pials in the lane, and that, nevertheless, it was narrower in some other parts than opposite the appellant's house. In my judgment, therefore, there is no foundation for any such inference.

The decrees of the lower Courts must be reversed with costs throughout. It is probable, however, that the Commissioners may elect to take action under Sections 18 and 19, and it will be convenient that time should be reserved for this purpose before the land is restored or steps taken to rebuild the pials. The decree will be that, after the expiration of six months from this date, the defendant do restore to the plaintiff the land sued for and pay him Rs. 21 as damages, unless the acquisition of the land by the Municipality and the payment of compensation to the plaintiff shall have been otherwise arranged, and that in any case the defendant do pay to the plaintiff his costs throughout.

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BRANDT, J.—Municipal Commissioners are empowered under Section 138 of Madras Act III of 1871 to remove "any obstruction or encroachment in any public street" within municipal limits, without payment of compensation in the case of obstructions or encroachments made or created after the Act has come into operation in any town; and under Section 139 to remove such obstructions or encroachments erected before the introduction of the Act, upon payment of reasonable compensation.

There is a concurrent finding by both the lower Courts, and indeed it does not seem to have been denied by the respondent, that the ground on which the pials, removed under the respondent's orders, stood, and the pials thereon, had been in existence and in [68] the possession and enjoyment of the appellant for at least forty or fifty years before they were so removed.

The District Munsif decided the case against the appellant on the ground it was not proved by him that the ground on which the pials stood was his private property, and that as these structures "projected" into the lane (some four feet in width or less in the widest part) along which it was not denied that there was a public right of way for foot passengers and cattle, it must be inferred or presumed that the appellant had encroached upon the lane.

The Subordinate Judge held, on the contrary, that proved or admitted long possession and enjoyment by the appellant threw upon the respondent the burden of proving that the space occupied by the pials was not the "private property" of the appellant, and that the respondent failed to prove this, but that the action of the President and Commissioners was justified, as the existence of the pials was beyond question "an obstruction to the public."

Against this decision appeal is preferred, and it is conceded on behalf of the respondent that, if the Subordinate Judge was right in law in holding that long possession and enjoyment throws upon the respondent the burden of proving that the space occupied by the pials was not private property, then the action of the President and Commissioners cannot be supported; but it was contended that, having regard to the definition of "street" in Section 2 of the Act, the burden of proving that any land or space outside the main wall of any building fronting a street and intervening between the roadway proper and such main wall is private property, rests upon the owner or occupant of such house or other person claiming the same.

The word "street" is, for the purposes of the Act, thus defined in Madras Act III of 1871:—

"The word 'street' shall mean any road, street...... alley or passage, whether a thoroughfare or not, over which the public have a right of way, together with such land (not being private property), whether covered or not by any pavement, pial, verandah or other erection or structure, as may be between the roadway and the main wall of any house or houses adjacent thereto."

With reference to the abstract proposition on which the ingenious argument for the respondent is based, it appears to me sufficient to [69] say that the Act must be reasonably construed, and that this it cannot be unless regard be had to the following considerations. It cannot be doubted, I think, that in framing the definition above quoted, the Legislature had in view the case of there being some ground or space between the roadway proper and the main buildings on either or on one side of the roadway; but that there are or may be roads, streets and lanes between buildings

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on either side, in which there are no such spaces intervening between the roadway and the buildings, could hardly be denied: again, it is quite possible to conceive cases in which a right of way may have been acquired between, or passing by the side of, buildings, subsequent to the construction of such buildings, and it is not shown that the present is not such a case.

No evidence was adduced in this case on the side of the respondent to show the width or limits of that which is supposed to constitute the "street." And it would be altogether unreasonable to hold that Municipal Commissioners are at liberty to demolish a verandah, pial, or other structure forming a constituent part of a building past which there may be a right of way, on the simple ground that such pial or other structure is beyond the main wall of the house. There is no evidence, and, in my opinion, there is no presumption, that the pials were thrown out beyond the main building, upon what, at the time of the building of the house, was a public lane, or that they are not as much a constituent part of the house as the wall which they adjoin.

Having regard to all the facts of the case before us, I am of opinion that the finding of the Subordinate Judge was right in part, but that he ought to have held, and that we must hold, that it lay upon the respondent to prove that the space on which the pials stood was land which, not being private property, was a space, not being part of the roadway proper, from which the Commissioners were, under Section 139 of the Act, empowered to remove the pials erected thereon: and that the respondent failed to prove this. I am of opinion then that the decrees of the lower Courts should be reversed and decree made in favour of the appellant in the terms proposed by my learned colleague.

NOTE.—See *Wedderburn* v. *Coopoosami Sastriar*, Appeal 59 of 1876, reported in 1 Ind. Jur. 120.

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8 M. 70 = 2 Weir 639.

[70] APPELLATE CRIMINAL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

BIYACHA *v.* MOIDIN KUTTI.* [29th August and 18th September, 1884.]

Criminal Procedure Code, Section 488—Maintenance—Imprisonment for default of payment—Subsequent offer to pay—Sentence absolute.

A sentence of imprisonment awarded under Section 488 of the Code of Criminal Procedure for wilful neglect to comply with an order to pay maintenance is absolute and the defaulter is not entitled to release upon payment of the arrears due.

[**Diss.**, 22 C. 291 (295); **F.**, L.B.R. (1893—1900) 316 (317); **R.**, 20 M. 3 (5) = 2 Weir 638; U.B.R. (1892—1896), 70 Cr.]

IN 1881, one Moidin Kutti was ordered by the Head Assistant Magistrate of Malabar to pay Rs. 8 a month to his wife, Biyacha, as maintenance. In July, 1884, Biyacha having complained to the Deputy Magistrate (C. Kunhi Kannan) that maintenance had not been paid for nine months past, the Magistrate, under Section 488 of the Code of Criminal Procedure, sentenced Moidin Kutti to suffer rigorous imprisonment for four and a half months for wilful neglect to comply with the order.

* Criminal Revision Case 494 of 1884.

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On the 26th July, Moidin Kutti's brother presented a petition to the Deputy Magistrate offering to pay the arrears of maintenance and praying that Moidin Kutti might be released.

The Magistrate being in doubt whether he could release Moidin Kutti, a reference was made to the High Court by the Acting District Magistrate of Malabar (C. A. Galton) as follows:—

"The question is whether a person, committed to jail for non-payment of the maintenance ordered by a competent Magistrate, may be released when the arrears are paid, even though he has not served out the time of imprisonment awarded him. The imprisonment in such cases is, it appears to me, inflicted more as a punishment for contempt of the order passed, than for non-payment of the allowance. Nevertheless it was not, I think, intended by the Legislature that a man who disobeys an order of maintenance [71] should be treated more severely than one imprisoned for default of payment of fine, as in the latter case the delinquent is discharged as soon as the fine is paid. As, however, the question is not wholly free from doubt, I have thought fit to refer it for the orders of the High Court."

Counsel were not instructed.

The Court (TURNER, C.J., and HUTCHINS, J.) delivered the following

JUDGMENTS.

HUTCHINS, J.—The question is a difficult one, but we are bound to go by what the Legislature has said, and I am constrained to hold that, although the Magistrate is not bound to order the full term of imprisonment for which the defaulter is liable under Section 488 of the Code of Criminal Procedure, yet whatever time is ordered must be served. The language of that section, and of the corresponding form in Schedule V is very different from that employed in cases where the imprisonment is to cease on payment.

Generally, imprisonment awarded in terms as "in default of payment of a fine" terminates on payment or levy by process of law (Section 68, Indian Penal Code). That is not the case here. Under Section 250 of the Procedure Code, when compensation has been awarded to a complainant and "it cannot be realized," imprisonment may be awarded up to one month. The form of warrant in Schedule V (XXX) adds the words "unless sooner paid," which seem to be implied in the words "it cannot be realized."

Under Sections 123 and 124, a person required to give security for a period may be "committed to prison until such period expires, or until within such period he furnishes the security;" it is expressly added that the Magistrate may order his discharge if he thinks this can be done without hazard (cf form XIII).

In default of a fine for contempt, imprisonment may be ordered for a month, unless such fine be sooner paid (Section 480); but this comes under the general provisions first noticed. Section 485 provides for imprisonment where a man refuses to answer questions, &c.; he may be imprisoned for a week unless he consents in the meantime.

Section 514 provides that, if a penalty under a forfeited bond be not paid "and cannot be recovered by attachment and sale," the obligor may be imprisoned in the Civil jail for six months. [72] From the Civil jail being selected, and from the words "cannot be recovered," I should be inclined to hold in such a case that the imprisonment was intended to cease upon payment. The corresponding form is XLVIII, and contains the words "whereas cause has not been shown why payment

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should not be enforced against him": the declared object, therefore, is to enforce payment.

But according to the wording of Section 488 there need only be (1) a wilful neglect, (2) an unsuccessful attempt to levy by warrant. "After the execution of the warrant" the Magistrate may "sentence" to imprisonment for a month for each month's allowance remaining unpaid. The form of warrant (XL) mentions only the wilful disregard, and not the fact that the money cannot be recovered, as though the contempt were the chief thing in view; and the imprisonment is to "be carried into execution" absolutely.

TURNER, C.J.—It is difficult to see what object the Legislature can have had beyond the enforcement of the payment unless it be to punish the husband for contempt of the order; but I am unable to say that the language of the Code warrants any other construction than that which has been adopted by my learned colleague.

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8 M. 72=8 Ind. Jur. 670.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

LAKSHMI (*Plaintiff*), *Appellant*, *v.* CHENDRI AND OTHERS (*Defendants*), *Respondents*.* [29th October, 1884.]

Service tenure—Resumption—Notice.

Where land held on service tenure is resumable at the will of the grantor, the holder cannot be ejected before a reasonable notice to surrender the land has been given.

[R., 8 C.W.N. 904 (905).]

THE plaintiff, Maharaja Sri Raja Lakshmi Chellayamma Bahadur Garu, Rani of Bobbili, sued to recover certain land from the defendants, Padala Chendri Nayudu and others.

[73] This land was the emolument of the office of revenue nayudu in plaintiff's estate, and was held by defendant No. 1.

The plaintiff alleged that defendant No. 1 failed to perform the duty to her satisfaction, and that she gave him notice to quit.

The other defendants were made parties to the suit as being in possession with defendant No. 1.

The defendants pleaded that the claim was *res judicata*, inasmuch as a suit in 1881 for the recovery of the land, brought by plaintiff against defendant No. 1, had been dismissed, and denied that there had been any default by defendant No. 1 in his duties.

The District Munsif of Chicacole (C. Venkataratnam) dismissed the suit on the ground that plaintiff had not given a reasonable notice to defendant No. 1 to surrender the land.

On appeal, the District Judge of Ganjam (J. R. Daniel) was of opinion that notice was unnecessary, but confirmed the decree on the ground that the land was held on hereditary tenure of service and could not be resumed arbitrarily.

The plaintiff appealed to the High Court.

Anandacharlu, for appellant.

Srirangacharyar, for respondents.

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* Second Appeal 611 of 1884.

The Court (TURNER, C.J., and HUTCHINS, J.) delivered the following 1884 OCT. 29.

JUDGMENT.

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8 M. 72 = 8 Ind. Jur.

In the former suit brought by the plaintiff to recover possession of the same lands from the first defendant, plaintiff alleged that she had not consented to his appointment; that the appointment was illegal, and she was entitled to recover the lands. It was found that although the appointment by the Collector was *ultra vires*, yet the plaintiff had accepted first defendant's services and was estopped from contesting the validity of the appointment. It was consequently held that she had no right to resume the lands. The Munsif stated that it was neither alleged nor proved that the plaintiff could resume at pleasure.

The plaintiff now, admitting that the defendant has been appointed, claims that she has a right to dispense with his services and resume the lands at pleasure. We hold that she is not prevented by the rule of *res judicata* from asserting this claim. The cause of action in the two suits is not the same. The right now asserted was not asserted in the former suit.

The Courts were then bound to dispose of the case on the [74] merits. It is admitted that the grant was made subsequently to the permanent settlement, and the Judge considers that he is entitled to presume, from the fact that members of the same family have been allowed to succeed to the tenure and to the office, that the grant was hereditary and is not resumable. A grant may be hereditary but, nevertheless, resumable if the grantor is at liberty to dispense with the services of which the performance is the condition of the tenure. It does not clearly appear from the facts stated by the Judge that the grant was hereditary. The proprietor appointed a revenue nayudu and set apart these lands for his remuneration. The subsequent appointments were made by the revenue officers who, following the custom obtaining in respect to village offices, selected persons from the family of the original grantee. It was asserted in the former suit that the lands had been divided and held separately by the members of the family, which favours the view that the grant was hereditary. Nevertheless it may be resumable, and at present nothing has been found to warrant the conclusion that it is not.

Assuming, however, that the grant was not hereditary and was resumable, the plaintiff would not be entitled to dismiss the tenure-holder and resume the lands without reasonable notice—*Unide Rajaha Bommaraz Bahadur* v. *Pemmasawmy Venkatadry Nayudu* (1), and we agree with the Munsif that reasonable notice was not given in this case. The respondent was at first required to surrender the lands immediately and next to vacate possession within five days, and this at a time when, according to the Munsif's finding, he had expended money on their cultivation.

On these grounds we dismiss this second appeal with costs.

(1) 7 M.I.A. 128 (146).

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LATE
CIVIL.

8 M. 75.

8 M. 75.

[75] APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr Justice Muttusami Ayyar.

SUBRAMANYA (*Plaintiff*), *Appellant* v. SADASIVA AND OTHERS (*Defendants*), *Respondents*.* [27th October, 1884.]

Civil Procedure Code, Section 45—Hindu Law—Suit for partition—Alienees made parties to suit—Onus probandi.

Where a suit was brought by a Hindu for partition of family property against his father, brothers, and fifteen others to whom, it was alleged, the father had improperly alienated numerous parcels of the said property at different times:

Held, that the better course was for the Court to have ordered, under Section 45 of the Code of Civil Procedure, separate trials to be held in respect of each alienation.

In a suit brought by a Hindu to contest an alienation of family property made by his father, the onus of proving that the alienation is binding on the son lies upon those who claim the benefit of the alienation.

[R., 16 B. 608 (612); 4 Bom. L.R. 587 (599); **Disappr.**, 13 A. 216 (219).]

THIS was a suit brought by Subramanya Ayyan, *in forma pauperis*, against his father, Sadasiva Ayyan, and twenty other defendants (1) to obtain by partition a one-sixth share in seventy-eight parcels of land alienated by defendant No. 1, from the defendants in possession thereof; (2) to set aside the right exercised by defendant No. 1 of superintending certain other land dedicated to charity by plaintiff's family and to establish plaintiff's claim to one-fifth share of such right and to recover possession of the said land from the defendants in possession thereof.

Defendant No. 1 virtually admitted the claim. Defendants Nos. 3, 20, and 21, sons of defendant No. 1, and defendant No. 2, son of a deceased son of defendant No. 1, did not contest plaintiff's claim.

The principal issue framed by the Subordinate Judge of Madura (East) (T. Ganapathi Ayyar) was "whether any and which of the debts for which the properties were alienated were [76] incurred for immoral and illegal purposes and whether any and which of the alienations are not binding upon the plaintiff."

In disposing of this issue, the Judge held that it was only by showing that the debts were contracted for immoral or illegal purposes that the plaintiff could claim exemption from the binding nature of the sales, and as plaintiff failed to adduce such proof, the issue was decided against him. The plaintiff's suit was dismissed, except as to item No. 16, a house site, as to which it was decreed that defendant No. 1 should deliver to plaintiff a one -sixth share thereof.

Plaintiff appealed to the High Court on the ground, *inter alia*, that the *onus probandi* was wrongly cast upon him by the Subordinate Judge.

Gopalacharyar, for appellant.

Bashyam Ayyangar, for respondents.

The Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.) delivered the following

JUDGMENT.

In order to ascertain whether the several alienations challenged by the appellant in this suit were binding on the sons of the first defendant

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* Appeal 145 of 1884.

who were not parties to them, it would have been better if the Subordinate Judge had, under the provisions of Section 45, directed separate trials to be held in respect of the alienations made to each of the contesting defendants or the parties under whom they claimed.

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The circumstances of each alienation might then have been more fully considered.

The Subordinate Judge has not, in our judgment, altogether apprehended the law respecting the burden of proof in such cases. *Prima facie* a Hindu father is incompetent to make alienations of ancestral immoveable property and his sons have a right to question those alienations when they are not made with their consent. Persons then, who claim the benefit of alienations, must show that the alienations were made for a purpose justifiable under Hindu law, or that they, in good faith, believed that they were made for such a purpose. Until a person claiming the benefit of an alienation has given some proof that the alienation is made for a justifiable purpose, or that he believed it to have been so, it is not incumbent on the Hindu son to prove that the purpose was not justifiable. If, on the other hand, a person claiming the benefit of an aliena-[77]tion shows that it was made for a purpose ostensibly justifiable, the Hindu son must show that the purpose was in fact not justifiable and that the person to whom the alienation is made was aware that it was not so justifiable. The alienations impugned are said to have been made to pay antecedent debts. If those debts were not incurred for immoral purposes, or if the person to whom the alienations were made had no reason to believe they were made for immoral purposes, then the alienations would be binding on the son under the Privy Council decision in *Girdharee Lall's case* (1). If, on the other hand, the persons to whom the alienations were made were themselves the creditors, and it be shown that the debts were contracted for immoral purposes, then the alienations will not bind the sons. The issues which the Subordinate Judge framed appear insufficient to determine the rights of the parties, and, unless separate issues are drawn in respect of each alienation, it is impossible to avoid considerable confusion in their decision.

In respect of the properties as against the defendants Nos. 4 to 19 and the representative of the fifth defendant, who has died, we set aside the decree and direct a new trial.

The costs of this appeal to abide and follow the result.

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8 M. 77.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

AVALA (*Fifth Defendant*), *Appellant*, v. KUPPU AND OTHERS (*Plaintiffs*), *Respondents*.* [10th July 30th and October, 1884.]

Res judicata.

It is by the decree and not by the judgment that a question of *res judicata* must be decided.

In 1881, A sued K and others claiming a declaration of his title to certain land and an injunction against interference with his possession.

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* Second Appeal 311 of 1884.

(1) 1 I.A. 321 = 14 B.L.R. 187.

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K claimed part of the land by purchase from M.

[78] The Munsif decreed for A and this decree was confirmed on appeal by the District Jndge, but in his judgment the District Judge recorded that K's claim was not adjudicated upon and that he should bring a fresh suit if he had any claim.

In 1883 K sued A to recover the land, which he claimed by purchase from M.

A pleaded that the claim was *res judicata* by virtue of the decree in the former suit. The District Munsif and, on appeal, the District Judge held that the claim was not *res judicata* and decreed for K.

Held, on appeal to the High Court, that as no reservation was made in the decree of K's right to bring another suit, the plea of *res judicata* was good, but that, under the circumstances, an opportunity should be given to K to apply to the District Court to have the decree in the former suit brought into conformity with the judgment.

This having been done, the decree of the Lower Courts was confirmed.

[R., 12 M. 500.]

THE facts of this case appear sufficiently for the purpose of this report from the judgment of the Court (TURNER, C. J., and HUTCHINS, J.).

Dunhill, for appellants.

Ramanujacharyar, for respondents.

JUDGMENT.

TURNER, C.J.—The plaintiffs, Kuppu Nayakan and three others, claim a one-eighth share in the lands in question under a conveyance of October 1880 from fourth defendant, Marappan. Avala Nayakan, the fifth defendant, appellant, claims to have previously purchased the same one-eighth share and another, or one-fourth in all, from Peria Muttu Goundan and two others, defendants 1 to 3. In 1881, this fifth defendant sued the defendants 1 to 3, as well as the plaintiffs, to have it declared that the whole one-fourth had passed to himself, and that defendants 1 to 3 and plaintiffs might be enjoined against interference with his possession. A decree to this effect was passed by the Munsif and this decree was affirmed on appeal.

The plaintiffs, however, seek to avoid the plea of *res judicata* by a reference to the appeal judgment, and this contention has been allowed in both the lower Courts. It is stated in that judgment that "if Marappan has any right, he must bring a separate suit; all that is now decided is that plaintiff purchased the plaint land from defendants 1 to 3 and obtained possession, and two years later was obstructed in his enjoyment by defendants 4 to 7."

It is by the decree and not by the judgment that a question of *res judicata* must be decided. The decree is the formal expression of the adjudication upon the right claimed; the judgment [79] simply contains the grounds of such adjudication. In the former case this appellent claimed this identical one-eighth share as against the present plaintiffs, and they were bound to set up every defence on which they relied. The decree adjudicated that the share had passed to the appellant as against these plaintiffs and that decree was simply affirmed on appeal. The fact that Marappan was not a party can make no difference, because, upon plaintiffs' own case, his interest had been assigned to them before the former suit.

As the case stands at present, therefore, the plea of *res judicata* must necessarily prevail, but under the circumstances, we think it right

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to allow the plaintiffs an opportunity of applying to the District Judge to amend his former decree, so as to bring it into harmony with his judgment. We do not understand how the Judge could reasonably have refused to adjudicate between the titles to Marappan's one-eighth share set up respectively by the contending parties before him; but, if he did so, he should have reserved the point in his decree.

The case will now stand over for six weeks.

On the 30th October the Court delivered the following judgment:—The decree having now been amended, the plaintiffs' claim is not *res judicata*. The claim has been rightly decreed, but we think each party should bear their own costs throughout and the decrees will be modified accordingly.

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8 M. 79.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

THE OFFICIAL ASSIGNEE (*Petitioner*), *Appellant v.* RAMALINGA AND OTHERS (*Creditors of the Insolvent Amba Sankar Davai*), *Respondents*.* [27th October and 11th November, 1884.]

Insolvent Act, 11 and 12 Vict., c. 21, Section 19—Rule 14 of Insolvent Court—Official Assignee—Commission.

The right of the Official Assignee to commission under 11 and 12 Vict., c. 21, Section 19, does not arise until there are in his hands funds realized and available for distribution among the creditors. If at such time the adjudication is annulled the right to commission subsists.

[R., 7 M.L.T. 290 (291) = 5 Ind. Cas. 727 = (1910) M.W.N. 1.]

[80] THIS was an appeal from the order of Kernan, J., made in the Court for the Relief of Insolvent Debtors on the 18th August 1884.

The facts necessary for the purpose of this report appear from the judgment of the Court (TURNER, C. J., and MUTTUSAMI AYYAR, J.).

Mr. *Shephard*, for appellant.

Mr. *Grant*, for respondents.

JUDGMENT.

The judgment of the Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.) was delivered by

TURNER, C.J.—One Amba Sankar Davai was adjudicated an insolvent on the 8th May 1884 and a vesting order made. A meeting of creditors was held on the 15th May 1884, and eventually on 29th May 1884 it was resolved that an application should be made to the Court to annul the insolvency in order that the insolvent might assign the assets to trustees to administer and distribute the estate for the benefit of creditors. There was some little delay in securing the assent of all the creditors and it was not until August 1884, that the order for the annulment of the adjudication and vesting order was actually made. Meanwhile, the Official Assignee had set himself to secure and realize the assets. He had collected some moveable property and had taken steps to sell the immoveable property. At the time the adjudication was annulled, he held

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* Appeal 15 of 1884.

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in his hands a sum of money which, however, would not have been available for dividends, as it would have been exhausted in defraying the expenses incurred.

In his order annulling the adjudication, the learned Commissioner directed the allowance of, or payment to, the Assignee of all costs and expenses incurred by him in collecting and realizing the estate in excess of the cash in hand, but he refused an application by the Assignee to be allowed a commission at the rate of 5 per cent., or some other rate on the value of the estate that had vested in him.

The learned Commissioner held that the Official Assignee was entitled to his commission only when the proceeds of the estate were about to be distributed by the Assignee to creditors.

The 19th Section of 11 and 12 Vict., c. 21, declares that the Official Assignee shall receive no other remuneration in the shape of commission or otherwise than "a fair remuneration out of the sum to be distributed as dividends." By rule 14 of the Insolvent Court, the remuneration of the Official Assignee was [81] settled at a commission of 5 per cent. on the principal sum forming the proceeds of each estate distributable as dividends (1).

It appears clear that the Official Assignee is not entitled under any circumstances to a commission on the value of the estate vested in him, nor can we hold he is entitled to a commission on the value of the estate collected by him. It was possibly the object of the Legislature to incite the Official Assignee to activity and economy in expenditure or collections by indicating as the fund from which he was to be remunerated only the sum, which, after realization and the satisfaction of the expenses of collections and the debts of secured and other preferred creditors, might remain in his hands available for distribution among the general body of creditors. Neither the Act nor the rule appear to have made any special provision for the remuneration of the Official Assignee in the event of the annulment of the adjudication. But it appears to us that the right of the Official Assignee to his commission arises when there are in his hands any funds realized and available for distribution among the creditors—when he is in fact in a position to declare a dividend, and that, if there had been such funds in his hands at the time an adjudication is annulled, he could not thereby be deprived of the commission he has earned, and that a deduction should be made of the commission as well as of the costs and expenses of realizing the estate. In this view effect is given to the language of the Act and of the rule, neither of which make the actual declaration of a dividend condition precedent to the accrual to the Official Assignee of a right to remuneration.

But, inasmuch as it is admitted in this case that the cash in the hands of the Official Assignee will not do more than cover the expenses of realization, we see no reason to interfere with the order of the learned Commissioner and must dismiss the appeal, but, under the circumstances, without costs.

Solicitors for appellant: *Barclay* and *Morgan.*

Solicitor for respondents: *Wilson.*

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(1) Ordo Curiæ, 22nd December 1848.—xiv.—The Official Assignee shall be entitled to 5 per cent. commission on the principal sum forming the proceeds of each estate distributable as dividends. . . . .

8 M. 82.

1884 JULY 30.

APPELLATE CIVIL.

8 M. 82.

[82] APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

AYYASAMI (*Plaintiff*), *Appellant v.* SAMIYA (*Defendant*), *Respondent.** [30th July, 1884.]

Civil Procedure Code, Section 332—*Limitation Act, Sch. II, Arts.* 11, 13.

Where an application was made under Section 332 of the Code of Civil Procedure for possession of property and rejected, and the applicant brought a suit to recover the property more than one year subsequent to the order rejecting the application.

Held, that the suit was not barred either by Art. 11 or Art. 13 of Sch. II of the Indian Limitation Act, 1877.

[N.F., 24 A. 467 (470); U.B.R. (1904), IVth Qr., Lim., Sch. II, 13; F., 12 M. 294; 10 Bom. L.R. 749 (751); Appr., 16 C.W.N. 971 (972) = 14 Ind. Cas. 92; R., 15 B. 438; 14 A.W.N. (1894) 78; 19 Ind. Cas. 968 (969); 3 O.C. 84 (86).]

THE plaintiff, Ayyasami Ayyar, on the 6th March 1883, sued for possession of certain land, of which he had been dispossessed in November 1880, in execution of a decree obtained by the defendant, Samiya Pillai, in suit No. 1 of 1880 in the Subordinate Court of Kumbakonam.

In December 1880, plaintiff applied under Section 332 of the Code of Civil Procedure to recover possession, but was referred by the Subordinate Court to a regular suit by an order dated 14th February 1882.

The District Munsif of Mannargudi (V. Mulhari Rau) held that the suit was barred by Art. 13 of Sch. II of the Indian Limitation Act, 1877, and dismissed the suit.

On appeal, the Acting District Judge of South Tanjore (C. W. W. Martin) confirmed this decree. The plaintiff appealed to the High Court on the following grounds:—

(1) Plaintiff's claim is not barred by limitation.

(2) Setting aside the order of the 14th February 1882 is incidental and ancillary to the relief claimed by the plaintiff and is not the sole or final object of the suit.

(3) The articles of the Limitation Act relied on by the lower Courts have no application to the case.

[83] *Gopalacharyar*, for appellant.

Ramachandra Rau Saheb, for respondent.

The Court (TURNER, C.J., and HUTCHINS, J.) delivered the following

JUDGMENT.

The provisions of Art. 11 in the second schedule to the Limitation Act do not apply in terms to a suit brought to test an order made under Section 332 of the Civil Procedure Code, and we are not warranted in applying that article to any suits other than those to which express reference is made in the article. It is possible and was probable that mention of Section 332 of the Code of Civil Procedure was omitted by oversight from this clause.

Nor, in our judgment, is this suit governed by the provisions of Article 13, for that applies to decisions or orders passed in a proceeding other

* Second Appeal 118 of 1884.

1884 JULY 30. — APPELLATE CIVIL. — 8 M. 82.

than a suit, whereas an order in an execution proceeding is an order in a suit. It may also be questioned whether this suit can be properly described as a suit to set aside an order, for it is a suit to establish the right of the plaintiff. The order under Section 332 simply decided the question of possession, and is by the terms of that section made dependent on the result of the suit to establish the right. It is, therefore, unnecessary for the plaintiff to sue to have it cancelled

We, therefore, set aside the decrees of the Courts below and remit this suit to the Court of First Instance for trial on the merits. The costs of the appeals will abide and follow the result.

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8 M. 83.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

PATHUMA (*First Defendant*), *Appellant v.* SALIMAMMA (*Plaintiff*), *Respondent.** [20th October, 1884.]

Civil Procedure Code, Section 13 —Decree of Competent Court—Res Judicata.

In 1875, P sued in a Munsif's Court to eject a tenant from a house and to recover arrears of rent. S intervened and claimed the house under a deed of gift. The value of the property comprised in the deed of gift exceeded the limit of the **[84]** pecuniary jurisdiction of the Munsif's Court. The suit was dismissed. But on appeal the claim of S under the deed of gift was adjudicated upon and rejected, and P obtained a decree for the land.

In 1882, S sued P to recover all the property comprised in the deed of gift:

Held, that S was estopped by the decree in the former suit from claiming the house.

It was contended by P that the deed of gift was invalid:

Held, that, as to validity of the deed of gift, the decree of the Munsif's Court was not the decree of a competent Court within the meaning of Section 13 of the Code of Civil Procedure, 1882, and, therefore, that S was not estopped from showing that the deed was valid, and claiming the rest of the property comprised therein.

[**Appr.**. 23 C. 415; **R.**, 25 C. 571 (576); 35 C. 353 (360)=7 C.L.J. 470=12 C.W.N. 359; **D.**, 29 M. 65 (67)].

THE plaintiff, Salimamma, sued her mother, Pathuma, and two others, to recover, *inter alia*, a shop and a warehouse (item 6 in schedule D of the plaint) under a deed of gift, executed by Pathuma and two other heirs of the deceased husband of Pathuma in 1863, to plaintiff and her deceased sister. The defendants pleaded (1) that this gift was intended for the benefit of Pathuma, and was made in the names of plaintiff and her sister on behalf of their mother, and (2) that the plaintiff's claim to this property was *res judicata*, by virtue of the decree in suit 422 of 1875, in the Court of the District Munsif of Mangalore.

That suit was brought by Pathuma against a tenant to recover the shop and warehouse and arrears of rent. The tenant denied the title of Pathuma. Salimamma intervened and was made a defendant and claimed the property under the deed of gift of 1863.

The suit was decreed in favour of Pathuma upon appeal.

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* Appeal 12 of 1884.

Upon this question the judgment of the Subordinate Judge (K. R. Krishna Menon) was as follows :—

"Whether the plaintiff's claim in respect of the properties described in Schedule D is or is not barred by Section 13 of the Civil Procedure Code, is the fourth issue for determination. In 1875, the present first defendant instituted a suit before the District Munsif of Mangalore to recover one warehouse and a shop (comprised in the gift) from a tenant to whom they had been verbally let by the present first defendant (the mother of the present plaintiff). The Munsif disbelieved the letting and dismissed the suit. On appeal I believed the letting and, therefore, gave judgment for plaintiff reversing the original decree. For the purpose of determining the probabilities of the letting, I incidentally considered the question of title also and decided it in favour of the present first defendant, [85] and my decision was confirmed by the High Court on Second Appeal. This decision is now relied upon by the defendants as a bar to the present suit and a case decided by our High Court, *Mohidin* v. *Muhammad Ibrahim* (1) and two cases decided by the Calcutta High Court, *Toponidhee Dhirj Gir Gosain* v. *Sreeputty Sahanee* (2), and *Run Bahadoor Singh* v. *Lucho Kooer* (3), are cited as authorities in support of their contention. Whatever might have been the difficulty in finding out the true interpretation of the expression 'competent Court' used in former Code of 1877, that difficulty has been now removed by the unequivocal language used in Section 13 of the present Code (Act XIV of 1882). The Court whose decision is pleaded as a bar should be one competent to try the subsequent suit, and it has been held to be so even under the old Code by the Judicial Committee of the Privy Council in *Misir Raghobardial* v. *Sheo Baksh Singh* (4). The first of the Calcutta cases cited by the defendants' Vakil is the identical one, the mischievous effects of which the Legislature removed by amending the language of the *res judicata* section of the Civil Procedure Code as the speeches of the Hon. Messrs. Evans Stokes delivered at the passing of the present Code indicate. The decisions quoted are thus overruled not only by a subsequent decision of the highest authority but also by a Legislative enactment, and they are, therefore, of no weight. The present suit is beyond the pecuniary limit of the jurisdiction of the Court in which the former suit was entitled, and it has been decided by the first of the Calcutta cases cited by defendants that, in considering the competency of a Court for the purpose of deciding upon a question of *res judicata*, the powers of the Court in which the suit was instituted and not those of the Court in which the suit was decided on appeal must be looked to. The plaintiff's claim has not, therefore, become *res judicata*. Further, the causes of action in both the cases were different, and the determination of the question of title was not absolutely necessary in the former suit, and a finding upon the question of letting was sufficient to sustain the decision then arrived at, and upon this ground also the plea of *res judicata* cannot be sustained. I therefore find this issue against the defendants."

The plaintiff obtained a decree *inter alia* for the shop and ware-[86] house and the rest of the property comprised in the deed of gift. Pathuma appealed.

Mr. *Shephard* and *Ramachandra Rau Sahib*, for appellant.

Mr. *Powell*, for respondent.

(1) 1 M.H.C.R. 245. (2) 5 C. 832. (3) 6 C. 406. (4) 9 C. 439.

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—
APPELLATE
CIVIL.
—
8 M. 83.

The Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.) delivered the following

JUDGMENT.

The first defendant brought a suit in the Munsif's Court against a tenant of the shop and warehouse (item 6 in Schedule D) claiming ejectment and three years' arrears of rent.

The plaintiff interfered and set up a title to the property under the gift on which she now relies. She was made a party to the suit. The value of the shop and warehouse was within the pecuniary limit of the Munsif's jurisdiction.

An issue as to the title derived under the gift was framed and tried and decided by the Appellate Court in favour of the first defendant. The value of the whole property comprised in the gift was Rs. 2,577; the question as to validity of the gift involved the whole value of the property comprised in it; that question being whether the ostensible donees, the plaintiff and her sister, had received the gift for their own benefit or as name-lenders for their mother.

We hold that the decision of the Munsif as to the title to the item of property then in dispute was the decision of a competent Court in a matter then directly in issue, and that it is binding on the plaintiff in this suit, but that it was not the decision of a competent Court as to the effect of the gift. In the result, we find the plaintiff is estopped from claiming the shop and godown and the mesne profits claimed in respect of that property.

We must also allow in part the objection that the properties 2 and 3, originally in Schedule A, and now in Schedule D, which, it is found, were purchased with the proceeds of the decree obtained by the first defendant in the suit brought by her against the tenant, cannot be recovered, the decree in the former suit operating to estop the present plaintiff from asserting her right to those proceeds.

It appears that these properties formed part of the estate of the father, but were conditionally sold. The repurchase, the plaintiff contends, was in effect a redemption. She is entitled to redeem 7/40ths, but her share can only be recovered on payment of **[87]** 7/40ths of Rs. 800, which the plaintiff's counsel states she is willing to pay. The payment will be made in six months from the date of this decree; otherwise her right to redeem will be declared foreclosed.

As to the properties in D. the plaintiff is only entitled to one moiety. It is not proved she is entitled to more.

With these exceptions, we consider no sufficient ground has been shown for disturbing the decree of the Subordinate Judge. It will be modified accordingly, and the parties will pay and receive proportionate costs in all Courts.

8 M. 87 (F.B.).

1884
Nov. 25.

FULL
BENCH.

8 M. 87
(F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar. Mr. Justice Hutchins. and Mr. Justice Brandt.

REFERENCE UNDER SECTION 46 OF THE STAMP ACT.*
[25th November, 1884.]

Stamp Act, Schedule 1, *Article* 11—*Promissory note—Bond—Impressed label—Impressed sheet —Rule* 9 (*a*) *of the Rules of Government of India of* 26*th February* 1881.

By a document, dated 8th March 1882, which purported to be a promissory note attested by three witnesses and written on an impressed label of two annas, A promised to pay B before a certain date Rs. 135 :

Held, that the document was a bond and must be treated as unstamped for the purposes of Section 34 of the Indian Stamp Act, 1879.

By a document, dated 23rd June 1880, stamped with an adhesive stamp of one anna, purporting to be a promissory note attested by two witnesses, A promised to pay Rs. 56 to B or order, on demand :

Held, that the document was not a bond but a promissory note.

[F., 15 M. 259 (F.B.).]

THIS was a reference to the High Court by the Board of Revenue under Section 46 of the Indian Stamp Act, 1879.

The Resolution of the Board of Revenue, dated 8th July 1884, was as follows :—

"A promissory note for Rs. 135 was written on hundi paper with an impressed label of two annas affixed under Rule 9 (*a*) of the rules, dated 26th February 1881. As it was attested, the District Munsif of Barkur treated it as a bond, which ought to **[88]** be written on an impressed sheet with a stamp of value one rupee, and levied fourteen annas as the deficiency, with ten rupees as a penalty.

"The Head Assistant Collector moved the District Court under Section 50 of Act I of 1879, representing that the Munsif ought to have treated the document as unstamped and to have collected one rupee besides the penalty. The District Judge remarked that the document as a promissory note would have been correctly stamped, and that the Munsif was right in collecting only fourteen annas deficiency and ought to have levied ten times that amount, and not ten rupees, as the penalty.

"The same point arose with regard to a witnessed promissory note for Rs. 56, which bore an adhesive stamp of one anna. The District Munsif of Mulki treated it as a bond and levied seven annas as deficiency with a penalty of five rupees. The Collector moved the District Judge, who adhered to the view he had taken in the previous case.

"As these documents by being attested came within the definition of bonds, the rules required them to be written on impressed sheets, and the adhesive stamp and affixed label cannot, in the opinion of the Board, be taken into consideration. The documents were legally unstamped, and the Board consider that the Courts were mistaken in dealing with them as merely insufficiently stamped.

"As regards the first case, the Collector submits that a promissory note, which under Article 11 of the Schedule requires a stamp of more than one anna, cannot be written on hundi paper with an affixed impressed

* Referred Case 5 of 1884.

1884 Nov. 25. — Full Bench. — 8 M. 87 (F.B.).

label, and that the District Judge was in error in holding that the document, if a promissory note, was correctly stamped.

"The Board observe that the word 'hundi' is not defined in the Stamp Act or in the Negotiable Instruments Act, although it is used in the rules under the Stamp Act issued by the Government of India. It is usually understood to mean a bill of exchange, but as the District Judge of South Canara holds that it includes a promissory note, and as the Collector refers to this point in his annual report upon the stamp revenue, the Board resolve to refer this question also to the High Court."

The promissory note for Rs. 135 referred to in the Resolution **[89]** of the Board of Revenue was dated 8th March 1882, and the date of the promissory note for Rs. 56 was 23rd June 1880.

The Government Pleader (Mr. *Shephard*) appeared on behalf of the Board of Revenue.

JUDGMENT.

The judgment of the Full Bench (TURNER, C.J., KERNAN, MUTTUSAMI AYYAR, HUTCHINS and BRANDT, JJ.) was delivered by

TURNER, C.J.—We reply to this reference that the document of the 8th March 1882 being attested and not payable to bearer or order, is a bond as defined in the Stamp Act, that the stamp it bore was not a stamp which was proper for such an instrument, and that the instrument should have been treated as unstamped.

The instrument of 23rd June 1880 is a promissory note payable to order and therefore, although attested, it is not a bond and it bears a proper stamp as a promissory note.

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8 M. 89=9 Ind. Jur. 21.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

MINAKSHI (*Defendant* No. 1), *Appellant v.* VIRAPPA AND ANOTHER (*Plaintiff and Defendant* No. 11), *Respondents.**
[13th March and 15th October, 1884.]

Hindu law—Unborn son—Right to ancestral property not defeated by will of father.

According to the Hindu law which obtains in the Madras Presidency the right of a son in the womb to ancestral property cannot be defeated by a will or gift.

Quære: Whether this rule would govern the case of an alienation for value.

[Appr., 16 M. 76.**]**

THIS was an appeal from the decree of E. Turner, Acting District Judge of Madura, dated 28th September 1883, modifying the decree of T. Ganapathi Ayyar, Subordinate Judge of Madura (East), in suit 53 of 1882.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the Court (TURNER, C. J. and MUTTUSAMI AYYAR, J).

The Advocate-General (Hon. *P. O'Sullivan*) and *Gopalacharyar*, for appellant.

Bhashyam Ayyangar, for respondents.

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* Second Appeal 1063 of 1883.

JUDGMENT.

1884 Oct. 15. — Appellate Civil. — 8 M. 89 = 9 Ind. Jur. 21.

[90] In this case one Anaiyappa Pillai died on the 4th of February 1874, leaving two widows, Minakshi, defendant No. 1, and Avadai, defendant No. 11. Avadai was delivered of a son Malaiayya on the day following his father's death. This son died in 1878 and Avadai claimed to succeed to ancestral property left by Anaiyappa Pillai as the mother and heiress of her son. In that character she has granted a lease to the plaintiff Virappa Nayakan. Her right to make this lease is contested by Minakshi, who relies upon an alleged will executed by Anaiyappa Pillai on the day preceding his death and registered on the day of his death.

It has been found that Anaiyappa Pillai, at the time of the execution of the will, understood its purport and effect, and that he did not execute it under undue influence, but freely and voluntarily. The question arises whether the will can take effect so as to defeat the right of this unborn son.

On the question as to the time at which the right of a son accrues to share in ancestral property a wide difference of opinion prevailed among Hindu lawyers. The author of the Dayabhaga held that the right accrued only on partition, and the author of the Mitakshara that it accrued on birth. By the latter, for certain purposes, conception was regarded as equivalent to birth; for instance, if a partition was made among brothers, and it was known that their mother was pregnant, a share was to be reserved, and if after a partition the mother bore a son who must have been conceived before partition, the partition was to be re-opened and the rights of the child in the womb recognized. A passage has been cited by Mr. *Bhashyam Ayyangar* from the Smriti Chandrika, ch. I, paragraph 27, in which the author, reciting the sloka "The venerable teachers direct that ownership to wealth is acquired by birth alone," explains the terms "by birth alone" as meaning "by the very formation of the fœtus in the mother's womb."

The testamentary power of a Hindu has been held not to be more extensive than his power of gift, and it has been held by this Court in *Muthia Chetti* v. *Zamindar of Ramnad* (1) that a father cannot make a gift of ancestral property so as to defeat the rights of a son begotten, but as yet unborn.

When a question arises as to the effect of a gift or testamentary [91] disposition to defeat the rights of an unborn son, we conceive we are following what was understood to be the Hindu law of this Presidency in supporting the ruling cited.

It was observed by Mr. Justice Willes in the *Tagore Case* (2), when commenting on limitations of property to certain persons, that "by a rule now generally adopted in jurisprudence, this class would include children in embryo who afterwards came into separate existence," and if the note which has been given us of a decision of this Court in Regular Appeals 43 and 46 of 1874 (3) is correct, Mr. Justice Holloway declared that the rule of Hindu law was on this point analogous to the rule referred to by Mr. Justice Willes.

We hold, then, that the rights of a son in the womb to ancestral property cannot be defeated by a will or a gift.

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(1) 2 Ind. Jur. 205. (2) 9 B.L.R. 377 (397).

(3) Not reported; see Revenue Register, vol. ix, p. 38, and 2 Ind. Jur. 208.

1884
Oct. 15.

APPELLATE CIVIL.

8 M. 89= 9 Ind. Jur. 21.

Whether there may not be grounds for holding otherwise in the case of an alienation for value is a question which we need not now consider.

There are obvious reasons of convenience for holding that a purchaser for value is not bound to enquire whether the wife of the seller is *enceinte*, nor indeed has science yet arrived at such a point that where there has been frequent opportunity of access between the parents a conclusive opinion can be formed as to the exact moment of conception.

Whether an alienation to a *bona fide* purchaser for value, which would be valid if made with the consent of sons, and valid if there were no sons in existence to consent to it, would be voidable because of the existence of a child in the womb, which might or might not be a son, we should prefer to determine after hearing the full arguments.

In the present case, we must hold that the estate of Anaiyappa Pillai vested in his son on his birth, and, on the son's death, in Avadai.

We do not overlook the right of Minakshi to maintenance, but that is not a question which can be determined in this suit.

The appeal consequently fails and is dismissed with costs. The memorandum of objections not being pressed is dismissed.

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8 M 92.

[92] APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

SUBRAMANYA (*First Defendant*), *Appellant*, *v.* PONNUSAMI AND ANOTHER (*Plaintiffs*), *Respondents.** [23rd October, 1884.]

Hindu Law—Sale by widow in excess of power—Suit by reversioners for share of land sold on payment of proportionate amount of sum properly lent—Decree for redemption.

The widow of a Hindu sold to the defendants a portion of her husband's estate for less than its market value and for a sum in excess of what she was justified in raising by sale. The plaintiffs, two of three reversioners entitled to the estate, sued, on the death of the widow, to recover from the purchasers two-thirds of the land sold upon payment of two-thirds of the sum which the widow was justified in raising:

Held, that the plaintiffs were entitled to the relief claimed.

[Appl., 6 C.L.J. 490 (522); R., 3 C.L.J. 260 (269).]

THIS was a suit by two Hindu reversioners to recover a two-thirds share in thirty parcels of land, which had been sold by the widow of their cousin, with mesne profits from the date of the widow's death in 1881.

The defendants, Nos. 1 and 2, were the purchasers. Defendant No. 3 was a reversioner alleged to be entitled to one-third share.

The pleas were (1) that the first plaintiff, Ponnusami Udayan, having embraced Christianity, had no right to the land; (2) that the sales had been made for legal necessity.

The District Munsif of Tiruvalur (T. Kanakasabai Mudali) held that the sales had been made for proper purposes and dismissed the suit.

On appeal the District Judge of North Tanjore (W. F. Grahame), held that by virtue of Act XXI of 1850, plaintiff No. 1 had not lost his rights

* Second Appeal 1096 of 1883.

and found that the widow, to discharge a debt of Rs. 349-1-3, sold without pressure, for Rs. 500, property worth Rs. 1,500.

1884 Oct. 23. — Appellate Civil. — 8 M. 92.

The District Judge decreed (citing Mayne's Hindu Law, Sections 545, 560) that plaintiffs should recover two-thirds of the **[93]** land sued for and mesne profits from the date of decree on condition of paying two-thirds of Rs. 349-1-3 with interest at 6 per cent. per annum since death of the widow.

Defendant No. 1, Subramanya Udayan, appealed to the High Court, *inter alia*, on the following grounds:—

(1) The District Judge was wrong in treating the sale by the widow as a mortgage.

(2) Plaintiff No. 1 having become a Christian before Act XXI of 1850 came into operation and before any right in the land vested in him, had no right to a share.

(3) The District Judge was wrong in charging interest on the amount advanced by defendants only from the date of the widow's death.

(4) Plaintiffs were not entitled to any mesne profits.

Hon. *Rama Rau*, for appellant.

Mr. *Shaw* (with him Mr. *Norton*), for respondents.

The Court (TURNER, C.J., and HUTCHINS, J.) delivered the following

JUDGMENT.

The Appellate Court has disposed of this appeal according to the ordinary rule in such cases. Where it is found that an alienation has been made by a widow to a person cognizant of the circumstance to an extent considerably in excess of what the justifying purpose requires, the Court, at the instance of the reversioner, may declare the alienation valid only as a mortgage for the amount which should properly have been raised.

The Appellate Court has therefore rightly held plaintiffs entitled to redeem.

But, in ascertaining the amount which it is incumbent on them to pay, the Judge should, in our judgment, have allowed, in addition to the amount awarded by him, the sum of Rs. 22-8-0 which was paid to the conditional mortgagee and interest to the extent of Rs. 52-13-1 on the debts which were discharged by the alienee.

Although the instruments by which those debts were secured provided only for the payment of interest at the rate of 12 per cent. up to certain dates, specified in them respectively, when payments were not made at the appointed times, interest would be fairly chargeable at the rate agreed until satisfaction of the claim.

[94] The decree of the Appellate Court is varied by declaring that the plaintiffs are entitled to recover possession on payment of two-thirds of Rs. 75-5-9 in addition to the amount mentioned in that decree.

The parties will respectively pay and receive proportionate costs in this appeal.

1884
Nov. 11.

APPELLATE CIVIL.

8 M. 94=
9 Ind. Jur.
68.

8 M. 94=9 Ind. Jur. 68.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

VIJAYA (*Plaintiff*), *Appellant* v. SRIPATHI (*Defendant*), *Respondent*.*
[11th November, 1884.]

Hindu Law—Maintenance—Suit to reduce rate awarded by decree.

S, a Hindu, obtained a decree for maintenance at a certain rate against R, her father-in-law. After the death of R, V, who was adopted by R, subsequent to the decree, sued S to have the rate reduced on the ground that the estate of R, which came to his hands, was considerably diminished in value:

Held, that, as the estate had been diminished by the voluntary acts of R and V, the claim could not be allowed.

[F., 24 B. 386 (390) ; 26 B. 707 (709).]

THIS was an appeal from the decree of M. Cross, Subordinate Judge at Kumbakonam.

The facts and arguments appear sufficiently for the purpose of this report from the judgment of the Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.).

Gopalacharyar, for appellant, referred to *Ruka Bai* v. *Ganda Bai* (1); 1 West and Buhler, p. 262 ; Mayne's Hindu Law, Section 383 ; *Sreeram Buttacharjee* v. *Puddomookee Debia* (2) ; *Ram Kullee Koer* v. *The Court of Wards* (3).

Hon. *Rama Rau*, for respondent.

JUDGMENT.

The defendant Sripathi Ammal obtained a decree against her father-in-law, Ramudu Chetti, declaring her entitled to receive annually for her maintenance 50 kalams of paddy now estimated at Rupees 50, Rupees 480 in cash and Rupees 60 in lieu of a residence.

[95] The plaintiff, Samudra Vijaya Chetti, the brother-in-law of Ramudu Chetti, who was adopted by him subsequently to the decree, has come into Court claiming that the maintenance should be reduced, inasmuch as the estate which came to his hands and is now enjoyed by him is considerably less in value and extent than the estate in the hands of Ramudu Chetti at the time the decree was passed in the defendant's favour.

The circumstances which the plaintiff alleges as having reduced the extent and value of the estate are the assignment of 22½ velis to the widow and 3 velis to the grand-daughter of the deceased Ramudu Chetti in pursuance of his will, the sale by the plaintiff of about 36 velis in part to satisfy heavy debts incurred by him in establishing his right of succession and in part to discharge sums which he was directed to pay by the will of Ramudu Chetti.

The plaintiff alleges that the lands remaining in his hands are only 46 velis for his own use, and 6 velis dedicated to a charity, and he asserts that the 46 velis yield a net income of only a little over Rupees 1,000.

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* Appeal 60 of 1884.

(1) 1 A. 594. (2) 9 W. R. 152. (3) 18 W. R. 474.

He also asserts that he has still to pay debts amounting to Rupees 18,000.

1884 Nov 11. — APPELLATE CIVIL. — 8 M. 94 = 9 Ind. Jur. 68.

It is contended on behalf of the defendant that a suit will not lie to alter the rate of maintenance which has already been determined by judicial decree; next, that the plaintiff has not truly stated the amount which he received from his adoptive father; thirdly, that the amount so received and the income which he has enjoyed was amply sufficient to discharge all proper expenditure; fourthly, that if, notwithstanding the decree obtained by the defendant, the question as to the propriety of the rate of maintenance can be re-opened, it can only be re-opened when the change of circumstances has been brought about independently of the voluntary action of the person chargeable with the maintenance, and of those claiming under him; and, fifthly, that if there had not been deducted from the estate as it stood in the time of Ramudu Chetti what has passed out of the hands of the plaintiff by the voluntary act of his adoptive father, or by his own act, the estate would have produced an income, in proportion to which the maintenance decreed to the defendant would still be reasonable.

It is unnecessary for us to determine in this suit whether a decree for maintenance once passed can or cannot be varied by [96] subsequent proceedings. Possibly this Court would hold, as has been held elsewhere, that a reduction of the family wealth would, under certain circumstances, justify a reduction in the allowance assigned for maintenance even as the result of judicial decision.

But we are not aware of any case in which it has been held that where the family property has been diminished by the voluntary act of those who are liable for the maintenance of the family, such reduction justifies a diminution of the rate agreed or allowed by Court.

To hold otherwise would be to put it in the power of any person liable to such a charge to defeat the charge, and where there has been a decree to defeat the decree.

To apply these principles to the present case, the Judge doubts, and it appears to us not without reason, whether the plaintiff has correctly stated the amount of property which he received on the death of Ramudu Chetti. His adoptive father had not only possessed an estate in land yielding an income of upwards of 15,000 rupees annually, according to plaintiff's own estimate, but he had engaged in money dealings, and it is improbable that he left no more than the outstandings admitted by the plaintiff. Assuming, however, that the sum due to him at his decease was no more than the 30,000 rupees admitted by the plaintiff, and of which he has collected 17,000 rupees; this sum with the annual income of the estate ought to have sufficed to meet all the necessary charges of litigation. Of these charges the plaintiff produces no account. They could hardly have exceeded 15,000 rupees unless the remuneration for professional assistance was much larger than the law required, or is customary in practice. The other causes which have produced a diminution of the family estate, are either the will of Ramudu Chetti or the voluntary acts of the plaintiff.

In the view which we take of the law, although no doubt Ramudu Chetti would have been justified in providing maintenance for his widow and also in making provision for the marriage of his grand-daughters, the plaintiff would not have been bound to give effect to those directions in such a manner as to disable him from meeting the reasonable sum for maintenance which had been awarded by the decree to the defendant; still

1884 Nov 11. — APPELLATE CIVIL. — 8 M. 94 = 9 Ind. Jur. 68.

less was the plaintiff justified in surrendering to another daughter-in-law a capital sum [97] which would produce an income largely in excess of that enjoyed by the defendant, or in making payment of a considerable sum to construct a mantapam, even though Ramudu Chetti may have expressed his intention of so doing. Neither the alienations by Ramudu Chetti nor the alienation by the plaintiff can, under the circumstances, be set up to defeat the decree obtained by the defendant.

We consider then that the Judge was fully justified in dismissing the present suit. To hold otherwise would be to sanction the doctrine that the rights of third parties can be subordinated to the arbitrary pleasure of persons whose obligation to respect them has been established by judicial decision.

The appeal is dismissed with costs.

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8 M. 97.

APPELLATE CIVIL.

Before Sir Charless A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

ROBERT BELL NIXON (*Insolvent*), *Appellant*, *v.* THE CHARTERED MERCANTILE BANK OF INDIA, LONDON AND CHINA (*Opposing Creditor*), *Respondent.** [14th October, 1884.]

Insolvent Act, 11 *and* 12 *Vict.*, c. 21, *Sections*. 47,51.

By an order made under the provisions of 11 and 12 Vict., c. 21, it was directed that an insolvent-debtor was entitled to his discharge as to all the debts mentioned in his schedule, save and except the debt due to a certain creditor, and as to such debt that the insolvent should be entitled to be discharged as soon as he had been in custody at the suit of the creditor for six months, and it was further ordered that the insolvent be committed to custody in respect of this debt for six months :

Held, that the order of committal was within the power given to the Court by Sections 47 and 51 of 11 and 12 Vict., c. 21.

[Overruled, 13 M. 150.]

THIS was an appeal from an order of Kernan, J., dated 25th August 1884, made in the Insolvent Court in the matter of the petition of Robert Bell Nixon, an insolvent debtor.

The material portion of the judgment of Kernan, J., for the purpose of this report, was as follows :—

[98] "I think the debts of the insolvent so far exceeded his means of paying as to show gross misconduct in contracting his debts. He was utterly insolvent, and was so for at least twelve months before the year 1883.

"As regards the debt of the Chartered Mercantile Bank to the extent of Rs. 80,000, I order that the insolvent Robert Bell Nixon be discharged, when he shall be in custody at the suit of the Bank for six months, and I order the insolvent to be committed to custody in respect of the debt, to the extent of Rs. 80,000, during the said period of six months, and that the Official Assignee do pay to the insolvent, while in custody, Rs. 5 per week.

* Appeal 16 of 1884.

"As regards the general creditors, who have not made any special case, I will merely discharge the insolvent under Section 47. He has been before this Court, now, since 5th July 1883, and his future property will be liable to his debts, unless he may hereafter obtain an order under Section 66."

Upon the application of the insolvent, it was ordered that his solicitors should be paid Rs. 250 in addition to the costs of schedule, to enable the insolvent to appeal, if so advised, and that the order for arrest should not issue for one month.

The insolvent appealed on the ground, *inter alia*, "that the learned Commissioner having passed a final order discharging the insolvent as to all his debts except the debt due to the Chartered Mercantile Bank of India, London and China, and as to that debt discharging the insolvent, as soon as he should have been in custody at the suit of the said Bank for a period of six months, had no power to order the commitment of the insolvent to custody."

Mr. *Shaw*, for appellant.

Mr. *Branson*, for the Bank.

JUDGMENT.

The judgment of the Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.), after discussing the evidence, proceeded as follows :—

When we look to the general conduct of the insolvent as a merchant, there is unfortunately nothing that would justify us in interfering with the Commissioner's order. The insolvent knew that his capital had been lost: he must have known at the latest in February and March 1883 that his liabilities had increased so largely that he had been for some time speculating with the money of his creditors: he nevertheless continued business which his experience had shown him, involved considerable risk, and **[99]** allowed the monies he received from Madras merchants and the Bank to go to his general account and satisfy prior engagements. He was thus unable to obtain the goods, which, in the case of the merchants, he had received their monies to buy, and, in the case of the Bank, he had represented himself as having acquired and could hold as security.

The order of the learned Commissioner appears to us to be within his powers under Sections 47 and 51 of the Act. The 47th Section gives the Commissioner power to commit an insolvent to custody for any debt or demand if he is not already in custody, and the 51st Section gives him power in the cases mentioned in that section to adjudge that the insolvent shall be discharged when he shall have been in custody for a time specified not exceeding two years. Instead of committing the insolvent, the learned Judge might have refused protection and left the opposing creditor to a suit to secure the imprisonment of his judgment-debtor, but this would have occasioned useless expense.

We dismiss the appeal and allow the costs of the opposing creditor in this Court out of the estate. The order of the learned Commissioner will issue forthwith.

Solicitors for Nixon : *Grant* and *Laing*.

Solicitors for the Bank : *Branson* and *Branson*.

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APPELLATE CIVIL.

8 M. 99.

8 M. 99.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

SIVARAMA (*Auction-purchaser*), *Petitioner v.* RAMA AND OTHERS (*Judgment-debtors*), *Respondent.** [20th November, 1884.]

Civil Procedure Code, Section 313, 315—*Refund of purchase-money—Limitation Act, sch. II, Art.* 174.

Under Section 313 of the Code of Civil Procedure a purchaser at a sale in execution of a decree may resist the confirmation of the sale and prevent its conclusion, while under Section 315 he may apply, after the confirmation of the sale, for refund of the purchase-money on the ground that nothing passed by the sale.

[100] To entitle a purchaser under para. 2 of Section 315 of the Code of Civil Procedure, to a refund of purchase-money, it is not necessary that a Court should have decided in other proceedings that the judgment-debtor had no saleable interest in the property which purported to be sold, or that the purchaser should have obtained actual possession and have been deprived thereof.

[F., 9 M. 437.]

THIS was an application to the High Court under Section 622 of the Code of Civil Procedure to set aside an order of C. Gopalan Nayar, District Munsif of Shernad, rejecting an application, made on the 2nd April 1884, under Section 315 of the Code of Civil Procedure, by Sivarama Krishna Bhatta, plaintiff in suit 170 of 1882, and purchaser of certain land sold in execution of the decree in the said suit on the 28th November 1882, for a refund of purchase-money paid by him for the said land, on the ground that the judgment-debtors had no saleable property therein (their interest having been already sold in execution of another decree) by cancelling a receipt acknowledging satisfaction of the decree to the extent of the purchase-money. The petitioner also prayed for an order that he should be at liberty to recover the said sum under the decree.

The District Munsif delivered the following

JUDGMENT.—"If debtors had no saleable interest, petitioner should have asked under Section 313 to set aside the sale, and he is now barred from doing so under Art. 172 of Sch. II of the Limitation Act. In my opinion Section 315 is inapplicable to the case, inasmuch as the sale has not been set aside under Section 312 or Section 313, nor has it been found (by a judicial tribunal) that petitioner has been deprived of the property by reason of want of interest in the debtors nor has money been paid to any person as provided therein. I reject the petition."

Gopalan Nayar, for petitioner.

Respondents were not represented.

JUDGMENT.

The judgment of the Court (TURNER, C.J., and HUTCHINS, J.) was delivered by

TURNER, C.J.—It would be idle to refer the purchaser to a suit (in which he must be defeated) to entitle him to claim a refund under Section 315, para. 2, and there is no reason why the term "it is found" should not apply to the Court executing the decree as well as to any Court in which

* Civil Revision Petition 255 of 1884.

the right to insist on the purchase is decided in a separate suit. It is more difficult to determine why a purchaser who is allowed only sixty [101] days for an application under Section 313 should, if that period has elapsed without an application, be permitted to make another application under Section 315, but it is clear that if we construe the terms "is deprived of it" as meaning a deprivation of possession, we are putting on those terms a meaning which they do not necessarily bear, and we are excluding from the operation of the section many cases which, it may reasonably be inferred, it was intended to include; for instance, where a purchaser after obtaining a certificate applies for possession and is resisted and is referred to a suit in which he fails. This is the case of most common occurrence. We might also exclude cases which are frequent where the interest is one which does not admit of certain possession. On the whole, the distinction we think between the two applications under the two sections is this. Under Section 313 the purchaser may resist the confirmation and so prevent the conclusion of the sale, while under Section 315 he may apply after the confirmation of the sale for the refund of the purchase money, on the ground that nothing has passed by the sale.

We set aside the order of the Munsif and direct him to pass a fresh order. We make no order as to costs.

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8 M. 101.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

KUNHI MOIDIN (*Auction-purchaser*), *Petitioner v.* TARAYIL MOIDIN (*Decree-holder*), *Respondent.** [22nd September and 20th November, 1884.]

Civil Procedure Code, Section 315—Refund of purchase money.

Upon an application for refund of purchase money under Section 315 of the Code of Civil Procedure, the Munsif, being of opinion that the purchaser had in collusion with the judgment-debtor run up the price of the land at auction far beyond its value with a view to prevent other property attached from being sold to satisfy the decree, rejected the application, except as to a sum of Rs. 50, which represented the alleged value of the judgment-debtor's interest in the land brought to sale by the decree-holder:

Held, that, as the judgment-debtor was found to have no interest in the land, the purchaser was entitled to a refund of the money paid to the decree-holder.

[R., 13 A. 383 (386).]

[102] THIS was an application under Section 622 of the Code of Civil Procedure to set aside an order of P. Govinda Menon, District Munsif of Ernad, dated 20th December 1883, made on a petition under Section 315 of the Code of Civil Procedure.

The petitioner, Pukkoden Kunhi Moidin, applied for a refund of Rs. 475 paid by him on 12th June 1878, as purchaser of certain land at an auction sale in execution of the decree in suit 226 of 1876.

Possession was not obtained, the land being in the possession of a stranger, and, in suit 450 of 1882, brought by the petitioner against the decree-holder and others to establish his claim to the land, it was

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* Civil Revision Petition 64 of 1884.

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decreed that the judgment-debtor in suit 226 of 1876 had no interest in the land.

The decree-holder in suit 226 of 1876, Tarayil Moidin, opposed the petition for refund on the ground that the petitioner had conspired with the judgment-debtor to defraud him. He alleged that he had only brought to sale his judgment-debtor's panayam (mortgage) right in the land worth Rs. 50, and that the purchaser who was a relative of the judgment-debtor had bid at auction for the land till the price exceeded the amount of the decree and far exceeded the value of the interest, which, he asserted, was possessed by the judgment-debtor in the land, with a view to prevent other property attached from being sold.

The judgment of the Munsif was as follows:—

"On looking into the nature of the case and the state of the paramba, I have no doubt whatever that the auction-purchaser and judgment-debtor have colluded and that this mere uyuparamba has been purchased for more than its real value and that the other properties have been caused to be released from attachment. No man of sense would purchase this paramba for Rs. 475. The very fact of purchasing at that price by the auction-purchaser is itself the strongest evidence of fraud. It is difficult to obtain clear evidence of fraud. It is only possible to guess from fact. A Court of Justice will not execute a claim based on fraud. There shall, therefore, be no order under Section 315 to return the full amount to the auction-purchaser. I have no doubt that the decree-holder in this case mentioned without information in the schedule that the debtor has a panayam claim of Rs. 50 on the paramba in dispute. I think that, as the decree-holder did not make sufficient inquiry when that claim was mentioned, he is to [103] return to the auction-purchaser the amount of the claim alleged to have belonged to the debtor. On these grounds, it is ordered that the decree-holder shall return Rs. 50 to the auction-purchaser and both parties shall bear the costs."

Gopalan Nayar, for petitioner.

Sankaran Nayar, for respondent.

JUDGMENT.

The judgment of the Court (TURNER, C. J., and HUTCHINS, J.) was delivered by

TURNER, C. J.—In this case a person who purchased property at auction in execution of a decree applied for possession; this claim was resisted. He brought a suit to vindicate his title, and it was held on the 14th October 1882 that the judgment-debtor had no saleable interest in the property. He then applied for a refund of his purchase money. The Munsif had reason to think that the purchaser had, in order to defeat the right of the decree-holder, run up the price, and eventually had been declared to be the purchaser on a bid greatly in excess of the value; and on this ground he refused a refund of more than what he supposed to be the actual value.

If it had been found that the judgment-debtor had any saleable interest, the sale would have been sustained notwithstanding the price might have been excessive.

The decree-holder was himself to blame for causing an alleged right to be brought to sale when his judgment-debtor possessed none.

It was obviously the intention of the Legislature that, when there is no saleable interest, the sale shall be held null and void, as it would be if it had been made otherwise than in execution of a decree of Court. The

purchaser having been deprived of the supposed interest offered for sale, is entitled to a refund of all that he paid, though the decree-holder can only be responsible for what he has actually received.

The Munsif may properly refuse interest if it is proved the purchaser has largely contributed to the loss he has sustained in this respect.

The order of the Munsif is set aside and he is directed to pass a fresh order. Each party will bear his own costs of this application.

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8 M. 104 (F.B.).

[104] APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

REFERENCE UNDER SECTION 46 OF THE INDIAN STAMP ACT.*
[25th and 26th November, 1884.]

Stamp Act, Schedule I, Article 44 (*b*)—*Section* 3 (13), *Schedule I, Article* 29; *Article* 5 (*c*) —*Mortgage—Assignment of growing coffee.*

By an agreement made the first day of September 1884, A, in consideration of Rs. 1,000 to be advanced to him by B, assigned to B the whole crop of coffee then growing upon a certain estate, upon trust, *inter alia*, to secure the repayment of the sum advanced.

It was stipulated that A should cultivate the crop till maturity and deliver it to B:

Held, that this document was a mortgage liable to duty under Article 44 (*b*) of Schedule I of the Indian Stampt Act, 1879.

THIS was a case referred to the High Court, under Section 46 of the Indian Stamp Act, 1879, by the Board of Revenue.

The case was stated by the Secretary to the Board of Revenue as follows:—

"I am directed to forward, under Section 46 of the Stamp Act, for the decision of the High Court, the enclosed document, by which a coffee-planter binds himself to deliver his crop in return for advances of money from the Bank.

"A similar document was forwarded in referred case No. 1 of 1871, and the Court, on 15th January 1872, decided that it was a mortgage under Section 3, clause 18, of Act XVIII of 1869. Since then Act I of 1879 has come into force and Article 29 of Schedule I is new; but the Board have ruled that, following the definitions in the General Clauses Act, a coffee crop on the bushes is immoveable property, and that, therefore, such documents do not fall under Article 29, but must be treated as mortgages under Article 44 of Schedule I, Act I of 1879.

[105] "Messrs. *Barclay & Morgan* in forwarding this document for adjudication, urge the following points:—

"(*a*) The document is not a mortgage within the definition given in Section 3 (13). It transfers or creates in favour of the Bank no right over specified property. The coffee growing on the estate has not arrived, and possibly may never arrive, at that stage when it can be called a crop—(See the decision of Sir Richard Garth at II, Calcutta series, 87—'The question of stamp must depend on the state of things existing

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* Referred case 8 of 1884.

1884 Nov. 26. — Full Bench. — 8 M. 104 (F.B.).

at the time when the mortgage was made'). The document does not contemplate the existence of the crop. On the contrary, the advances of money are made for the purpose of calling the crop into existence. The document, therefore, does not come within the definition of a mortgage, and is an agreement not otherwise provided for, chargeable with duty under Article 5 (*c*) of the Schedule.

"(*b*) If this decision of the Calcutta High Court is not followed, the document may be held to fall under Article 29 of the Schedule. Act III of 1877 defines moveable property so as to include fruit upon trees, and the Allahabad High Court followed this definition in construing Act XI of 1865—(see III, Allahabad series, 168).

"(*c*) If it is held that the document does not fall under Article 29, it must fall under Article 44 (*b*) and not under Article 44 (*a*)—(see the decision reported at VIII, Bombay series, 310).

"The Board, as at present constituted, are of opinion that, because the crop is to be delivered only after it is picked, the property to be delivered is moveable property the General Clauses Act notwithstanding, and further that the property pledged being non-existent and only potential at the time of the execution of the deed, is, therefore, not sufficiently specific to bring the document within the definition of a mortgage deed and that it is assessable to stamp duty either under Articles 29 (*a*) or 5(*c*)."

The material portions of the said document, dated 18th September 1884, and called an agreement made between Henry [106] Wilkinson, a coffee-planter and the Agra Bank are set out in the judgment of the Full Bench.

The Government Pleader (Mr. *Shephard*), for the Board of Revenue.

Mr. *Tarrant*, for the Agra Bank.

The Government Pleader.—The document is a mortgage within the meaning of Article 44 (*b*) of Schedule I of the Stamp Act. Articles 14, 15, 55 are not applicable. The only question which can arise is whether it falls within Article 29.

[Hutchins, J.—That would apply to the covenant as to future crops.]

Growing crops can be mortgaged—*Petch* v. *Tutin.* (1) A mortgage is defined (if it can be called a definition) in Section 3 (13) of the Act. The chief difficulty is as to whether there is existing property.

In *Moran* v. *Mittu Bibee* (2) there was an agreement for a mortgage. No crop was assigned, but indigo was to be manufactured. Article 44 speaks of mortgages generally : the nature of the property is immaterial.

Mr. *Tarrant.*—There can be no crop till it is mature. It is estimated to weigh two tons. Money is advanced to raise it, the planter has to cultivate it till maturity and then deliver to the Bank. The General Stamp Act of 1879, under which the decision of Sir W. Morgan, C. J., and Innes, J., in referred case 1 of 1871 was passed, differs from the present. By Clause 18 of Section 3 of that Act every pledge of property is included in a mortgage. Nor is it specified property within the meaning of Section 3 (13) of the present Act.

[Kernan, J.—The Bank obtains an actual interest which will prevent creditors attaching it].

(1) 15 M. & W. 110. (2) 2. C. 58.

As to Article 29, the crop is moveable property—*NasirKhan* v.*Karamat Khan* (1). Fruit on trees is moveable property according to the General Clauses Act and Registration Act.

The Government Pleader in reply.—All that the instrument under Article 29 has to do is to evidence an agreement to secure.

JUDGMENT.

The judgment of the Full Bench (TURNER, C.J., KERNAN, MUTTUSAMI AYYAR, HUTCHINS and BRANDT, JJ.), was delivered by

[107] TURNER, C.J.—The owner of a coffee estate, in consideration of advances made or to be made up to Rs. 1,000 by the Agra Bank, assigned to the Bank the whole of the crop of coffee then growing on the estate, upon trust to sell the same and apply the proceeds to the satisfaction of the sums advanced and interest.

It was agreed that the crop should be allowed to remain in possession of the planter, who was to cultivate, gather and prepare the crop, and deliver it to the Bank. It was further stipulated that, if the proceeds of the growing crop were insufficient to meet the advances, the planter should repay the difference within one year, and should, if required to do so, execute a charge on the crop to be produced in the year 1884-85.

Assuming that this instrument created an interest only in moveable property, as to which we pronounce no opinion, it created not a mere hypothecation or pledge of the property but an assignment of the property by way of mortgage, and, consequently, was liable to stamp duty under Article 44 (*b*) of Schedule I of the Indian Stamp Act, 1879.

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8 M. 107 (F.B.)

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, and Mr. Justice Hutchins.

MARI (*Plaintiff*), *Appellant* v. CHINNAMMAL AND OTHERS (*Defendants*), *Respondents*.* [7th October, 1884].

Hindu law—Inheritance—Step-mother—Paternal uncle.

Under the Hindu law which obtains in the Presidency of Madras, a step-mother does not succeed to the estate of her step-son in preference to a paternal uncle.

Kumaravelu v. *Virana Goundan* (I.L.R., 5 Mad., 29) and *Muttammal* v. *Vengalakshmi Ammal* (I.L.R., 5 Mad., 32) approved.

[Appl., 15 M. 300; R., 16 C. 367 (381); 13 M. 10 (14); 16 M. 384 (394); 21 M. 263 (266)=8 M.L.J. 130; 36 M. 116 (119)=12 Ind. Cas. 128 (130)=21 M.L.J. 850=(1911) 2 M.W.N. 168; 20 P.R. 1906=69 P.L.R. 1906; 100 P.R. 1901.]

THIS was an appeal from the decree of J. H. Nelson, District Judge of South Arcot, dated 21st May 1881, confirming the decree of Adiappa Chetti, Subordinate Judge at Cuddalore, in Suit 88 of 1880.

[108] The facts appear from the judgment of the District Court, which was as follows:—

"The plaintiff appeals against the decree of the Lower Court dismissing his suit for the recovery of the possession of certain immoveables recently possessed and enjoyed by his divided nephew Gopal Padayachi,

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* Second Appeal 697 of 1881.

(1) 3 A. 168.

and, after the death of that individual, possessed and enjoyed by Gopal Padayachi's step-mother, the present defendant No. 1.

"I see no reason to question the propriety of the Lower Courts' decision, and accordingly affirm its decree and dismiss this appeal with costs.

"No doubt 'mother' includes 'step-mother,' and if the estate in dispute be regarded as that of the deceased Gopal Padayachi, the defendant should take it in preference to the plaintiff.

"But in truth the estate should not be so regarded. Rightly and properly looked at, this is a joint family estate, the management of which has devolved successively upon Arunachala Padayachi, his son Gopal Padayachi, and lastly upon the defendant.

"In Indian families ordinarily the most capable individual is made or becomes the managing member, and it chances not infrequently that the most capable member is a female. In the present case, upon the death of Gopal Padayachi, the management naturally devolved upon his mother-in-law, and it is her duty as managing member to preserve the estate, provide herself with maintenance, suitably settle her daughter, and do various other acts.

"The plaintiff, having many years ago separated himself from this family, can have no concern now in its management and no right over the corpus so long as one of its members remains.

"The question of unchastity was not raised upon the pleadings, and the Lower Court did right in disregarding it."

On the 10th August 1882, the case was argued by *Rama Rau* for appellant and *Anandacharlu* for respondents, and judgment was reserved; and on the 2nd of February 1883 the Court (KERNAN and MUTTUSAMI AYYER, JJ.) remitted the following issues to the District Court for trial:—

"i. Whether defendant No. 1, step-mother of Gopal deceased, married again after the death of her husband.

"ii. Whether in Southern India, by usage prevailing or by the usage of the caste of the parties, a step-mother is [109] entitled at all to succeed to the inheritance of her step-son, and, if so, is she so entitled before his paternal divided uncle."

On the 23rd April 1883, the District Judge (J. Hope) returned the following findings on these issues:—

"It is admitted on both sides that defendant No. 1 did not marry again after the death of her husband, the father of Gopal Padayachi.

"The Vakil for the respondents Nos. 1 and 3 states that he has no evidence to prove that, either by usage prevailing in Southern India or by the usage of the caste of the parties, a step-mother is entitled to succeed to the inheritance of her step-son; nor has he any authorities to cite in support of the contention. It has been ruled that in competition with a sapinda of the deceased, a step-mother cannot succeed—*Kumaravelu* v. *Virana Goundan* (1).

"Both issues referred by the High Court are therefore found in the negative."

On the 8th August 1883 the following judgments were delivered:—

JUDGMENTS.

KERNAN, J.—The plaintiff is the paternal uncle of Gopal Padayachi, who died without issue and without leaving a wife.

(1) 5 M. 29.

The father of Gopal, Arunachalam, was brother of the plaintiff, and these brothers and their families were divided.

Arunachalam was married twice. Gopal was the son of the first wife and she died before Gopal.

Defendant No. 1, Chinnammal, is the second wife of Arunachalam and step-mother of Gopal, and she had not any child by her husband.

Defendant No. 2, Menakshi, is her daughter, but not a daughter of Arunachalam. On the death of Arunachalam, his son Gopal became possessed of the property allotted to his father on partition. Gopal and his father were not divided.

On the death of Gopal, defendant No. 1, as his step-mother, took possession of his property.

This suit has been brought to recover this property from defendant No. 1.

[110] The Munsif held that defendant No. 1, as step-mother of Gopal, is entitled to hold the property. The District Judge held that a step-mother, as a mother within the Hindu law, is entitled, as such, to succeed to property, and that, if the property belonged to Gopal, she should be entitled to hold it. He also held that the property of Gopal was joint family property, and that defendant No. 1, as manager of the joint family, was entitled to hold the property and maintain herself and her daughter, and that, as the plaintiff was separated from Arunachalam and his family for many years, he has no claim to the property.

The District Judge does not say who the members of the *joint* family to which he alludes are, either by general or individual description. We do not see that Gopal was at his death the member of any joint family.

The defendant No. 2 is not a member of his family. If the defendant No. 1 is entitled to the property, there is no one, so far as appears on the record, who is a member of any joint family with her. We entirely dissent from the judgment of the District Judge on this point. Gopal died divided from the rest of his kinsmen.

The next question is whether the defendant No. 1, the step-mother of Gopal, is entitled to his property.

On this subject there is a decision exacty in point, which must govern, in 3, Indian Jurist, p. 551—*Kumaravelu* v. *Virana Goundan* (1).

In the judgment it is said of the step-mother, who claimed to succeed to her son, that a divided childless Hindu is not a "mother" within the meaning of Mitakshara, ch. ii, s. iii, and that the word "mother" includes only the natural mother. It is also said that, as against a sapinda, it is clear she cannot succeed to the estate of her step-son.

We agree in that decision, for which there are many authorities. However, the Court then went further, and it is then said, "she does not participate in the offerings of the step-son to his father." She is not a sapinda, therefore, in the sense of being connected with the funeral cake (Dayabhaga, ch. xi, s. vi, sloka 3), nor is she sapinda or of one body with her step-son in the Mitakshara sense.

[111] We have been pressed by Mr. *Anandacharlu* to refer the matter to a Full Bench as a case of much general importance. Very many arguments have been adduced to show that a step-mother is a sapinda of her deceased step-son.

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(1) 5 M. 29.

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I should wish to see this question decided on full argument; but I do not feel sufficient doubt on the subject to say that it ought to be submitted to a Full Bench, though, if Mr. Justice Muttusami Ayyar thinks well of it, I am willing to do so. I have not seen S. A. 624 of 1881, referred to by Mr. *Anandacharlu*, nor S. A. 163 of 1874, referred to by Mr. *Rama Rau* and by the Court in 3, Indian Jurist, p. 554.

MUTTUSAMI AYYAR, J.—I concur. The parties to this appeal are Padayachis by caste. The plaintiff, Mari Padayachi, had a brother named Arunachala Padayachi, who died leaving a son, Gopal Padayachi, by his first wife, and defendant No. 1, his second wife. Arunachala had divided from his brother, the plaintiff, and, upon his death, Gopal succeeded to his property. Gopal died unmarried, and plaintiff claimed his property as his heir under the Hindu law.

Defendant No. 1 pleaded an oral bequest by Gopal in her favour and that of her maiden daughter, defendant No. 2, and further contended that, under the Hindu law, she was entitled to take her step-son's property in preference to his paternal uncle, the plaintiff. The Subordinate Judge refused credit to the evidence produced by defendant No. 1 to establish the nuncupative will set up by her, but he considered that the word "mother" in the Mitakshara included a step-mother, and dismissed the plaintiff's suit. At the final hearing in the Court of First Instance, the plaintiff imputed want of chastity to defendant No. 1, but the Subordinate Judge declined to entertain the plea, observing that, if her subsequent misconduct deprived her of her right of succession, the suit ought to have been so framed.

On appeal, the District Judge agreed in the opinion that the word "mother" in the Mitakshara included the step-mother, but considered the estate as a joint family estate, of which the management devolved successively, first on Arunachala Padayachi, then on his son Gopal Padayachi, and lastly upon the defendant No. 1. He observed also that the question of unchastity was not raised by the pleadings, and dismissed the appeal.

[112] As Gopal Padayachi was a divided nephew, I do not think that we could regard his property as common to him and to the plaintiff, but I agree with the Judge that the question of want of chastity was not raised by the pleadings. The substantial question, therefore, for decision is whether the word "mother" in the Mitakshara includes the step-mother, and, if not, whether she is a gotraja sapinda entitled to succeed to Gopal in preference to his uncle according to the Mitakshara law. It was held by this Court in second Appeal 565 of 1878 (1) that a step-mother was not a sapinda; that the word "mother" in the Mitakshara did not include the step-mother; and that as against a sapinda she could not succeed to her setp-son. In that case the Court observed as follows: "She does not participate in the offerings of the step-son, and she is not a sapinda therefore in the sense of being connected by the funeral cake (Dayabhaga, ch. xi, s. vi, sloka 3), nor is she sapinda or of one body with her step-son in the Mitakshara sense" (West & Buhler, 174). The very reason assigned in the Mitakshara, ch. ii, s. iii, slokas 3-5, for the preference of the mother over the father as immediate successor to the son, shows that the natural mother is intended in that passage. A Full Bench decision of the Calcutta High Court, *Lalla Jotee Lall* v. *Mussamat Duranee Kooer* (2) decides against her right to succeed. Reference was also made to S.A. 163 of 1874 of this Court. In that case, the appellant, a stepmother, sued to eject a

(1) 5 M. 29. (2) Vyavastha Chandrika, Vol. i, p. 653=B. L.R. sup. vol. 67.

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tenant who held under her step-son, but the tenant pleaded a holding under a sapinda in answer to the claim, and her suit was dismissed. As there is, however, no judgment on record, the reasons on which her claim was disallowed cannot now be ascertained with precision. In S. A. 624 of 1881 (1) a stepmother claimed to succeed to her step-son in preference to his paternal grandmother. Following the decision in S. A. 565 of 1878, the Court dismissed her suit, though it was then observed that she might be a bandhu. The Full Bench decision of the High Court at Calcutta proceeded on the view that the words "mother" and "grandmother", as used in the Mitakshara in connection with inheritance, did not include step-mother and step-grandmother. Adverting to the contention that the word [113] "mother" in the Mitakshara, ch. i, s. vii, sloka 2—where a share is allotted to her on the occasion of partition among sons after the decease of their father—includes step-mother, the Court observed that though the word "mother" may include step-mother in some cases, it does not do so in all cases. This was a suit in the Mithila country, and it was decided under the Mitakshara law as the Vivada Chintamani of Vachespati Misra, which is a work of special authority in the Mithila School, contained a special rule on the subject. In *Lâkshmi Bai* v. *Jayràm Hari* (2), however, it was held that wives of gotraja sapindas have rights of inheritance co-extensive with those of their husbands, and that they succeed after them. In that case, the competition was between the widow of the great-grandson of the deceased's paternal grandfather's grandfather, and the male heirs who were fifth in descent from the father of the same ancestor. In decreeing the widow's claim, Mr.Justice Melville referred first to Mitakshara, ch. ii, s. v. sloka 5, wherein the paternal great-grandmother is declared to be an heir, and then to the opinion of the commentator, Visvesvara Bhatta, the author of the Subhodini, *viz.*, that by a logical interpretation of the Mitakshara, the wives of all sapindas and samanodakas have rights of inheritance co-extensive with those of their husbands.

Sir Thomas Strange observes that step-mothers are no heirs, and refers in support of his opinion to Manu, ch. ix, s. 185, and to Dayabhaga, ch. xi, s. vi, slokas 3 and 4.

In support of this second appeal it is argued that the word "mother" in ch. i, s. vii, includes step-mother; that she is not only connected with funeral offerings, but that she is also a sapinda in the Mitakshara sense of the term; that she is, at all events, entitled to succeed to her step-son as a gotraja sapinda in preference to his paternal uncle; and that we should refer this case to a Full Bench, as the question is one of general importance.

There can be no doubt that the word "mother" either in Mitakshara ch. ii, s. iii, slokas 1, 2 or 5, does not include the step-mother. In sloka 5 the ground of her preference to the father is said to consist in her not being, unlike the father, a common parent to other sons. Prior to the date of the Mitakshara there was a school [114] of lawyers represented by Dharesvara, who contended that even the paternal grandmother excluded the father in order that the inheritance might not pass to sons dissimilar by class or of another tribe. This might be said to explain why the natural mother was originally preferred to the father, and why the stepmother was not admitted as heir along with her (see Mitakshara, ch. ii, s. iv, sloka 2). Nor can the contention that the word "mother" in sloka 1 includes

(1) 5 M. 32. (2) 6 B. H. C. R. 152.

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step-mother be upheld. The word "pitarau" in Yajnavalkya's text, which the Mitakshara resolves into mother and father, is an irregular compound. According to the method of Sanscrit grammarians, a compound is formed in a regular way either by cumulation with the conjunctive particle expressed after each noun, as in "matacha pitacha," or by reciprocation with the conjunctive particle implied, as in the compound word "mata pitarau." It is formed in an irregular way by the retention of the second noun and the omission of the first noun, the conjunctive import being denoted by the plural termination as in the word "pitarau." According to the emendatory rule of Katyayana as to the formation of compounds, the more revered object is to be placed first. Interpreting then, the word "pitarau" in Yajnavalkya's text with reference to these rules of Panini and Katyayana, the mode in which the Mitakshara resolves the compound word is in accordance with the Sanscrit grammar. That it is so is also evident from the word "mother" being placed before the word "father" in Patangili Mahabashika, the greatest work in existence on Sanscrit grammar (see Stokes, H.L.B., 442). Whatever doubt there might be as to whether Yajnavalkya used the irregular compound "pitirau" with reference to the exigencies of the verse, as hinted by Dr. Burnell in his introduction to Vyavahara Nirnaya, or with reference to the superior claims of the mother to reverence, there can be no room to doubt that the author of the Mitakshara took it in the latter sense, since he interprets it according to the method of grammarians. This may not, however, be conclusive, for all the leading commentaries in Southern India dispute the mother's priority of claim. In Smriti Chandrika, ch. xi, s. iii, sloka 9, the father is preferred to the mother, and in Madhaviya, s. 38, the conflicting smritis on the subject are mentioned, and the commentator remarks that what is proper should be admitted. The only legal mode of determining what is proper, where the **[115]** smritis conflict with one another, is a reference to approved usage. In ch.iv, s. viii, para. 14, Nilakanta, the author of the Vyavahara Mayukha, places the father before the mother and questions the rule of priority prescribed by the Mitakshara. In the Vyavahara Nirnaya of Varadaraja, a native of the Tamil country who lived at the end of the sixteenth century, both parents are said to inherit on the authority of the text of Manu (see page 36).

In Smriti Chandrika, ch. xi, the commentator mentions the several arguments in connexion with the prior claim of the mother and refutes them all.

I. As to the argument that the mother confers greater benefit on her son, because she bears him in the womb, nurtures him during his infancy, and because a mother is said to surpass a thousand fathers in veneration, he observes that the father too benefits the son and imparts knowledge to him, and cites a text which says, "of the two, the father is pre-eminent because the seed is considered important."

II. He next adverts to the argument of the Mitakshara that the father is a common parent to the sons of a rival wife, while the mother is not so, and characterizes it as mere prattle, adding that, as between a mother and a father, there can be no distinction in respect of propinquity to the son. As to the argument that the word "mother" stands first when the irregular compound "pitarau" is reduced to the regular compound "mata pitarau," he declares that it is insipid, and relies on the observation in the fifth chapter of the Mimamsa in connexion with the irregular compound Sarasavatau (two sacrifices) that there is no rule apparent in

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the word itself as to the order in which the two sacrifices are to take place. He then proceeds to notice the theory of Srikara that both the father and mother inherit together and divide the heritage between them, and rejects it on the ground that distinct rights, quite independent of each other, are created in the parents. As to the last argument, that a uterine brother is preferred on account of the uterine relation consequent on the community of the womb, the author of the Smriti Chandrika says that "it is an argument as weak as the support of a Kusa grass," and that, although one may be more attached to his uterine than to his half-brother, he is unable to conceive how a mother could become thereby a preferable [116] heir. This strong condemnation of the interpretation placed by the Mitakshara on the word "pitarau," and of the reasoning in its support in a work of special authority, and in other commentaries prevalent in the South, countenances the contention for the appellant that it is unsafe to adopt the interpretation and reasoning in the Mitakshara as conclusive on the subject of the stepmother's right to inherit.

As to the sense in which Yajnavalkya used the word "mother," all the commentaries, including the Mitakshara, interpret it as including stepmother in the chapter on "Allotments to be made to women on the occasion of partition among sons after the decease of their father" (see Mitakshara, ch. i, Section vii, sloka 1; Smriti Chandrika, ch. iv, Section 14; Madhaviya, Section 22; Vyavahara Nirnaya, page 10). There are also several smritis in which a step-mother is said to be equal to a mother. Manu says in ch. ix, 183: "If among all the wives of the same husband, one brings forth a male child, all are mothers of male issue." Vyasa says: "Childless wives of the father are declared to be equal sharers, and all grandmothers are declared equal to the mothers" (Madhaviya, Section 22). Vishnu says: "Mothers receive allotments according to the shares of sons" (Smriti Chandrika, ch. iv, Section 14). Brahaspati says: "Their [sons] mothers get equal shares" (Vyavahara Nirnaya, p. 10). Though all these Smritis refer to allotments to be made to women on the occasion of partition among sons, they nevertheless show that the word "mother," as used in smritis, may include a step-mother. As to her status in relation to funeral oblations, it is no doubt stated in Dayabhaga, chapter XI, section vi, sloka 3, that stepmothers do not participate in the funeral offerings, and that the introduction of step-mothers at the periodical obsequies is expressly forbidden. A text is also cited to the effect "that whosoever die, whether man or woman, without male issue, for such person shall be performed funeral rites peculiar to the individual, but no periodical obsequies." The practice, however, obtaining in Southern India is at variance with this text. Stepsons not only perform their stepmothers' funeral ceremonies in default of natural sons, but they also perform their annual sradhas. If the first wife dies childless, the husband performs her funeral and sradha, and if he marries after several years a second wife and gets a son by her, the duty of performing the first wife's sradha is [117] transferred from him to the stepson directly the latter is invested with the sacrificial thread and thereby enabled to perform religious rites. Furthermore, if there are several stepsons and the one performing the sradha for their stepmother dies, the duty devolves in practice on the surviving senior stepson. Again, both the stepson and stepmother are under pollution on each other's death for a period of ten days, as is the case with sapindas within seven degrees. According to ceremonial law, stepmothers assist their husbands, in default of natural mothers, in performing the ceremonies prescribed for the upanayanam or investiture of a stepson, or for the

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bestowal in marriage of a stepdaughter. This practice is founded upon Vythinatha Dikshatiyam, a work of authority on ceremonial observances in this part of the country, and he obviously carries out the principle, which is still binding in the case of adoption, that the son of a man by one of his several wives is the son of all (Manu, ch. ix, Section 183). Her son is a sapinda as half-brother, and her husband is a sapinda as father, and to both these she is a sapinda.

According to the practice, therefore, in Southern India, I do not see my way to saying that a stepmother is not a sapinda or a female sapinda having no connexion with funeral oblations and annual sradhas. Nor does she appear not to be a sapinda in the Mitakshara sense of the term. In this sense, brothers' wives are said by the author of the Mitakshara himself to be sapindas, because by union with their husbands, they produce sons who are connected with one body, that is to say, the body of their grandfather, and the reasoning would apply with equal force to stepmothers. As in the case of women, their gotras are changed by marriage from the gotra of their father to those of their husbands; a stepmother is a gotraja sapinda and she cannot be said to be sprung of a different family within the definition of a bandhu contained in the Mitakshara, Ch. ii, Section v, sloka 3, for by marriage she is, by a fiction of law, born again in the family of her husband, and if, therefore, she is not a gotraja sapinda, she is not also a bandhu.

Turning next to the general principles of Hindu law as to the succession of women as gotraja sapindas, the first that deserves attention is the Vedic rule of exclusion of women from inheritance. This is founded upon a passage in the Taittiriyam or the [118] Black Yajurveda that females and persons wanting in an organ of sense or member are incompetent to inherit (Smriti Chandrika, Ch. iv, Section 6).

With reference to the sutras of Baudayana and Apastamba, the reason of this rule is mentioned in Mitakshara, Ch. ii, Section i, 14, to be that, since the wealth of a regenerate man is designed for religious uses, the succession of women to such property is unfit because they are not competent to the performance of religious rites. An explanatory text in the Black Yajurveda declares women to be "Nir Indria" (see Vyavahara Nirnaya, p. 41). As to the extent in which this Vedic rule influenced the interpretation of Smritis which recognized the right of women, the Mitakshara refers to the opinion of Dharesvara and others who lived before him as referring the Smritis to appointed daughters and appointed wives (Mitakshara, Ch. ii, Section i, 15).

As to the scope of the rule of exclusion as part of the law now in force, the Dayabhaga School differs materially from the Mitakshara School. In the former, the rule is still recognized to be of general import, and the right to succeed is allowed only in the cases of those women who are expressly mentioned in Smritis. In Dayabhaga, Ch. xi, Section vi, sloka 11, Jimuta Vahana cites Baudayana in support of the general rule, adds that the succession of the daughter, the widow, the mother, and paternal grandmother takes effect as an exception under express texts, and excludes widows of their great-grandfather and of remoter ascendants from succession. In the table of heirs appended to the Dayakrama Sangraha, the paternal great-grandmother is also included; the Vedic rule of exclusion being, however, admitted to be of general import. But in the Mitakshara and in all the commentaries in the South the rule is not admitted to be of general import, but is limited to property expressly obtained for the purpose of sacrifices (Mitakshara, Ch. ii, Section i, sloka 26; Smriti

Chandrika, Ch. xi, Section i, sloka 22; Madhaviya, Section 44 ; Vyavahara Nirnaya, p. 41). 1884 OCT. 7.

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Thus the Vedic text being no bar to the succession of women under the Mitakshara law except as to property obtained expressly for the purpose of sacrifices, the general principle that the nearest sapinda succeeds applies as well to women as to men. The only question then is whether, as suggested in Subhodini and followed by the Bombay High Court, it applies to the wives of all [119] gotraja sapindas, or whether it is confined to the widows of ancestors in the line of ascent as mentioned in the Mitakshara, Ch. ii, Section v, sloka 5. If the difficulty arising from the position of the mother, grandmother and great-grandmother before their husbands, and from the reasoning in support of the mother's claim to preference were out of the way, it would be reasonable to construe the word "mother" as the father's wife, and to hold on the analogy of the natural mother taking before the brother that the stepmother as a gotraja sapinda would inherit to her stepson before her own son. Judging by the other commentaries which are works of special authority in Southern India, there is no evidence of consciousness in the country that the interpretation of the word "mother" in the Mitakshara is adopted by the people.

It may be going too far to follow the decision of the Bombay High Court, as the author of the Mitakshara does not mention any women in the case of collateral female sapindas, and, as in practice, brothers' widows do not inherit. In Mitakshara, ch. ii, Section iv, sloka 4, the sapinda relationship is said not to be restricted to kinsmen allied by funeral oblations or connected by libations of water, but also to extend to other relatives when they appear to have a claim to the succession. Having regard to Dr. Mayer's dissertation on the mode in which the widow's right of succession grew up historically out of her right to an allotment for maintenance (Mayne on Hindu Law, Section 446), and to the fact that daughters, mothers, stepmothers, grand-mothers were alone entitled to allotments, it is not improbable that the right of succession is limited by analogy to widows, daughters, mothers, and step and grandmothers, who, with other female lineal ancestors, are equal to mothers. This view is confirmed by the fact that although women are entitled to inherit as sapindas under the Mitakshara law, their heritage is in the nature of allotments directed to be made to women on partition. As pointed out in my judgment in the *Shivaganga case* (1) the text of Katyayana and Brahaspati, which let in women as heirs, reduced their heritage to a provision for life, by rendering their succession a case of interposition among male sapindas and depriving them of the power of alienation except under necessity. It should here be observed that the allot- [120] ments prescribed for women consisted originally of specific shares of the property under division and not of a bare provision for maintenance or expenses of marriage. As to Dharesvara's suggestion that the mother and grand-mother were preferred to shut out from succession sons dissimilar in class, it is expressly repudiated in Mitakshara, ch. ii, Section iv, sloka 3, and the practice of marrying women belonging to a different class has ceased to prevail. It does not, therefore, seem to me unsafe to recognize the right of succession to extend, at least, to those gotraja female sapindas who were entitled to allotments on the occasion of partition on the ground that there are indications of the right of

(1) 3 M 290 (323).

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succession in the case of women being assimilated to their right to allotments and having probably grown out of it.

On these grounds it appears to me that the contention in support of this appeal that a stepmother is included in the term "mother" in Yajnavalkya's text, and that the Mitakshara nowhere expressly excludes her, and that she is entitled in principle to inherit, seems to be weighty. I would, therefore, refer the question for the consideration of the Full Bench. It is, at all events, desirable to enquire, before overruling the contention, whether, according to usage, stepmothers inherit in southern districts either generally or in the caste to which the parties to this suit belong.

The case was accordingly argued before a Full Bench on 12th October 1883.

Hon. *Rama Rau*, for appellant.

Anandacharlu, for respondent.

On the 7th October 1884 the following judgments were delivered :—

JUDGMENTS.

TURNER, C.J. (KERNAN, and HUTCHINS, JJ., concurring)—Gopal Padayachi, the owner of the property in suit, died leaving a stepmother, a half sister, and a paternal uncle. The paternal uncle has claimed the succession, and, inasmuch as he is admittedly entitled, in the absence of nearer heirs, it lies on the stepmother, who disputes his claim, to prove that she is an heir and entitled in priority to the paternal uncle.

It is argued on behalf of the stepmother that she is entitled to inherit as a mother, and that, if she is not included as a mother in the line of heirs, she succeeds as a gotraja sapindha.

The claim of the stepmother to succession, as a mother, has [121] been asserted on the following grounds. The sloka "If among all the wives of the same husband one brings forth a male child, all become mothers of male issue by means of that son" (Manu, ix, 183), shows that the term "mata" is not a merely honorific title when applied to a stepmother; that it indicates a relationship entailing consequences peculiar to itself, and that, in a system of law which in matters of inheritance recognizes artificial relationships, as in the case of the adopted son, their is no reason for refusing to the stepmother the temporal as well as the spiritual advantages which admittedly accrue to her from the birth of a male child to a fellow wife. It is not asserted that her claim would obtain in competition with that of the natural mother. The doctrine of remoteness, which postpones the half-blood to the fullblood, would secure to the natural mother priority, but it is contended that, where there is no such competition, the claim of the stepmother to succeed as a mother must be conceded.

To support this argument, reliance is placed on the passage in the Mitakshara, Ch. i, Section vii, slokas 1, 2, which, quoting a text of Yajnavalkya—"Of heirs dividing after the death of the father, let the mother also take an equal share"—prescribes that a share is to be allotted to the wives of the father on a partition made by the sons after the father's decease. It is argued that the term "mata" in this text includes the stepmother as well as the mother, and indicates their equal claims, of which the sole ownership has, by the decease of the father, vested in the sons.

Again, it is argued that the part which devolves on a stepson in relation to his stepmother under the ceremonial law, indicates that his connection with her is that of a son. On him, in preference to the husband, devolves the duty of performing the funeral ceremonies of his stepmother. Moreover, a stepmother may confer spiritual benefits on a stepson: she may become the mother of a brother who will offer oblations to three ancestors in which the stepson would participate (Dayakrama Sangraha, Ch. i, Section vi, Sloka 2). Hence it is concluded we are to infer that, in the text which declares that the mother is the heir of a man who dies without issue, the stepmother also is included. If, on the other hand, she is not entitled to succeed as a mother, it is contended that she is so as a gotraja sapinda. By marriage she becomes half the body of her husband, and because she, with her husband, may beget and bring forth a sapinda she is sapinda of her husband, and, through [122] him, of her stepson, and, having by her marriage been born again in the gotra of the husband, she is a gotraja sapinda of her stepson and entitled to succeed as a less remote sapinda than the paternal uncle.

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It will be seen that the claim of the stepmother to succeed as mother is rested on the argument that the term "mata" is used by commentators to include a stepmother, that she enjoys equal advantages with a natural mother on a partition of the family estate, and that. in spiritual matters, she derives from, and may confer on, her stepson spiritual benefits.

The sloka of Yajnavalkya which declares the rule of succession to the separate property, whether self-acquired or obtained by partition, of a man who leaves no issue, gives the succession after the widow to the "pitarau," a word originally "mata pitarau"—a compound of the terms mother and father, which is interpreted by some writers "both parents," by others "the two parents." The use of a word in the dual number would, at first sight, appear to fix the meaning of the term mother and confine it to the natural mother. It is, however, not impossible that the term mother may be used collectively and imply all those to whom it can be applied in the sense of maternal parent. It may be admitted that the term "mata" is so used in some smritis. Thus in the sloka of Brahaspati "On the death of the father, the natural mother, *janani*, has a claim to an equal share with her own sons; mothers, *matarah*, take the same share, and the daughters each a fourth share" (Colebrooke's Dig., Bk. V, Ch. ii, Section 85). Here the term "mata" clearly means stepmother as opposed to natural mother, and the commentator allows that the use of the term in that sense is not singular. But the instance which is selected from Mitakshara, Ch. I, Section vii, slokas 1 and 2, is not one in which it can be said the construction of the term as including stepmother is undisputed.

It was asserted at the hearing that Colebrooke's translation of this passage was inaccurate, and the passage was rendered as follows from an edition produced in Court: "If there is a division after the father's death, wives take a share equal to that of their own sons," and this appears to be the sense in which it was understood by those commentators who held that it recognized the right to a share on a partition by sons only in the mothers of male issue and that childless mothers derived a right to maintenance from the sloka of Yajnavalkya 2, 143: "Their childless women who are [123] well behaved are to be supported" (see Mitakshara, Ch. ii, Section i, Sloka 13; Viromitrodaya, Ch. ii, pt. I, Section 19; Dayakrama Sangraha, Ch. vii, Sections 3-5). Jimuta Vahana interpreted

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the term "mother" in the sloka of Yajnavalkya as applying only to the natural mother (Dayabhaga, Ch. iii, Section ii, § 30).

Jaganatha, on the other hand, held that stepmothers, on a partition by sons, if they have no male issue, should receive the same shares as they would have received if they had had sons.

The commentators whose works are of authority in Southern India interpreted the sloka as including stepmothers (Smriti Chandrika, Ch. iv, Section 14; Sarasvati Vilasa, Sections 108, 109; Dayavibhaga, Section 22); and Varadaraja quotes the sloka of Vyasa, "Childless wives are declared to be equal sharers and grandmothers; they are all declared to be equal to mothers"—Nirnaya (Burnell) p. 10.

It may then be conceded that in this Presidency the sloka on which Mr. Anandacharlu relies may be cited as an authority for the proposition that the term mother may include stepmother. It must not, however, be overlooked that the right of a mother to a share was regarded by Nanda Pandita, not as a right of heritage, but a right to a provision. Account was to be taken of property which she had already received, and, if it was insufficient for her maintenance, an allotment was to be made to her so as to provide her with a sufficiency for her wants, which allotment could never be in excess of a son's share, but which would be less than a son's share if the property was so large that a son's share would more than suffice for her needs (Smriti Chandrika, Ch. iv, Sections 9-17). Although the Madhaviya disputes the correctness of the opinion that mothers are not entitled to a share, but only to so much as may be necessary for their maintenance (Dayavibhaga, Section 22), the doctrine of Nanda Pandita is noticed without dissent in the Sarasvati Vilasa, Section 114, and has become established law in this Presidency (Mayne, Hindu Law, Section 402).

The limitation "equal to that of sons" has reference, in all probability, to the rule obtaining when marriage was permitted with women of different castes. Sons making a partition did not, unless they were of equal caste, take equal shares. Their shares were regulated by the dignity of the caste to which they belonged. In prescribing, then, that wives should take shares equal to that of their own sons, it was probably meant that the share of a wife should not be greater than the share her son would have taken [124] according to his rank among sons. A similar interpretation has been placed on the text of Vishnu, Ch. xviii, Section 34: "Mothers shall receive shares proportionate to their sons' shares" (Dig., Bk. V, Ch. ii, Section 86).

It would be unsafe, then, to conclude from the provision made for wives on a partition effected by sons that there is recognized in them any heritable right in the estate of their stepsons. While the principle on which participation in the wealth enjoyed by their husbands admits stepmothers when a partition is made by sons, the principle on which priority is given to the claims of the mother over the father in the succession to a son excludes them. Admitting that the term "mata" has been occasionally used to include stepmother, and assuming that the term "pitarau" might be similarly construed, the sense in which it was intended the terms should be understood in particular passages must be ascertained from the context. From the employment of the compound term "pitarau" in the sloka which provided for the succession of parents, a difference of opinion arose among the commentators whether the mother or the father was entitled to priority of succession. Vijnanesvara and Visvesvara Bhatta supported the claims of the mother for the reason (among others) that the

father might be a common parent to other sons (that is to say, to sons by other wives), but the mother not so, therefore her propinquity was greater than that of the father (Mitakshara, Ch. ii, Section iii).

The same argument is adopted by the author of the Sarasvati Vilasa, who also gave priority to the mother (Sections 568-598). It is obvious that the ground on which these commentators preferred the mother excludedt the stepmother. Nanda Pandita and Nilakanta Bhatta, who prefer the father to the mother, both notice and contest the argument on the ground of propinquity, but do not meet it by what would have been a conclusive reply if a stepmother, in their opinion, was included in the term mother; while Jimuta Vahana, who also gives priority to the father, accords superiority to the mother over brothers, because it is necessary to make a grateful return to her for the benefits which she has personally conferred by bearing the child in her womb (Dayabhaga, ch. xi, Section iv, sloka 2); and both in this treatise and in the Dayakrama Sangraha preference of the father to the mother is supported [among other arguments] by a reference to the slokas of Manu (ch. ix, 33—37) which accord superiority to the male sex by the [125] illustration that the seed is more closely allied to the plant than the field.

The disinclination of Hindu lawyers to the descent of property to sons of a different class was the ground on which Dharesvara argued that the paternal grandmother was entitled to succeed in preference even to the father (Mitakshara, ch. ii, Section iv, sloka 2).

The sloka of Katyayana—"On failure of male issue, the father shall take the estate acquired by the son after partition, or the brother or the natural mother or the paternal grandmother in regular order" (Dig., Bk. V, ch. viii, Section 425)—excludes the step-mother, and, so far as has been brought to our notice, the only commentary which expressly allows the right of the step-mother is that of Lakshmidevi, who wrote under the name of Balambhatta, and whose work Mr. Justice West pronounces to be held in comparatively slight esteem (1 West and Buhler, 17).

The position which a step-mother enjoys in the family is explained by her relation to the father, and the argument that she and her stepson mutually confer on one another spiritual advantages would not be conclusive in this Presidency, where Hindu inheritance is not chiefly regulated by such considerations. The spiritual benefit which the birth of a son confers on a father may be shared by the mother's fellow-wife without necessarily involving a right on her part to share in the temporal advantages arising from the connection. It is not denied that the obligations of a stepson to a step-mother in matters of religious ceremony differ widely from those of a son to his natural mother. It is his natural mother and her ancestors that he names when performing the sradhas of his father. In respect of pollution consequent on death, there are differences between the honor paid to the memory of a mother and that of a step-mother. The right to perform the funeral ceremony does not involve a mutuality of right of succession. The daughter-in-law may perform the funeral of her father-in-law, yet this right does not constitute her his heir in this Presidency. On the other hand, the spiritual benefits which a stepmother may confer on a stepson are certainly not higher than are conferred by a daughter-in-law on a father-in-law, yet no right of inheritance is, on this ground, accorded to the daughter-in-law.

Sir Thomas Strange, who must have been acquainted with the law administered in this Presidency from the commencement of the century, declared that step-mothers, where they existed, were [126] excluded.

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Sir W. Macnaghten, in his notes on the earlier decisions of the Sadar Dewani Adalat, which recognized the right of the step-mother, expressed doubt of their correctness (Select Cases, 39, 42), and a Full Bench of the Calcutta High Court, in a case governed by the Mitakshara, negatived the stepmother's claim—*Lala Joti Lal* v. *Durani Kower*(1).

In this Presidency decisions to the same effect were pronounced in S. A. 163 of 1874 by the late Chief Justice and Mr. Justice Holloway, in *Kumaravelu* v. *Viran Goundan*(2) and *Muttammal* v. *Vengalakshmi Ammal* (3). The claim of the step-mother to succession has been allowed only in Bombay, *Kesserbai* v. *Valab Raoji* (4), and in the judgment in that case it was admitted that "she is not included by the Mitakshara within the term mother," and that "she cannot, in the Presidency of Bombay, be included in the term mother." Her right was allowed because she was the wife of a gotraja sapinda and therefore a gotraja sapinda herself.

Whether regard be had to the writings of commentators regarded as authoritative in this Presidency, or to decided cases, no support can be found for the claim of the stepmother to succeed as a mother. Although it has been alleged by the respondent's pleader that he has ascertained that in practice her claim has been admitted, no instance was produced when the learned Judges by whom this case was referred remitted an issue for the express purpose of ascertaining usage. Possibly had the instances to which the learned pleader referred been examined, it would be found that the step-mother owed her advantage to the good feeling of the heirs rather than to an intelligent recognition of her right.

It remains to be considered whether she can maintain her claim as a gotraja sapinda. It must be admitted that, on the principle of sapindaship, which has been accepted by commentators of authority in this Presidency, the wife is a sapinda of her husband [Mitakshara, Acharakanda, f. 6, p. i, l. 15 (*a*)] and of her stepson; but the question remains whether she is a gotraja sapinda, and, if she be a gotraja sapinda, whether female gotraja sapindas are included in the line of heirs.

If the step-mother is entitled to succession because she has by her marriage entered the gotra of her husband and has become a **[127]** sapinda of her husband, then, on the same grounds, a right of inheritance must be claimed for the wives of all gotraja sapindas. This right has been recognized in the Presidency of Bombay in a series of decisions. In a recent case which came from that Presidency before the Privy Council, their Lordships had occasion to examine the authorities and to consider the grounds on which the claim could be supported, and their conclusion is thus expressed: "Perhaps the most that can be said is that the text of the Mitakshara is not inconsistent with the claim of the widow and allows of an interpretation favourable to her right to inherit. The important point for consideration remains, namely, whether such an interpretation of the Mitakshara has been given by its expounders and the lawyers of the Bombay School, and has been so sanctioned by usage and decisions, as to have the force of law."

Adverting to the opinions of Visvesvara and Balambhatta that gotraja may properly be taken to include males and females; to a passage in a note of Mr. Colebrooke that Vijayantra, a commentator on Vishnu, preferred a son's widow to a daughter; to the course of the decisions of the Bombay Courts, and to the opinions expressed by the learned Judges of

(1) B.L.R. Sup. Vol. 67. (2) 5 M. 29. (3) 5 M. 32. (4) 4 B. 208.

(*a*) 1 West & Buhler 141.

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that High Court that the admission of females to the order of succession was in accordance with the usage prevailing in the Presidency; their Lordships saw no satisfactory grounds for dissenting from the conclusion of the High Court that the doctrine which had actually prevailed in Bombay was in favour of the right of the widow, nor any sufficient reason for holding that the doctrine which had so prevailed should not have the force of law—*Lallubhai Bappubhai* v. *Cassibhai* (1). It will be seen that their Lordships were of opinion that no certain inference was to be derived from the text of the Mitakshara, and that their decision rests on the interpretation accepted by the Bombay School and mainly on the usage prevailing in that Presidency.

Although the author of the Mitakshara did not yield full assent to the rule of the Taittiriyam that females are incompetent to inherit—and the rule has been by other commentators respected in this Presidency, restricted to wealth obtained for sacrificial purposes—the rule is never altogether lost sight of. Special reasons are given by Vijnanesvara for the succession of the wife, the daughter, [128] the mother and the grandmother, and the only ground on which it can be claimed that he recognized generally the competency of women to inherit, is the express mention of the paternal great-grandmother and the inferred admission of the wives of more remote ancestors in the direct line. On the other hand, although the persons mentioned as gotraja and bhinnagotra sapindas are not an exhaustive enumeration of those classes, it is noticeable that no mention is made of the wives of collaterals nor of any other female in those classes except the paternal grandmother and great-grandmother. It is obvious that their sapindaship with the *propositus* is altogether different in kind from that of the wives of collaterals.

The paternal grandmother is introduced in virtue of the sloka of Manu, and a place is assigned to her by Vijnanesvara in the line of succession not by reason of her sapinda connection as wife of the grandfather, but in virtue of the sloka; otherwise she would be postponed to the paternal grandfather, and the priority enjoyed by the great-grandmother over the great-grandfather, and of the other female ancestors in the direct paternal line over their husbands, can be explained only on the ground that they were regarded as equal to mothers. Of the commentators of authority in this Presidency to whose works we have access, while Vijnanesvara uses the term gotraja as belonging to the family, Nanda Pandita asserts that it refers to males alone and means only those who are by natural birth born in the family. He consequently denied that the grandmother was a gotraja, and, differing from Vijnanesvara, he assigned a place to her in the line of succession immediately after the mother. The author of Sarasvati Vilasa, though he notices and condemns the doctrine of Nanda Pandita as to the place due to the grandmother, does not advert to the interpretation placed by Nanda Pandita on the term gotraja. He, however, includes the grandmother among gotrajas (Section 581), as does also the author of the Madhaviya, Section 41.

It is also to be noticed that, in the Sarasvati Vilasa, the text of Manu quoted in Mitakshara, Ch. ii, s. v, Sloka 6, is given thus: "Sapindaship ceases with the seventh *male*," and similarly the author of the Madhaviya, "In default of sapindas, samanodakas take the property, and they are the seven *males* beyond the sapindas," &c. (Section 41). These passages lend strength to the opinion hitherto generally held in this

(1) 5 B. 110 (124).

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Presidency that females were not [129] admitted as heirs of males in competition with gotrajas except in virtue of express texts.

It was in advertence to the passage above referred to in the Smriti Chandrika of Nanda Pandita that in *Muttammal* v. *Vengalakshmi Ammal* (1) I expressed the opinion that a stepmother was not a gotraja sapinda, and that if she had a claim to inherit, it must be as a bhinnagotra sapinda. I should have confined myself to saying that I find no authority for holding that she is entitled to succeed as a gotraja sapinda.

No decision of the Sadr Adalat, the Supreme Court, or this Court has been cited, nor has any usage been proved by which a right of succession has been recognized as appertaining to a stepmother or to any of the females who, by marriage, have entered the gotra and acquired sapindaship solely through their husbands; for these reasons the claim of the stepmother as a gotraja sapinda has not been in my judgment established, and the claim of the paternal uncle must be allowed. The Court of First Instance held that the oral bequest pleaded by the first defendant was not proved. The claim for possession must be decreed; but, under the circumstances, I would dismiss the claim for mesne profits and direct the parties to bear severally their own costs in all three Courts.

MUTTUSAMI AYYAR, J.—In the absence of evidence as to usage, I also see reason to concur in the opinion of the majority of the Court. The course of decisions is, as already explained in my first judgment, against the stepmother. As to the contention that the term "mother" in the Mitakshara may be taken to include stepmother, I am clear that it cannot at all be supported. Though I entertain no doubt that she is a gotraja sapinda in the Mitakshara sense of sapinda relationship, I do not think that all famale sapindas are recognized to be heirs in this Presidency. For instance, brothers' and uncles' widows do not inherit. Though the author of the Mitakshara speaks of the Vedic rule of exclusion of women from inheritance as limited to property expressly granted for sacrifices, yet he gives no place in his compact series of heirs except to some females only whose claim is warranted either by special texts or special analogy. It may be that the analogy mentioned in Mitakshara, Ch. ii, s. v, Sloka 5, was not intended to extend as well to female ancestors of the half-blood as to widows [130] of collateral male heirs. I see therefore no sufficient warrant for saying more than that if usage were in favour of the stepmother's claim, the Mitakshara would be susceptible of the interpretation that there is legal origin for it. As to the ceremonial law or Acharakanda, it gives the stepmother a position only secondary to that of the natural mother, and is not of itself so decisive as to justify a departure from the course of decisions. I felt a difficulty in making up my mind because sisters have already been recognized to be entitled to succeed as bandhus. As a stepmother is, by marriage, of the same gotra with that of her husband, she cannot come in as a bandhu if she is not a sapinda, and thus there would arise the anomaly of a stepsister excluding the stepmother from succession. But on consideration, I come to the conclusion that this want of logical symmetry cannot be accepted as a sufficient warrant, in the absence of evidence of usage, for departing from decided cases.

(1) 5 M. 32.

8 M. 130 = 8 Ind. Jur. 669.

1884 OCT. 28.

APPELLATE CIVIL.

8 M. 130 = 8 Ind. Jur. 669.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

SECRETARY OF STATE FOR INDIA (*Third Defendant*), *Appellant* v. NARAYANAN (*Plaintiff*), *Respondent*.*

SITARAMA (*First Defendant*), *Appellant* v. NARAYANAN (*Plaintiff*), *Respondent*.* [22nd and 28th October, 1884.]

Revenue Recovery Act, Sections 2, 25, 37—*Sale for arrears of revenue—Liability of all fields included in patta.*

By accepting a raiyatwari patta, the landholder pledges each and every field included therein as security for the whole assessment.

Several fields separately assessed to revenue were held under one patta by K. Default having been made by K in payment of revenue, one of such fields, of which N was the owner, was attached under the Revenue Recovery Act. N claimed to [131] have it released from attachment on payment of the assessment due upon it. The claim was rejected and the field sold.

Held in a suit by N to set aside the sale, that the sale was valid.

[R., 11 M. 452; 26 M. 521 (525); 34 M. 493 (494) = 8 Ind. Cas. 414 = 20 M.L.J. 794 = 8 M.L.T. 323.]

THESE were appeals against the decree of F. H. Wilkinson, District Judge of South Malabar, reversing the decree of O. Chandu Menon, District Munsif of Calicut, in suit 845 of 1881.

The facts appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.)

The Government Pleader (Mr. *Shephard*), for the appellant in S. A. 577.

Gopalan Nayar, for the appellant in S.A. 645.

Anantan Nayar, for the respondent in both appeals.

JUDGMENT.

This suit was brought by a jenmi to set aside a sale of his land for arrears of revenue. The plaintiff (Narayanan Nambudri) had granted a kanam to Kandappan, defendant No. 2, and allowed the land to be entered in his patta In January 1881 he obtained a decree against Kandappan for its redemption. Meanwhile Kandappan had fallen into arrears to Government, and on the 11th February 1881 a demand had been served on him under Section 25 of Act II of 1864, requiring him to pay the arrears due on his patta, Rs. 16-0-9, within a fortnight. On the 28th March the land was attached for that sum under Section 27. On the 16th April the jenmi, plaintiff, was put into possession under his decree. On the 30th April the sale of the land for the arrears was proclaimed, and on the 30th May the auction took place and Sitarama Bhatta, defendant No. 1, became the purchaser. On the 14th May the plaintiff had put in a petition stating that he would pay what was due on this particular plot, but the Tahsildar refused to release the attachment unless all the arrears due on the patta were paid with costs and interest. On the day of the sale the plaintiff actually tendered the full amount due on the land, but he was then too late. Section 37 of the Act requires that the amount be paid the day before the sale.

The District Munsif at first decreed for the plaintiff, holding that he

* Second Appeals 557 and 645 of 1884.

1884 Oct. 28. — Appellate Civil. — 8 M. 130 = 8 Ind. Jur. 669.

had tendered the arrears before sale. After a remand, and the Government having been made a party to the suit, he found that the tender had been only of the arrears due on this particular plot and that the sale was valid. On appeal the District [132] Judge, after pointing out what he believed to be certain irregularities in the attachment and sale proceedings, set aside the sale on the ground that only 10 rupees were actually due on this particular plot, that plaintiff had tendered this sum and would have paid the bata, interest, and costs due on the plot if the Tahsildar had informed him of their amount.

It does not appear that there was any actual tender of money before the day of sale, which, as already mentioned, was too late: the plaintiff seems merely to have expressed his readiness to pay whatever was due on the particular plot. The judgment of the District Court does not proceed upon the ground that any irregularity had been committed, nor does it appear that there was any irregularity. The plaint did not allege any. The Judge was mistaken in supposing that the notice of attachment was not published in the district gazette (see Supplement V, 23rd April 1881, p. 6). The notices of demand (G) and attachment (H) both specify the arrears for which the land had been attached, as Rs. 16-0-9, and the question whether the plaintiff could not have obtained the release of the land by paying that amount, instead of the 63 rupees which had accrued due at the time of the sale, does not arise, for it is admitted that he did not tender that sum. The Board's Circular 109 is merely directory and would not invalidate a sale otherwise legal (*Stokes* v. *Venkatachalam Chetti*) (1).

But the main question is whether the Government can sell a field for the arrears due on the entire patta, or whether a person claiming an interest in that particular field can obtain its release upon payment of the proportionate arrears due on that field, or at all events its full assessment. Upon this point the decision of the District Court cannot be supported. Section 2 of the Act says that the land . . . . . shall be regarded as the security of the public revenue. Clearly something has to be supplied here; the land is the security for the revenue due on land only, and the question is, does that mean the particular field only or the entire holding? The answer is to be found in the following section: "Every landholder shall pay to the Collector the revenue due *upon his land* on or before the day on which it falls due, according to the [133] kistbandi or other engagement." The land in his sanad or patta is the security for the revenue due on *his land*, and the kists are calculated on the whole land and not on each field. By accepting his sanad or patta he in fact pledges each and every field as security for the whole assessment, and he cannot split the security any more than an ordinary mortgagor. Section 25 leads to the same conclusion. Indeed it has never been denied in the case of a zamindari that each and every part of it is liable for the whole peshkash, and the Act makes no distinction in this respect between a zamindari and a raiyatwari estate. The judgment of this Court in S.A. 1040 of 1883 quoted above is also to the same effect, though the point was not fully discussed.

We reverse the decree of the District Court and restore that of the Munsif. It is perhaps a hard case, but the plaintiff should not have alleged fraud against the purchaser. He must pay the costs both of the purchaser and the Government in this Court and in the District Court.

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(1) S.A. 1040 of 1883, not reported.

8 M. 133=8 Ind. Jur. 666.

1884 Oct. 27. APPELLATE CIVIL. 8 M. 133= 8 Ind. Jur. 666.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

RAMASAMI AND ANOTHER (*Defendants*), *Appellants v.* NARASAMMA (*Plaintiff*), *Respondent.** [27th October, 1884.]

Hindu Law—Inheritance—Stepmother—Sagotra Sapindas.

According to Hindu law current in the Madras Presidency, a step-mother does not succeed to the estate of her stepson in preference to his grandfather's brother's grandson.

THE plaintiff, widow of Sataluri Narasimha, sued to recover from the defendants, Ramasami and his father, Prasannacharlu, the estate of Venkatacharlu, son of Narasimha, by his first wife deceased, which on his death passed to his widow, and on her death was seized by the defendants.

The defendants pleaded that Ramasami, the minor son of Prasannacharlu, had been adopted by the widow of Venkatacharlu **[134]** under authority given by Venkatacharlu on his death-bed. The defendants further pleaded that they were the nearest sapindas of Venkatacharlu. The District Judge of Vizagapatam (A. Lister) found that Prasannacharlu was not a sapinda, and that the adoption was not proved, and decreed for the plaintiff. The defendants appealed to the High Court.

The Advocate-General (Hon *P. O'Sullivan*), for appellants.

Hon. *Rama Rau*, for respondents.

The Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.), after confirming the finding of the District Court as to the alleged adoption, found that the grandfather of Prasannacharlu was the brother of the grandfather of Venkatacharlu, and delivered judgment as follows:—

JUDGMENT.

We express no opinion in this case whether a stepmother who had not obtained possession would be entitled to maintain a suit to oust a stranger. All that it is necessary for us to find in this case is that the appellants are sagotra sapindas, and, as such, are entitled to inherit in priority to stepmother. The appeal is therefore allowed, the decree of the District Court reversed, and the suit dismissed.

Inasmuch as the appellants set up a false case of adoption, we shall direct that each party do bear respectively their and her costs in this suit in both Courts.

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* Appeal 95 of 1883.

1884 Nov. 11.

APPELLATE CIVIL.

8 M. 134.

8 M. 134.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

VENKATACHALA (*Plaintiff*), *Appellant v.* APPATHORAI (*First Defendant*), *Respondent.** [31st July and 11th November, 1884.]

Limitation—Order passed in 1877 *under Civil Procedure Code,* 1859, *Section* 269—*Suit brought after one year—Civil Procedure Code,* 1877, *Section* 335—*Limitation Act,* 1877, *sch.* II, *arts.* 11—13.

An order having been passed on the 10th August 1877 under Section 269 of the Code of Civil Procedure, 1859, cancelling delivery of possession of land brought to **[135]** sale and purchase by a decree-holder, no suit was brought by the decree-holder to establish his right to the land until 1883.

Held, that the repeal of Section 269 of the said Code on 1st October 1877 did not deprive the order of the 10th August 1877 of the effect it possessed when passed, and therefore that the suit was barred by limitation.

Koylash Chunder Paul Chowdhry v. *Preonath Roy Chowdhry* (I.L.R., 4 Cal., 610) and *Gopal Chunder Mitter* v. *Mohesh Chunder Boral* (I.L.R., 9 Cal., 230) distinguished.

THIS was an appeal from the decree of W. F. Grahame, District Judge of North Tanjore, dated 11th December 1883, reversing the decree of A. Kuppusami Ayyangar, District Munsif of Tiruvalur, in Suit 83 of 1883.

The facts and arguments appear sufficiently for the purpose of this report from the judgment of the Court (TURNER, C.J., and HUTCHINS, J.).

The Advocate-General (Hon. *P. O'Sullivan*) and *Bhashyam Ayyangar*, for appellant.

The Government Pleader (Mr. *Shephard*) and *Ramachandra Rau Saheb*, for respondent.

JUDGMENT.

The only question in this second appeal is whether the suit is barred by the law of limitation.

The appellant (R. M. A. R. R. M. Venkatachala Chetti) brought the suit on 22nd February 1883 to eject the respondent (Appathorai Pillai). Under a decree which he had obtained in a former suit against the respondent's father, he had brought the property to sale and purchased it himself and been put into possession, but the respondent complained that he had been improperly dispossessed, and on the 10th August 1877 an order was passed under Section 269 of the Code of 1859, cancelling the delivery of possession to the appellant and restoring possession to the respondent. The section declares that such an "order shall not be subject to appeal, but the party against whom it is given shall be at liberty to bring a suit to establish his right at any time within one year from the date thereof." The disputes with which the section deals are disputes arising out of obstruction by, or the dispossession of a person other than the judgment-debtor claiming a right to the possession of the property sold under the decree as proprietor, mortgagee, lessee, or under any other title. The object of the section was that the Court executing the decree might decide such disputes summarily and finally, subject only to the reservation **[136]** that the party aggrieved by the order might bring a suit within a year to establish his right. The present suit was not brought until five and a half years after the date of the order, but the appellant contends that it is not barred and that he had twelve years.

* Second Appeal 61 of 1884.

The Code of Civil Procedure, 1877, and the Indian Limitation Act of 1877, came into force together on the first day of October 1877. The section substituted in the former for Section 269 of the Code of 1859 was Section 335. It expressly enacts that the party against whom such an order is passed may institute a suit to establish the right which he claims to the present possession of the property, but subject to the result of such suit, if any, the order shall be conclusive. This however, in our judgment, is merely an express declaration of the effect of the old Section 269. The limitation period for such a suit and for other similar suits provided by the Code to contest orders made in execution was removed from the Code to the Limitation Act. Article 11 allows a year to the unsuccessful party to an order passed under Sections 280, 281, 282 and 335 of the Code of Civil Procedure (1877), but says nothing about the corresponding sections of the Code of 1859. Article 13 provides that a suit to alter or set aside a decision or order of a Civil Court in any proceeding other than a suit must be brought within a year from the date of the final decision or order by a competent Court. Article 13 merely reproduces Article 15 of the former Limitation Act. Article 11 is new and designed to meet the case of the orders specified, which are passed in a suit but not open to appeal.

If Article 13 applies, the present suit is clearly barred; but, in our judgment, the order was one passed in a suit and does not fall within Article 13. Article 11 does not include orders passed in suits under the old Code, and it is therefore contended that the appellant had twelve years as in an ordinary suit for ejectment. The argument is that Section 269 of the old Code has been repealed, and with it the limitation clause which it contains; that now there is no limitation period but the general one of twelve years.

In our opinion this contention cannot be supported. As already stated, the effect of an order properly made under Section 269 was that the dispute was conclusively determined as between the parties to the order, subject only to the result of a suit brought within the time prescribed. The repeal of Section 269 by the **[137]** amended Code did not deprive the order of the character which attached to it when it was made. It was and continued to be an order which was final unless and until it was set aside in the manner indicated in the section, *i.e.*, by a suit brought within a year. No such suit was brought and the order itself has been rightly pleaded as a bar to the present action. There is no doubt that the order was properly made under Section 269 in adjudication of the contested right to possession.

Our view is not in conflict with *Koylash Chunder Paul Chowdhry* v. *Preonath Ray Chowdhry* (1), and *Gopal Chunder Mitter* v. *Moresh Chunder Boral* (2). The former case merely decided that a suit for possession, brought after an order passed under Section 246 of the old Code, was not a suit to set aside an order in a proceeding other than a suit, falling under Article 15 of the Limitation Act of 1871: in that opinion we have already expressed our concurrence. In the latter case a question somewhat analogous to that before us was raised, but the learned Judges refused to consider it as it had not been taken in the Courts below: the only point decided was that Article 11 of the Limitation Act of 1877 did not apply to an order passed under the former Codes, and in that opinion also we concur.

This second appeal cannot be supported and is accordingly dismissed with costs.

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(1) 4 C. 610. (2) 9 C. 230.

1884
Nov. 24.

APPELLATE CIVIL.

8 M. 137.

8 M. 137.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

KRISHNAN (*Petitioner*), *Appellant v.* NILAKANDAN (*Decree-holder*), *Respondent.** [24th November, 1884.]

Decree—Execution—Limitation—Decree for possession upon payment of mortgage amount and value of improvements—Final decree on ascertaining value of improvements.

In a decree for redemption of a Malabar kanam (mortgage), it was ordered on the 12th December 1879 that the defendants should put the plaintiff in possession [138] of the land upon payment by plaintiff to defendant No. 1 of the mortgage amount, and of the value of improvements, to be determined in execution, to such of the defendants as should be found entitled.

On the 12th August 1880 the plaintiff applied for execution, and on the 23rd September 1881 an order was passed that execution should issue on payment into Court by the plaintiff of the mortgage amount and the value of improvements which had then been ascertained.

The plaintiff having failed to deposit the said amount, the application for execution was struck off the file on the 10th November 1881.

On the 8th December 1883 the plaintiff applied again for execution and objection was taken that the application was barred by limitation.

Held, that the application was not barred by limitation.

Dildar Hossein v. *Mujeedunnissa* (I.L.R., 4 Cal., 629) approved.

[F., 36 M. 104 (107) = 10 Ind. Cas. 552 = 21 M.L.J. 546 = 10 M.L.T. 69 = (1911) 2 M.W.N. 93.]

THIS was an appeal from a decree of E. K. Krishnan, Subordinate Judge of South Malabar, confirming a decree of U. Achutan Nayar, District Munsif of Betutnad, dated 12th March 1884, rejecting an application made by Krishnan Nayar, defendant No. 8, in Suit 332 of 1878 on the file of the District Munsif of Patambi, objecting to the execution of the decree.

The judgment of the Munsif was as follows :—

"Original Suit No. 322 of 1878 was a suit for redemption of a mortgage. The decree of the Court of First Instance was as follows: 'Upon payment of the kanam and purankadam (advance and further advance) amount, Rs. 85-11-5, to defendant No. 1 and the value of improvements, to be determined in execution, to such of the defendants as are then found to be entitled to receive the same, the defendants do, &c.' This decree was affirmed in appeal on the 12th December 1879. The amsham in which the property is situate having been transferred to the jurisdiction of this Court, the decree-holder applied for execution on the 12th August 1880 (Miscellaneous Petition No. 1233 of 1880). On the 13th August he was directed to deposit Rs. 8 as batta for issuing a commission to ascertain the value of improvements. On the 17th November 1880 the commissioner submitted his accounts. On the 8th December 1880 the decree-holder put in his objection (Miscellaneous Petition No. 2184 of 1880) to the commissioner's account. After perusing the

* Appeal against Appellate Order 33 of 1884.

commissioner's account and hearing the decree-holder's objection, the Court determined, on the 23rd September 1881, that the value of improvements payable by the decree-holder was Rs. 409-4-11, and on the same date, *viz*., 23rd September 1881, passed the final order on decree-holder's application, No. 1233 of **[139]** 1880, that execution would be issued on his depositing in Court the kanam and purankadam amount given in the decree and the value of improvements Rs. 409-4-11. The decree-holder failed to deposit the amount and his application was struck off on the 10th November 1881. The present application for execution (Miscellaneous Petition 1709 of 1883) was made by the decree-holder on the 8th December 1883. Notice was issued to the defendants, of whom defendant No. 8 contends that the execution is barred, more than three years having elapsed from the date of the former application. I do not agree with him. In my opinion the decree became a complete decree on the date on which the Court determined the value of improvements payable by the decree-holder. Before that, the decree was incapable of execution and the determination of the value of improvements was part of the decree. More than three years from the date of that order, *viz*., 23rd September 1881, have not elapsed, and the present application is therefore in time. Objection disallowed."

Anantan Nayar, for appellant.

Sankara Menon, for respondent.

The Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.) delivered the following

JUDGMENT.

The decision of the Munsif and of the Subordinate Judge on the question of limitation is in accordance with the ruling in *Dildar Hossein* v. *Mujeedunnissa* (1), and we are not prepared to dissent from that ruling; but, in awarding mesne profits, the Court executing the decree must be careful to notice that the decree-holder would be entitled only to porapad (rent), and not to the net profits of the estate, until he had paid or brought into Court the sums payable by him as a condition for redemption. With these observations we affirm the order, but direct each party to bear his own costs.

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8 M. 140 = 2 Weir 249.

[140] APPELLATE CRIMINAL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Brandt.

IN THE MATTER OF THE PETITION OF PAUL DECRUZ AND JOHN RAYMOND BIBER.* [6th October and 2nd December, 1884.]

Penal Code. Sections 190, 503, 508—*Intimidation—Excommunication by Roman Catholic priest—Criminal proceedings stayed until complainant established the illegality of the priest's acts in a Civil Court.*

Where the exercise of ecclesiastical jurisdiction is plainly *ultra vires*, or otherwise unsanctioned by the ordinances of a religious society, or where such ordinances controvert the general law, and, in either case, consequences result which the Criminal law was intended to restrain, the Criminal Courts are not at liberty to decline jurisdiction.

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* Criminal Revision Cases 277 and 278 of 1884.

(1) 4 C. 629.

1884
DEC. 2.

APPELLATE CRIMINAL.

8 M. 140 = Weir 249.

A Roman Catholic complained to a Magistrate that he had been threatened with an illegal sentence of excommunication and had been excommunicated by the ecclesiastical authorities, with a view to prevent him from asserting his legal rights in defending a civil suit concerning the property of a church.

Held, that, under the circumstances, the proper course was for the Magistrate to postpone the trial till the complainant proved in a civil Court the illegality of the action of the ecclesiastical authorities.

THESE were applications to the High Court under Sections 435 and 439 of the Code of Criminal Procedure to direct the Joint Magistrate of Malabar (H. Ross) to inquire into and try two complaints of similar nature made by Paul deCruz and John Raymond Biber, respectively, against the Very Rev. Fr. Nicholas Pagani, Pro-Vicar Apostolic of North Malabar, and the Rev. Fr. J. M. Monteiro, Vicar of Tellicherry. The complaint of deCruz, was as follows :—

"That petitioner is a member of the Roman Catholic Church of Tellicherry and the duly appointed administrator of its affairs. That the appointment of an administrator is, and has hitherto been, vested in the parishioners, and it was by them that petitioner has been, appointed as such. That on the 1st day of January last, the Very Rev. Fr. N. Pagani, the Pro-Vicar Apostolic of the Roman Catholic Churches of North Malabar and Canara, convened a meeting in the said church, when a few votes were extorted from [141] a minority of the members then present, and a resolution passed appointing two other persons as administrators in the room of petitioner. That this appointment being irregular, inasmuch as it was made without the knowledge and consent of the majority of the parishioners and without any justifying cause, petitioner, at the special request of the parishioners, refused to hand over the properties in his custody to the newly-appointed administrators. That, in consequence of this just refusal on the part of petitioner to give up the church properties to the said new administrators, the latter filed a civil suit in the District Munsif's Court at Tellicherry to recover possession of them, which said suit is still pending in the said Court. That knowing that the said suit is pending in a competent Court, and to thwart a just decision being arrived at therein by preventing petitioner from making a proper defence thereto, the said Pro-Vicar Apostolic, by a letter of admonition, dated 7th instant, threatened to, and did, excommunicate petitioner and all those who have aided him in withholding the said properties. That the Roman Catholic Church at Tellicherry, and all properties belonging thereto, being the exclusive property of the parish, the said Pro-Vicar Apostolic or any one else has no control over the temporal management thereof, and the aforesaid letter of excommunication was issued *malafide* and unwarrantedly. That the abovesaid letter of excommunication was, on the 16th March, publicly read in the church by the Rev. Fr. Monteiro, the Vicar, who, in addition thereto, has, as his own act, subsequently excommunicated several others of the parishioners known as, or admitting, helping petitioners in the defence of their legal rights towards meeting the said civil suit. That the said acts of the Very Rev. Fr. Pagani and the Rev. Fr. Monteiro are voluntary and calculated to force petitioner and the greater number of the parishioners out of their way to honestly defend the said civil suit and done with the corrupted and unjust motive of making them entirely powerless to adduce the required evidence therein. That as neither petitioner nor any one of the others who have been, as above, shut out of all spiritual benefits has been guilty of any act warranting this religious degradation from the Pro-Vicar Apostolic

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and the Vicar respectively, their object in so doing can only be to forcibly compel petitioner and others to give up their legal rights by refraining from justly vindicating them before a competent Court of justice. That the abovenamed Very Rev. Fr. Pagani and [142] the Rev. Fr. Monteiro have, and each of them has by respective acts as aforesaid, committed an offence punishable under Section 508 of the Indian Penal Code. Petitioner therefore prays that this Court may be pleased to inquire into the matter and render justice as the circumstances of the case may warrant and as to this Court may seem to be reasonable."

The Joint Magistrate examined deCruz who deposed as follows :—

"I complain against Pro-Vicar Pagani and Father Monteiro for publishing in the church at Tellicherry a letter of excommunication against me, and thereby attempting to cause me not to defend a civil suit now pending in the District Munsif's Court in which Messrs. D'Rozario and Fernandez have sued me for delivery of certain keys and church property which are in my possession as administrator. The object of the defendants is to make me give up the keys, &c., by inducing me to believe that if I do not do so I will become an object of divine displeasure. The Pro-Vicar's letter of excommunication which I produce (A) * shows that this is their object. I have not given up the keys, &c., and in common with more than 100 others have been refused every rite of the church. The defendants have committed an offence under Section 508 of the Indian Penal Code."

[143] The Magistrate in dismissing the complaint delivered the following judgment :—

"This is a complaint against (1) the Very Rev. Fr. Pagani, Pro-Vicar Apostolic of North Malabar and Canara ; and (2) the Rev. Fr. Monteiro, Vicar of the Roman Catholic Church at Tellicherry, of an offence under Section 508 of the Indian Penal Code. The complainant Paul deCruz was administrator of the Roman Catholic Church and as such had undisputed charge of certain keys and property of the church, until, owing to dissensions in the parish regarding church affairs, a meeting of parishioners was held in January at the instance of the first defendant, and two new administrators, Messrs. D'Rozario and Fernandez, were appointed, the

* We, Nicholas Pagani, S. T. Pro-Vicar Apostolic of North Malabar and Canara, considering the persistent obstinacy of certain persons of the parish of Tellicherry, who utterly disregarding our orders and their own duty, continue to refuse to hand over the keys and other property belonging to the church of Tellicherry, now in their possession, to the newly-appointed administrators of the said church, Messrs. T. T. D'Rozario and A. Fernandez, and considering the grave scandal and disturbance, &c., caused in the parish of Tellicherry by such refusal, we herewith admonish all those who hold keys, property, &c., belonging to the church of Tellicherry to hand them over to the said administrators, T. T. D'Rozario and A. Fernandez, within three days from the publication of this our admonition which we declare to be equivalent to a triple one.

And we declare, and hereby decree in writing, by the authority of Almighty God and the Apostles Peter and Paul and all the Saints, that all such persons who disregard this our admonition after the lapse of three days from its publication *be and remain* ipso facto *excommunicated.*

Moreover, we likewise hereby decree that all others, who by underhand or open machinations, by words, by writing, or by any other active measures, agitate or endeavour to prevent the said administrators, T. T. D'Rozario and A. Fernandez, from taking charge of the keys and other property belonging to the Tellicherry Church *be and remain likewise* ipso facto *excommunicated*, and that absolution from such excommunication be reserved to us or to our successors and to the Roman Pontiff, and that even in the hour of death, they be previously obliged (so far as is possible) to make full reparation for the scandal given, before any priest be empowered to absolve them.

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complainant being declared to have been removed from office. Complainant, however, contending that the resolution superseding him was one of a packed meeting and not of the whole body of parishioners or of a majority of them, refused to deliver up the keys, &c., to the new administrators, who have accordingly filed a regular suit in the District Munsif's Court to obtain possession of the same.

"Complainant states that, on the 7th March, the first defendant, knowing that the civil suit was pending, issued a letter of admonition (A) threatening excommunication of 'all those who hold keys, property, &c., belonging to the church' if they failed to hand over the same to the new administrators within three days from publication of the said admonition; that on the 16th March the publieation was made in church by the second defendant, and that he (complainant) having failed to deliver the keys, &c., within three days as admonished, has been excommunicated and refused every rite of the church.

"Complainant alleges that defendants have thus attempted to cause him to give up the keys, &c., which he is not legally bound to do unless the pending civil suit goes against him, and to prevent his defending that suit, which he is legally entitled to do, by attempting to induce him to believe that he will be rendered, by the defendants' act of excommunication, an object of divine displeasure if he does not give up the keys, &c., or cease to defend the suit.

"I am of opinion that this is not a case in which criminal proceedings can lie against the defendants. The power of excom- **[144]** munication is one which the first defendant holds for the enforcement of discipline in the Roman Catholic Church under him. Complainant, as a member of that church, thereby subjects himself to its discipline; and it is not for a Criminal Court to decide whether the power of excommunication has been rightly or wrongly exercised by the ecclesiastical authorities. In the present case the defendants appear to have excommunicated complainant for contumacy in refusing to obey their orders to deliver up the keys, &c. Whether or not this was a legitimate ground for excommunication (which is practically what complainant wanted me to dicide) is not in my opinion a question for this Court: and I accordingly dismiss this complaint under Section 203 of the Code of Criminal Procedure."

Mr. *Wedderburn*, for complainant.—The complaint charges an offence under Section 508 of the Penal Code. Complainant alleges that the sentence of excommunication was issued illegally for an improper purpose. For the purpose of this argument the complaint must be taken to be true, and there are grounds for supposing that the charge is not ill-founded; for, to warn a person from defending a civil suit on pain of excommunication is, *prima facie*, a very improper action from an ordinary point of view.

[Turner, C.J.—There is a late decision in point—*The Queen* v. *Sankara* (1)]. But the decision in that case can be distinguished. Here the priest says if you assert your civil right I will excommunicate you and you will thereby become an object of divine displeasure and remain so till absolved by me. By the act of excommunication the complainant loses his right to absolution and other spiritual and temporal advantages. In the note to Section 508 Mr. Mayne says: "It would be criminal for a clergyman to curse an offender from the altar as used occasionally to be done in Ireland."

(Mr. *Gould*.—That is impossible. No such thing could have happened.)

(1) 6 M. 381.

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In *The Queen* v. *Sankara*(1), the complainant had done an act for which he was excommunicated. Here he is told if he does a legal act he will be excommunicated. If, however, Section 508 is not applicable, and no doubt its meaning is ambiguous, the allegation in the [145] complaint would sustain a charge under Section 503 or Section 190 of the Penal Code and the Magistrate should not have refused to try the case. If the Magistrate is right in saying that the action of the priest is not examinable by the Court, then a priest might with impunity excommunicate a person for refusing to commit a crime. It has been decided by the Privy Council in *Brown* v. *Cure, &c., DeMontreal* (2) that the Court can decide upon the legality of an ecclesiastical sentence and the same principle is involved in the decision in *Laughton* v. *Bishop of Sodor and Man* (3).

The question is simply this—Did the priest act maliciously for an improper end ? There is a clear threat of injury to character and reputation, made to prevent complainant asserting a legal right to property, which is enough for a charge under Section 503. To defend a civil suit brought to recover church property is also equivalent to making a legal application for protection against injury within the meaning of Section 190.

Mr. *Gould* for defendants.—Mr. deCruz is a member of a voluntary society, and he is bound by the rules of the superiors of the society, and the idea of coming in to claim the protection of a Court, and a Criminal Court above all, is utterly preposterous, when all he has to do is to leave the society. This case does not come under Section 503. It may do him harm, but it does harm legally, and Section 508 is not applicable—*The Queen* v. *Sankara*. (1)

The whole question has been threshed out in *O'Keefe* v. *Macdonald* (4).

Mr. *Wedderburn* in reply.—Clubs are voluntary societies, and the right of a member to question improper expulsion has been frequently tried [See *Hopkinson* v. *Marquis of Exeter* (5), *Fisher* v. *Keane* (6), *Labouchere* v. *Earl of Wharncliffe* (7).]

The Court (TURNER, C.J., and BRANDT, J.) delivered the following

JUDGMENT.

We are of opinion that there are no allegations which, if proved, would support a charge of an offence punishable under Section 508, Indian Penal Code. The complainants are warned that, if they persist in a certain course of conduct, they will be excommunicated. A person who is excommunicated does not [146] become an object of divine displeasure by the act of the priest who pronounces the sentence. The proceeding, as we understand it, purports to be a declaration that the person on whom it is passed has, by his own act (in this case, alleged contumacy to those to whom he owes obedience in matters ecclesiastical) committed sin and rendred himself an object of divine displeasure, and it also purports to be a sentence of interdiction from the means of grace administered by the clergy until on repentance and submission these privileges are restored.

Nor do we consider that the allegations of the complainants, which are capable of proof, would justify a Criminal Court in entertaining a

(1) 6 M. 381. (2) L.R. 6 P.C. 159. (3) L.R. 4 P.C. 495.
(4) Ir. Rep. 7 Com. Law Series 371. (5) L.R. 5 Eq. 63.
(6) L.R. 11 Ch. D. 353. (7) L.R. 13 Ch. D. 346.

1884 DEC. 2. — APPELLATE CRIMINAL. — 8 M. 140 = 2 Weir 249.

complaint of an offence punishable under Section 190, Indian Penal Code. It is not fairly to be inferred from the communications addressed to the complainants that the accused had in view the probability that they would resort to any criminal or civil tribunal or seek the protection of any authority. It is a more difficult question whether, in reference to the allegations (other than the allegation that the object of the threat was to deter the accused from resorting to the authorities for protection), there is ground for inquiring into a complaint of an offence punishable under Section 503, Indian Penal Code.

We are reluctant to hold that the Criminal Courts can examine the propriety of the exercise by any ecclesiastical authority of jurisdiction which it claims to possess under the ordinances of the society to which it appertains when such authority has been exercised conscientiously; for, the machinery of our Courts of Criminal Justice has not been devised to secure the satisfactory determination of nice questions of ecclesiastical law or civil right, and such questions can ordinarily be more thoroughly sifted when the *lis mota* is between parties rather than between the Crown and an accused. But where the exercise of ecclesiastical jurisdiction is plainly *ultra vires* or otherwise unsanctioned by such ordinances, or where such ordinances controvert the general law, and, in either case, consequences result which the criminal law was intended to restrain, the Criminal Courts are not at liberty to decline jurisdiction.

In the case before us the complainants allege that they are threatened with an illegal sentence of excommunication, which will at least injure their reputation unless they abstain from acts which they are legally entitled to do.

[147] We cannot say that these allegations, if established, might not constitute the offence of criminal intimidation. But to hold that the offence had been committed, it would be necessary for the Courts to inquire (1) whether the acts inhibited by the threat were such as the complainants were legally entitled to do; (2) whether the ecclesiastical authority had or had not jurisdiction to pronounce on their legality; (3) whether or not the same authority had, under the circumstances, jurisdiction to pronounce a sentence of excommunication; and (4) whether if it did not possess that jurisdiction, but had exercised it in good faith and under misapprehension of law, such an exercise of jurisdiction would amount to an offence.

All these inquiries except the last raised nice questions of civil right involving the consideration of the ordinances and practice of a particular ecclesiastical society. We consider a Criminal Court may well postpone the exercise of its jurisdiction till the complainant has proved in a Civil Court the incompetency of the ecclesiastical authority to exercise the powers it has assumed either generally or in the particular case and the legality of the rights they severally assert; and giving effect to this opinion, we shall stay the further consideration of this application for six months to enable the complainants to resort to the Civil Courts if they think fit.

8 M. 147.

APPELLATE CIVIL.

1884 DEC. 5. APPELLATE CIVIL. 8 M. 147.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

ALAGU AND OTHERS (*Plaintiffs*), *Petitioners v.* ABDOOLA (*Defendant*), *Respondent.** [5th December, 1884.]

Civil Procedure Code, Section 43—Cause of action—Splitting a claim—Separate suits for rent due for successive years.

Petitioners filed two suits in a Small Cause Court on the same day to recover rent due for two successive years under the same lease. The sum of the two claims exceeded the pecuniary limit of the Court's jurisdiction. The suit for the rent of the **[148]** first year was dismissed under Section 43 of the Code of Civil Procedure, on the ground that the claim ought to have been included in the suit for the second year's rent.

Held that, as the petitioners had no intention of abandoning either claim, the proper course was to allow them to withdraw both suits and file a fresh suit in a competent Court.

ALAGU CHETTI and four others filed two suits, Nos. 191 and 192 of 1884, on the same day on the Small Cause side of the District Munsif's Court of Madura against the defendant, Abdoola Levvai, to recover rent due for fasli 1291 and fasli 1292, respectively.

The rent for both years amounted to more than Rs. 50, the pecuniary limit of the Small Cause Court's jurisdiction. Suit No. 191 was dismissed under Section 43 of the Code of Civil Procedure on the ground that the rent claimed therein should have been included in suit 192. The plaintiffs applied to the High Court under Section 622 of the Code of Civil Procedure to set aside the decree, on the ground that the cause of action in each suit was different and that the claims ought not to be combined in one suit.

Kalianarama Ayyar, for petitioners.

Ramanujacharyar, for respondent.

The Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.) delivered the the follwing

JUDGMENT.

The provisions of Section 43 prevent the maintenance of two suits each for one year's arrear of rent due in respect of the same tenancy: in other words for two breaches of one contract of lease. The principle is explained in *Chockalinga Pillai* v. *Kumara Viruthalum* (1), citing *Grimbly* v. *Aykroyd* (2).

But, as both suits were filed simultaneously and the plaintiff clearly has no intention to abandon the arrear for either year, we consider he should have been allowed to withdraw both and to file one suit in a competent Court. We set aside the decree that this may be done. Costs to abide and follow the result.

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* Civil Revision Petition 354 of 1884.

(1) 4 M. H. C. R. 334. (2) 1 Ex. 479.

1884
DEC. 8.

APPEL-
LATE
CIVIL.

8 M. 149.

8 M. 149.

[149] APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

LAVERGNE AND ANOTHER (*Plaintiffs*), *Appellants v.* HOOPER (*Defendant*), *Respondent.** [15th October and 8th December, 1884.]

Trade-mark—User in foreign market—Abandonment—Estoppel by conduct.

Such possession and use of a trade-mark in one market as to constitute a right in it, establishes in the owner thereof an exclusive right to that trade-mark in other markets, although the owner may not have used it in such markets.

To constitute a mark a trade-mark it must have been adopted as a symbol devised to distinguish a particular class of goods as the goods of that class manufactured or selected by a particular manufacturer or merchant.

Where the plaintiffs by their conduct led the defendant to believe that they claimed no right to a certain trade-mark, and that it was open to the defendant to adopt it as his own, and the defendant did adopt it, and by his industry secured a wide popularity for it in the Indian market:

Held, that the plaintiffs were estopped from denying the defendant's right to use the trade-mark in the Indian market.

[**R.**, 35 B. 425=13 Bom. L.R. 212 (225)=10 Ind. Cas. 805 (808); **Expl.**, 24 M. 163 (168); **D.**, 25 B. 433 (456).]

THIS was an appeal from the decree of KERNAN J., dated 28th March 1884.

The facts and arguments appear sufficiently for the purpose of this report from the judgment of the Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.)

The Advocate-General (Hon. *P. O'Sullivan*) and Mr. *Grant*, for appellants.

Mr. *Tarrant*, for respondent.

JUDGMENT.

The appellants, trading under the firm of Riviere Gardrat & Company, carry on business at Cognac in France as brandy merchants and exporters. They alleged in their plaint that in 1872 they designed as a trade-mark for their brandies a label bearing a Maltese Cross, and that, on and after January [150] 1873, they used this label on which were printed the words "Geo. Sage & Company, Fine Cognac Brandy, imported by Robert P. Stanton & Company, Liverpool," for brandies exported by them to the firm of R. P. Stanton & Company at Liverpool; that previous to 1875 they were at liberty to use this label as they pleased, inasmuch as the firm of Robert P. Stanton had ceased to exist, and that in 1875 the respondent's firm selected the appellants' Maltese Cross label or trade-mark for brandies to be purchased from the appellants and to be imported into Madras by the respondent's firm, and they set out certain letters which they claimed proved a contract by which they conceded to the respondent's firm the use of the Maltese Cross as a trade-mark on condition that the respondent's firm sold under that mark brandies procured from them alone, and the respondent's firm engaged to sell no other brandies under that trade mark than such as were procured from them. They alleged that by mutual agreement the colour of the cross had in certain

* Appeal 10 of 1884.

cases been varied; that the sale of the brandies imported under the trade-mark had been largely advertized and *pushed* by the respondent's firm, and that, as the greater quantity imported had borne a red cross label, it had become known in the market as Red Cross brandy. Lastly, they alleged that the respondent's firm had broken the contract by selling under the trade-mark brandies they had imported from other firms and had thus infringed their trade-mark.

They claimed a declaration of their right to the trade-mark, an injunction restraining the respondent from its use, an account of the profits of sales made by the respondent under the trade-mark of brandies imported from other firms and payment of such profits to them; and they also claimed damages. If the Court held the respondent entitled to use the trade-mark, then the appellants claimed in the alternative 50,000 rupees for breach of the contract made on 9th April 1875, whereby the respondent's firm bound itself to purchase from the appellants and not elsewhere brandies to be sold by them under the trade-mark and name mentioned.

According to the case of the appellants, in and before 1875, the trade-mark of a Maltese Cross in red or other colour had been adopted by them to distinguish brandies prepared by them for the market, and they had a property in it and the sole right to use it [151] in any market. The deceased partner of the respondent when on a visit to Cognac had inspected the labels and trade-marks used by the firm, and in 1875 he selected the trade-mark of a Maltese Cross in red or other colour to be used in the sale of brandies purchased by him from the appellants and imported by him for the Indian market. The appellants consented to the exclusive use of the trade-mark by the respondent's firm in the Indian market on the terms that the brandies to be imported and sold under the trade-mark should be brandies purchased only from them.

According to the respondent's case, the appellants had no property in a trade-mark of a Maltese Cross at the time it was first introduced into the Indian market. Mr. Coleman, who was the agent for a firm which imported beer under that trade-mark, adopted the trade-mark, closely resembling but not identical with one which had been used in the English market but abandoned by the appellants, for a class of brandies sold by him, and his right to the exclusive use of it in the Indian market was recognized by the appellants, and he did not contract with the appellants, to sell no brandies in this market under the trade-mark mentioned except such as he purchased from the appellants.

The learned Judge who tried the suit on the Original Side of this Court thought the appellants had a right of user of the trademark in France, but that they had no right of user in India; that if they had any title to the trade-mark in India which they could transfer, they had estopped themselves from insisting on it by assenting to its adoption by the respondent's firm; that the respondent's firm had acquired a right to the use of the trade-mark in India, and that it had not bound itself to sell brandies under the trade-mark other than those purchased from the appellants.

On appeal it is argued that, if the appellants established their right to the trade-mark in France and in England, they possessed a property in it in India; that the appellants had not transferred that property to the respondent's firm, and that there was no consideration for such transfer, and that the assent of the appellants to the use of the trade-mark by the respondent's firm in India was conditional on a contract to purchase from

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the appellants all brandies sold by the respondent's firm under the trade-mark.

The first and second issues had been framed as follows:—1st, whether the Maltese Cross mark in red, green, or blue is the [152] plaintiffs' trade-mark; 2nd, whether the symbol of red Maltese Cross and name of Red Cross brandy are the trade-mark and trade-name belonging to the plaintiffs. On these issues the learned Judge recorded findings in the negative, although in his judgment he had expressed the opinion that the appellants had a right of user in France, and the appellants, in reference to the opinion expressed by the learned Judge, have, in their grounds of appeal, claimed that findings should have been entered in their favour on these issues.

The learned Counsel for the respondent contends that, if the appellants *now* have any right to the trade-mark in the French or English market, which he is not prepared to admit, they had no such right in any market at the time the respondent's firm adopted it, and that though a somewhat similar label had at one time been used by one of the appellant's customers, its use had been abandoned when the respondent's firm commenced to use a Maltese Cross as their trade-mark as importers.

We consider that as the finding on the first and second issues was in the respondent's favour, although no objection has been filed, the learned Counsel for the respondent is entitled to contend that the evidence fails to show a right in the appellants to the trade-mark in France at the time the contract was made. We therefore treat the case as one in which all the questions of law and fact which were raised in the Court of first instance are open for decision on appeal.

We propose in the first place to consider the question of law whether such a possession and use of a trade-mark in one market as to constitute a right in it establishes in the proprietor an exclusive right to that trade-mark in any other market, though he may not have employed it in such other market.

That the right to a trade-mark will be recognized in this country we have authority in a case in which the respondent's firm prevented the infringement of the trade-mark now in suit by a rival English firm. The same considerations of policy which prior to the regulation of trade-marks by statute induced the English Courts to protect them and to recognize in a manufacturer or selector a right under certain limitations to the distinguishing mark or title under which he offered his goods to the public and to mulct in damages any other person who intentionally infringed a [153] trade-mark so adopted, have induced the Courts in this country to accept as consonant with equity and justice the general rules which obtain in commercial countries respecting trade-marks. Of course the Courts in British India would only recognize the particular provisions of the statute law of other countries in so far as may be necessary for the determination of rights which have been acquired under such provisions, unless indeed by the law of England or British India they are directed to do so. [The object of the law in recognizing a right to trade-marks is to protect the public from fraud, to secure to a purchaser reasonable certainty that he is purchasing an article which has a certain reputation in the market, and to secure to a manufacturer or selector the reward of his skill and care, the benefit of the custom which he deserves, and which is intended for him, and although where a stranger infringes a trade-mark unintentionally, he is not liable to damages, he will be restrained

from the further use of it—*Millington* v. *Fox* (1)]. [The remedies which are conceded for the protection of trade-marks adopted in the home market are also extended to trade-marks which have been originally adopted in foreign markets, and it is immaterial that goods bearing such marks are not sold in the home market, *Collin's Company* v. *Walker* (2), *Collin's Company* v. *Brown* (3), *Collin's Company* v. *Cower* (4).] It must not be assumed that every ornament which may be applied to the case or flask or wrapper in which goods are exposed for sale are necessarily trade-marks. Such ornaments are often employed as mere devices to arrest attention and are not intended to convey any other meaning. To constitute them trade-marks they must have been adopted as symbols devised to distinguish a particular class of goods as the goods of that class manufactured or selected by a particular manufacturer or merchant, and it is possibly open to argument whether the appellants on their own statement had acquired in 1875 a right to a red Maltese Cross as a trade-mark except in combination with the words which purported that the goods had been exported by a particular firm and selected by a particular firm. In the view we take of the case, it is unnecessary for us to determine this point.

[154] Again, as the right to a trade-mark may be acquired, so it may be abandoned. As there is no length of time required for the acquiring of a right to a trade-mark, in like manner apart from statutory law there is no length of time required to constitute an abandonment; and it must, in each case, where abandonment is asserted, be a question to be determined from the circumstances whether the right has or has not been abandoned.

A right to use a trade-mark may be created by license or assignment, and the owner may be, in respect of a trade-mark as in respect of any right, estopped by his conduct from denying the title of another person. In the case before us, if the appellants establish that, before the date of the alleged contract in 1875, they had acquired a right to the use of the Maltese Cross as a trade-mark, and that they had not abandoned that right, the possession of the right would have been a good consideration for the alleged promise by the respondent's firm to purchase brandies sold under that mark only from the appellants. And if it were shown that independently of any contract they had conceded the use of the mark to the respondent's firm only for a purpose which has failed, the limitation in the right of user being such as might reasonably be inferred, they would be entitled to relief from the Court. On the other hand, it might be shown that they had never adopted the Maltese Cross as a trade-mark, or that they had abandoned its use or that if they retained a right to it at the date of the alleged contract, they had induced the respondent's firm to believe that they claimed no such right, and that it was open to the respondent's firm to adopt the mark as its own, and if, as is admitted in the plaint, the respondent's firm by largely advertizing and pushing the sale secured a wide popularity for the mark, the respondent's firm is entitled to enjoy the benefit of its expenditure and exertions, and the appellants would be estopped from denying the title of the respondent to the use of the mark at least in this market.

With these observations, we proceed to consider the evidence.

M. J. A. A. Gardrat deposed that the firm of which he is a member is in the habit of exporting brandies prepared by them under a large number of marks. Of these marks, six are employed for so many qualities of brandy regularly supplied by the firm. There are also other

(1) 3 My. & Cr. 338. (2) 7 W.R. 222. (3) 3 K. & J. 423. (4) 2 K. & J. 428.

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marks which the firm appears to claim as its own property which are used for brandies prepared according to [155] special order, and there is a third class of marks which are used by it for brandies specially prepared and which it regards as the property of the persons who give the orders.

In December 1872 M. Riviere, a late partner who was then in England seeking orders, sent to the head office of the firm an order to supply brandy to Messrs. R. P. Stanton & Co. of Liverpool under a Red Cross mark. The design differs from that which is the subject of this suit only in this that the sides of the arms of the cross are concave, while the sides of the arms of the cross claimed by the respondent are straight. Brandy was supplied under this mark to the firm of R. P. Stanton & Co., and the label bore the name of R. P. Stanton & Co. as importers, George Sage & Co., as exporters. M. Gardrat has deposed that inferior brandies are sent out by the firm under fancy names.

The firm of R. P. Stanton became bankrupt in August 1873, and it does not appear that it re-opened its business or that any brandies were supplied to it by the appellants after that date. It is admitted in the plaint that it ceased to exist. There is some evidence, but in our judgment of too vague a nature to be safely accepted, that brandies were also supplied by the appellants under the same label to Messrs. Oakes, Cunliffe, Manchester, J. Dreyfus, London, and Greenlees of Liverpool. M. Gardrat deposed to this, but could give no particulars of dates. M. Lavergne who was not examined for two months after his partner and had had an opportunity in the meantime to refresh his memory from the books of the firm could only state his belief that brandies had been supplied under the label between 1873 and 1876. It is noticeable that no allegation is made in the somewhat prolix plaint that brandies were supplied under the Red Cross label to any other firm than R. P. Stanton & Co.

Probably in May 1873, and certainly not later than August 1873, Mr. Coleman, the then sole proprietor of the respondent's firm, visited Cognac. He had been previously doing business with the appellant's firm, but he desired to make arrangements for a supply of brandy under his own label. According to the recollection of the appellants, which, having regard to the purpose of his visit, we believe, is more accurate in this respect than Mr. Coleman's, he was shown one of several books of labels under which brandies are supplied by the firm. This book contained [156] labels of all the three classes which have been mentioned, that is to say, not only those which were used by the firm as the trade-marks of their regular qualities, or which the firm used for special qualities while claiming the label as their trade-mark, but at least eighteen others to which the firm makes no claim.

It is desirable to refer to the language of the witnesses as to what occurred on this occasion.

M. Gardrat has deposed on his examination-in-chief as follows:—

"He asked us to give him an idea about a trade-mark to be used for these brandies. We showed him our book of labels, and when he came to the Maltese Cross he chose the label 'The Maltese Cross.' We told him we might use this trade-mark or label for our shipment to Madras."

And on cross-examination.

"When Mr. Coleman came to that label No. 20." (The labels not claimed by the appellants, it may be observed, are Nos. 21, 22, 23, 24, 25, 26 Bis, 31, 32, 34, 36, 37, 38, 39, 41, 42, 44 and 45. No. 20 was consequently the first of a long series which were not, with a few exceptions,

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claimed by the appellants). "He selected that label; he selected the trade-mark with 'Geo. Sage.' He said he would let us know the full particulars when he got to Madras. When he came to the label, he was struck with the appearance of it, and said "that will suit me." He said we might use it for him. The reason we gave him why we could use it for him was "because we were not using it for other persons, or rather the firm for whom we had that label made had ceased to exist." And then in answer to the somewhat suggestive question, "Was there anything said at that interview about his getting all his brandy with this mark exclusively from us," the witness replied, "There had been no contract made then; the only thing that was said was we will give you the exclusive use of that label for Madras."

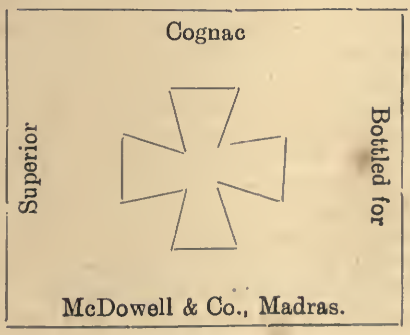
M. Lavergne's evidence is as follows: "Mr. Coleman distinctly said that he wanted a special mark, and we showed him a book of labels. This is the book G-1 that was shown him by me or my partners. When the book was handed to Mr. Coleman, he said that the label marked G-2 pleased him. Before saying he was pleased with the label, he looked through the book. Nothing **[157]** further was said on this occasion about supplying brandy under this mark," and on cross-examination "Mr. Coleman thought of no other label than G-2. Nothing was said as to the right of my firm to that label."

Mr. Coleman, who was unfortunately labouring at the time of his examination under an illness of which he subsequently died, denied that he was shown any book and gave as his reason that he had made up his mind to have his own mark. He deposed that he selected the mark, a red Maltese Cross, from the label of Messrs. Salt & Co., brewers, and with those trade-mark the label selected by him corresponds in every particular.

It will be noticed that the conversation at Cognac could not have occurred later than August 1873.

It was not until March, 1875, that Mr. Coleman gave the order for the shipment of brandies under the Maltese Cross label, and the contents of his letter confirm his statement as to his impression that he had borrowed the device from Messrs. Salt & Co., rather than that it had been suggested to him by any label he had seen at Cognac. He makes no reference to any label selected by him which he would in all probability have done if he had remembered the circumstances. On the contrary he enclosed a sketch of the label he required. He wrote as follows:—

"I will be glad if you can put up two hogsheads of your cheapest brandy; reduce it to 26 under proof according to Syke's hydrometer; and bottle and ship on our account."



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"The case should be branded on the outside like the label. If you help me with this, I promise to ask you to send me large shipments."

On the 9th April 1875, the appellants replied :—

[158] "With regard to your order for the two hogsheads brandy to be bottled for your account, we have done our best to understand your idea and carry it out. In order to save time we are going to ship you as soon as possible *via* London

"25 dozens pale brandy with your label at 13S. F.O.B. Charin Co.

"25 do. do. do. do. do. at 15S. do.

"And we have already ordered dies for this label and also brands for the cases."

* * * * *

"P.S.—It is also understood that this brand, the Maltese Cross, is your property and that we shall not be allowed to use it for any one else, unless it is in obedience with your instructions, and in return it is to be understood that you will import it exclusively through us."

On the 30th April 1875, the respondent's firm wrote to the appellants, and, after informing them that a sample bottle of brandy had been sent to them, observed, "The design of the label we forwarded to you a mail or so ago is intended to appear on bottles of brandy equal in quality to the sample above referred," and on the 7th May 1875, "We trust that our letter of the 12th March recommending you to ship brandies under a label bearing a Maltese Cross per pattern thereto attached has reached you, and that you have given the same your usual kind attention," and on the 21st May 1875, "We note with thanks that you are preparing shipments of 50 cases of brandy bearing labels and capsules with the trade-mark we gave you." This appears to have been the first letter addressed by the respondent's firm to the appellants after the receipt of the appellants' letter of 9th April 1875, and we observe that it makes no reference to the suggestion contained in the postscript to that letter that the respondent's firm should bind itself to import brandies under the label from the appellants only.

On the 28th April 1875, the appellants registered at Cognac as a trade-mark the label G-2, *i.e.*, the Red Maltese Cross with the words Geo. Sage & Co., Fine Cognac Brandy, imported by Robert Stanton & Co., Liverpool. They did not communicate this circumstance to the respondent's firm. In September 1879, they took steps to register in England the Maltese Cross as their trade-mark and then described themselves as having used it for four years and a-half.

[159] There is no evidence to show whether the label bearing a Maltese Cross with the name of Geo. Sage was originally designed by Messrs. R. P. Stanton or by M. Reviere. Seeing that the name entered on the label as that of the exporter was a fancy name, while that of the importer was the true style of the firm, it appears to us to be a fair inference that the mark was intended to be the special trade-mark of the importer and not of the exporter. On this evidence we consider that the appellants have failed to prove that they had adopted the Maltese Cross as one of their trade-marks either in 1873 or up to 9th April 1875 : that Mr. Coleman was shown the Maltese mark by the appellants as a trade-mark which it was open to him to make his own in 1873 ; that possibly from an unconscious memory of the label he then saw but in the belief that the mark was suggested to him by the label of Messrs. Salt & Co., Mr. Coleman adopted the Maltese Cross as his trade-mark in 1875.

Assuming, however, that the appellants had adopted the Maltese Cross as a trade-mark in 1873 or at any other time before 9th April

1875, we think it is to be inferred from the statement made to Mr. Coleman that they had abandoned it, and if they had not abandoned it then we hold that their conduct estops them from denying the right of the respondent's firm to adopt it.

According to the evidence of both parties, Mr. Coleman went to Cognac to arrange for a mark of his own, and according to the evidence of the appellants the Maltese Cross was shown to him in a book containing marks to which they made no claim and was the first of the series of such marks. It was represented to him as a mark which might be used for his exports and as a mark which had been abandoned by the firm for which it had been designed, nor according to M. Lavergne's evidence was any claim then made to the mark by the appellants.

When, without any reference to the circumstance that a label not materially at variance with that ordered by him had been shown him by the appellants, he invited their assistance to procure such a label, they made no claim to it in terms which could reasonably have been interpreted as denying his right to assume it as his own. They in terms admitted it to be his property ; and a reasonable sense may be given to the postscript by interpreting it as referring it to the assistance they were to render in procuring **[160]** the label and brands or to the promise to respect his property in it. It is to be noticed that on the 20th April 1875 the appellants for the first time registered the Maltese Cross in Cognac as a trademark and they then registered a label with the name of Geo. Sage as exporter and Robert Stanton & Co. as importer. It is explained that they had not up to that time exported brandy under the label suggested by Mr. Coleman, but they now claim the Red Cross as their mark independently of the words which purport to be the names of the exporter and importer, and if the French Law (on which we have no information) requires that a trade-mark should be registered only in the form in which it was actually used, there was apparently no reason why the appellants should not have awaited the despatch of a shipment to the respondent's firm, unless it was that they desired to force Mr. Coleman to deal only with them if at any time he desired to take his custom elsewhere. The appellants did not inform Mr. Coleman that they had registered the mark as their own, nor did they inform him in the postscript of 9th August that they intended to do so. Had they done so, it might fairly have been argued that the information would have put Mr. Coleman on inquiry on whose behalf the registration had been made and he might have gathered from the reply that it was the intention of the appellants that he should enter into the contract which is now alleged. But no such information was given and the contract was not made ; for we are persuaded that the respondent's firm did not understand that its property in the trade-mark it had selected was conditional on its accepting such a contract.

Bearing in mind that the respondent's firm believed that the trade-mark had been suggested by it, the subsequent correspondence could not but have confirmed that belief.

In the letter of 9th April, the appellants writing to the respondent's firm described the label as "your label" and the brand as "your property."

In their letter of 2nd June 1875 they charged the respondents £4·12 for the branding irons : and when they subsequently waived this charge, they did so as a matter of favour.

In a letter written by the respondent's firm on 21st September 1875, they wrote to the appellants "We much wish that the brandy you put

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up in bottles bearing our Red Cross trade-mark should be [161] of that quality," and they observed "our trade-marks will fall into disfavour." On 3rd December 1875 the appellants acknowledged this letter without repudiating the claim to the mark or suggesting that they themselves would be common sufferers.

On the same date the appellants wrote another letter in which they distinguish between "consignments of our own brand" and shipments of brand McDowell.

In a letter of 31st December 1875 the respondent's firm spoke of "our Red + Brandy," and in a letter of 5th February 1870 wrote in reference to a shipment of better quality "use a green label with gold edge and our Maltese Cross in red and gold in the centre."

On 26th October 1876 the appellants wrote to the respondent's firm about a shipment of "your Red Cross Brandy." Again on 13th June 1877 the respondent complained that the inferiority of the brandy supplied would "damage the reputation of our brand and trade-mark." Again the claim was not repudiated by the appellants in their reply of 20th July 1877. On the contrary, in a letter of 18th July 1877, written in answer to a private letter of Mr. Coleman, Mr. Coleman was told that he need be under no apprehension for the appearance of the printer's name on his label, and, in reference to the complaint that the brand supplied was inferior, that he was at liberty to take his orders elsewhere; while it was not stated that by so doing he would forfeit his right to the trade-mark.

In 1879 Messrs. Cutler & Palmer introduced brandies with the Maltese Cross label and the respondent's firm contemplated proceedings. Mr. Coleman was in London and apparently had inquired at the London office of the appellants if his mark had been registered. The agent of the appellants replied on 24th April 1879 "no doubt the registration of your brands has been effected, but to make sure we have reminded our firm at Cognac to see to it." On 29th April 1879 the label used by the respondent's firm was registered by the appellants at the respondent's instance at Cognac. On the 14th May 1879 the appellants wrote to the respondent's firm. 'These flasks * * have goblets and will doubtless tend to increase the sale of your mark.'

On 18th June 1879 the respondent's firm wrote to the appellants "please let us know if our label has been registered both in Bordeaux and London, if not do so at once."

On 19th June 1879 the appellants wrote to the respondent [162] "all the labels used for you will be registered and sent to no one else," and on the 15th July 1879, "Red Cross, McDowell & Co., our letter 19th June replies to your inquiry concerning registration. It was fully attended to and completed on the 29th June last in Cognac not in Bordeaux. Cognac is the place where Cognac brands are registered. Your labels have not been registered in London. We do not even have our own labels registered there. Nevertheless, in obedience to your instructions, we have sent a set of labels to London by this mail and they will be registered on Wednesday next, 16th instant" * * * In this letter the appellants for the first time clearly intimated that they claimed to have at one time a property in the Red Cross trade-mark.

They wrote:—

"Red Cross. When in 1875 your Mr. Coleman selected in our book the Maltese Cross for his brandies we had already registered the Red Cross ourselves several years before; therefore should Messrs. Cutler

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Palmer & Co. or Bisquit Dubouchi have registered it in London even anterior to the 29th April, date of your registration here, still we have no doubt our primacy in the registration of the original Red Cross would, if found necessary, give us the power to interfere and protect our mutual interest. In the meantime we trust your Madras Magistrates will soon grant you justice. This could be done in France at once. Your case being extremely simple, some years ago you start a certain brand quite distinct of any other which ever before had been imported in Madras ; so long as it remains a venture no one interferes, but the moment it becomes a success an opponent comes coolly forward and reaps the benefit of your industry, risks, &c. Fortunately times have gone by when such burglaries were permitted."

This statement that the Red Cross had been registered as a trade-mark by the appellants before the conversation with Mr. Coleman, was inaccurate, and the appellants have in this letter and in their plaint ascribed to the conversation with Mr. Coleman a date nearly two years later than the true date. The allegation that the mark had been selected from the appellants' books was repudiated immediately. On the 13th August 1879, the respondent's firm wrote: "you are under a mistake in your statement that the Red Cross mark was selected from your books. If you refer to a letter to your M. Riviere from Mr. Coleman, dated 12th March 1875, you will find the label designated in it."

[163] In their letter of the 15th July 1879 the appellants, though they asserted the mark was selected from their books, and suggested that it could be protected for the mutual benefit of the two firms, distinguished between the respondent's trade-mark and the trade-mark they had registered as their own, and it was not necessary for them to have registered the mark as the respondent's mark in 1879, if they were conscious it was their own and had already been duly registered in 1875, though it may have been prudent to register it if there was any doubt as to their own title. However this may be, they did not at once repudiate the claim of the respondent's firm to the re-invention of the trade-mark. The explanation offered is that they were then on friendly terms with the respondent's firm. Apparently, the more reasonable explanation is that that they did not then care to assert a right to the mark as their own. On 29th September 1880 the appellants informed the respondent's firm that they had received from Bordeaux a flask with a removable tin goblet on which was painted in red the Maltese Cross and the name McDowell & Co., and they inquired if the respondent's firm had any knowledge of such a flask, or if it could be that such flasks were being imported into India by some other firm without their order. Exhibit G. 35. On the 28th October 1880 the respondent's firm replied as follows :—"Regarding the flask of Red Cross Brandy which you mention, this was put up at our request by a firm at home as we found it impossible to sell the brandy here at the price you charge us."

M. Gardrat admitted that the letter gave him information that the respondent's firm was selling brandy under the Red Cross mark which had been "put up for them by another firm at home," but he added that he did not understand the expression. He must nevertheless have suspected that brandy was being sold under the Red Cross mark by the respondent's firm which had not been sold by his firm, but he neither protested nor took any steps to prevent the use of the mark by the respondent's firm until 9th August 1882, when this suit was filed. And what are the circumstances under which it has been filed ? Messrs. Cutler & Palmer,

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who were defeated in their attempt to pirate the mark which the respondent's firm has admittedly at considerable expense established as a well-known trade-mark in this market, induced the appellants to bring this suit undertaking to pay part of the costs of the proceedings and to obtain their supplies of Red Cross [164] Brandy from the appellants. These circumstances, although they do not of course deprive the appellants of their right to relief if they establish it, nevertheless suggest that the appellants were conscious of the weakness of their claim and were not themselves prepared to incur the expense of asserting it. However this may be, having regard to their whole conduct and the accounts given by them of the conversation with Mr. Coleman respecting the selection of a trade-mark, we are satisfied that the respondent's firm was induced to believe that the trade-mark they selected was to become the property of the firm, and that in that belief they expended money and labour in establishing it. Consequently, we hold the appellants estopped from denying the right of the respondent to use it at least in the Madras market. On these grounds, we affirm the decree of the learned Judge and dismiss the appeal with costs.

Solicitors for appellants, *Grant & Laing.*

Solicitors for respondent, *Barclay & Morgan.*

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APPELLATE CIVIL.

Before Sir Charles, A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

KRISHNA (*Plaintiff*), *Appellant v.* VENKATASAMI (*Defendant*), *Respondent.** [31st July, 1883, and 17th November, 1884.]

Rent Recovery Act, Section 11—Implied contract.

Where a landlord having, for many years, accepted rent at "dry" rates from a tenant for certain land, sued the tenant to enforce acceptance of a patta at "garden" rates on the ground that the tenant had raised a crop with water taken from a well constructed by the tenant:

Held, that there was an implied contract within the meaning of S. 11 of the Rent Recovery Act to accept rent at "dry" rates and that plaintiff was, therefore, not entitled to enhance the rate of rent, the improvement having been effected at the expense of the tenant.

[R., 28 M. 328 = 15 M.L.J. 14; 4 Ind.Cas. 1136 (1137) = 5 M.L.T. 264.]

THE plaintiff, Krishna Rau, sued the defendant, Venkatasami Nayak, under the provisions of the Rent Recovery Act (Madras Act VIII of 1865) to enforce acceptance of a patta.

[165] The defendant pleaded that he was not bound to accept a patta, as the rent for part of the land was charged at "garden" rates, 21 fanams per kottai, instead of 15 fanams, the "dry" rate, as before.

The plaintiff replied that the higher rate was charged because a "garden" crop had been raised by means of well water.

To this the defendant rejoined that "dry" rate had always been paid, and that the plaintiff had no right to enhance it, and that the well was not situated on plaintiff's land.

The Sub-Collector of Tinnevelly (E. Turner) held that, as defendant had paid "dry" rates for many years, a contract existed to pay such rates, and decreed that defendant should execute a muchalka at such rates.

* Second appeal 99 of 1883.

On appeal, the District Judge of Tinnevelly (J. C. Hughesdon) confirmed this decision.

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Plaintiff appealed to the High Court on the ground that the fact that "dry" rates had been levied for some years did not amount to a contract that "garden" rates could not be levied for all time.

The Advocate-General (Hon. *P. O. Sullivan*) and *Ramachandra Rau Saheb*, for appellant.

P. B. Gordon, for respondent.

The Court (TURNER, C. J., and MUTTUSAMI AYYAR, J.) delivered the following

JUDGMENT.

The evidence shows no more than that respondent has held the lands at dry land rates, which is consistent with a tenure from year to year and does not prove a contract that the same rates shall be maintained in perpetuity. The rate then must be determined according to the rules laid down in Section 11, para. 3, Act VIII of 1865. We remit to the Lower Appellate Court for determination the issue, what is a fair rate of rent calculated under the rules mentioned.

In compliance with this order, the District Judge returned a finding that, as defendant had dug the well, plaintiff was not entitled to enhance the rate above 15 fanams, but that, if plaintiff was entitled to enhance the rate, the rate was 43 fanams.

Upon the return of the above finding, the Court delivered the following Judgment.

In second appeal 11 of 1878, under circumstances which are said to be similar to those of the present case, the Head Assistant Collector had refused to allow the zamindar anything in **[166]** excess of the original dry land rate. The District Court upheld the decision on the ground that it had invariably refused enhancement in such cases. The decisions of the Courts below were upheld by this Court by the Chief Justice, Sir Walter Morgan, and Mr. Justice Innes; but we have not the benefit of the reasons which governed the decision, as no judgment was written. On the other hand in second appeals 160 and 161 of 1870 it was held by Innes and Kindersley, JJ., that a landlord might claim an enhancement not exceeding the amount entered at the permanent settlement as the faisal rates of dry land.

It is found in this case that the tenant has paid for a series of years and up to the year in dispute only punja rates on the land, in respect of which he resists the imposition of a "garden" rate. Since our former order was passed, the Full Bench has held in *Venkatagopàl* v. *Rangappa*(1) that payment of rent at a certain rate for a series of years is evidence of what the Act terms an implied contract, and on this ground it has been ruled in favour of the landlord that he was entitled to claim rates higher than the faisal rate.

The same construction must be adopted in favour of a tenant, and therefore in the case before us it must be held that there was an implied contract to pay rent at the punja rates. Is then the zamindar entitled to enhance the rent by reason that the land has been improved at the tenant's expense and is now cultivable and has been cultivated as a garden crop? It was the policy of the Act to allow the enhancement of rates so settled only under the circumstances expressly mentioned in the Act, namely, when the land has been improved by the landlord, or at the expense

(1) 7 M. 365.

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of Government with a consequent increase of the demand for revenue on the landlord. The Act contains no provision for enhancement when the improvement is effected at the expense of the tenant.'

On these grounds, we affirm the decree of the Courts below and dismiss the appeal with costs.

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8 M. 167.

[167] APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice and Mr. Justice Muttusami Ayyar.

NARASIMULU (*Defendant No. 2*), *Appellant v.* SOMANNA (*Plaintiff*), *Respondent.** [19th January, 1883 and 17th November, 1884.]

Registration Act, 1877, *Ss.* 49, 50—*Notice—Fraud—Optionally registrable sale-deed, unregistered, competing with similar deed registered.*

R sold land to S in 1878, for Rs. 54 and put S in possession. In 1879 R sold the same land to N for Rs. 24-8-0. N registered his sale-deed. The sale-deed of S was not registered. In 1879 S sued N to have N's sale deed cancelled on the ground of fraud. The Lower Courts held that N's sale-deed was executed collusively and fraudulently and decreed the claim :

Held, on second appeal, that as there were grounds, apart from notice and knowledge of possession, for holding N's sale-deed to have been executed collusively, the decision was correct.

[R., 16 M. 148 (160) (F.B.).]

THIS was an appeal from the decree of E. C. Johnson, District Judge of Godavari, dated 29th November, 1881, confirming the decree of V. Srinivasa Rau, District Munsif of Ellore, in suit 150 of 1879.

The facts appear sufficiently for the purpose of this report from the judgment of the Court (TURNER, C. J., and MUTTUSAMI AYYAR, J.)

Subba Rau, for appellant.

Ramachandra Rau Saheb, for respondent.

JUDGMENT.

Korlipara Somanna, the respondent in this appeal purchased a piece of ground from one Morturi Ramanna for Rs. 54 on the 5th July 1878 and has since been in possession. But the sale-deed, Exhibit A. executed in his favour was not registered under Act III of 1877. Subsequently the vendor colluded with the appellant (Korlipara Narasimulu) and executed the sale-deed, Exhibit I, for the same land in his favour for Rs. 24-8 on the 14th January, 1879, and this document was registered, though like Exhibit A the document was only a subject of optional registration. Thereupon [168] the respondent sued to cancel the sale deed, Exhibit I, and alleged that it was collusive and fraudulent, and the Courts below considered his allegation proved and decreed the claim.

The Registration Acts for this country divide instruments which fall within their purview into two classes, of which the one is effectual to create title, only after registration, while the other, though effectual to create title, is liable to be defeated by a registered instrument subsequently executed.

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* Second Appeal 382 of 1882.

Looking to the whole course of British Indian legislation on the subject of registration, this Court has held that an instrument of which registration is not compulsory is not rendered indefeasible because notice of it is obtained by the person claiming under a subsequent instrument; and that mere notice will not deprive a person claiming under a subsequent instrument of the priority which the Registration Acts confer on a registered instrument in competition with an unregistered one, *Nallappa* v. *Ibram* (1). That this is so in the case of instruments of which the registration is compulsory, has been held in 1869 by the Court of Chancery in England [in a case which arose in this Presidency]—*per* Lord Hatherley—*Hicks* v. *Powell* (2). But although where the prior instrument is optionally registrable, mere notice may not deprive a person claiming under an instrument subsequently executed and registered of the priority given him by the Act, inasmuch as the prior instrument was effectual to create a title, we are at liberty to hold that a participation in fraud by the person claiming under the second instrument will deprive him of the benefit of the provision which was aimed at the prevention of fraud. Were it not for that provision which was intended at once to encourage registration and to protect innocent parties, the assignee would receive no higher title than his assignor could convey and, *ex hypothesi*, the assignor had no title. Though it is to be inferred from the provision respecting oral agreements accompanied with possession that knowledge of possession like mere notice is not of itself sufficient to defeat the priority conferred on a registered instrument, such knowledge or notice may of course also be taken into consideration with other circumstances as indicating that the subsequent transaction is fraudulent.

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[169] In the case now before us the prior instrument was optionally registrable and therefore conferred a complete title which was followed by possession: the subsequent instrument, it is found, was executed collusively and there are other grounds besides notice and knowledge of possession for holding it to be fraudulent. To allow it to prevail would be to defeat the object of the Registration Act. The appeal fails and is dismissed with costs.

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8 M. 169.

ORIGINAL CIVIL.

Before Mr. Justice Kernan.

SINAMMAL *v.* THE ADMINISTRATOR-GENERAL OF MADRAS AND OTHERS.* [26th, 27th April 1883, and 2nd February, 1885.]

Hindu law—Marriage—Divorce—Change of religion—Degradation—Death of husband while outcast—Dissolution of marriage—Suit by widow to recover husband's estate.

In 1850 K married S both being Brahmans. K subsequently became a convert to Christianity.

In 1881 K died and S claimed his estate.

Held that, according to Hindu law, K died an outcast and degraded, and that, as his degradation was unatoned for, the marriage became absolutely dissolved, and no right of inheritance remained to S.

[R., 9 M. 466; 4 N.L.R. 39; 49 P.R. 1907=83 P.L.R. 1908=110 P.W.R. 1907; U.B.R. Civil (1897—1901) 488]

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* Civil Suit 16 of 1883.

(1) 5 M. 73 (75). (2) L. R. 4 Ch. App. 741.

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THIS was a suit brought *in forma pauperis* by one Sinammal, who described herself as a Brahman widow, against (1) the Administrator-General of Madras, and, as such, administrator to the estate of Arthur Kristnama deceased; (2) Mangalam, otherwise called Mrs. Kristnama; and (3) Chittur Anandachari.

The plaintiff alleged in her petition, dated 14th November 1882, that thirty years ago, when she was eight years old, she was married to Kristnama, who was then a Brahman; that shortly after the marriage Kristnama became a convert to Christianity; that by such conversion Kristnama lost his caste and plaintiff consequently did not cohabit with him; that Kristnama, after his conversion, held various appointments under Government and died in 1882, being then Deputy Collector at Tanjore, leaving property worth Rs. 40,000, which was in the possession of defendant No. 1; [170] that Kristnama, after his conversion, divided from his father and brothers, and that the property left by him was acquired without aid from ancestral funds; that Kristnama, at various times after his conversion, paid to plaintiff various sums for her support and interchanged visits with her; that defendant No. 2 represented herself to be the widow of Kristnama and claimed his estate.

If the marriage of defendant No. 2 proved to be valid, the plaintiff claimed a moiety of the estate of Kristnama, but the whole estate if the said marriage proved to be invalid.

Defendant No. 1 pleaded (1) that the plaintiff was debarred from bringing this suit by reason of a release executed by her on the 26th January 1857 to Kristnama; (2) that plaintiff having refused to live with Kristnama after his conversion, the latter married defendant No. 2 according to the rites of the Christian religion, and that this marriage was valid; (3) that the succession to the estate of Kristnama was governed by the Indian Succession Act, and that the plaintiff could have no claim to it.

Defendant No. 2 pleaded, *inter alia*, that she was legally married to Kristnama in the free Church of Scotland Mission Hall at Madras in January 1858. She denied that Kristnama ever visited plaintiff after the said marriage or paid to plaintiff any money, and claimed that she was entitled to the whole estate of Kristnama.

On the 28th February 1883 Chittur Anandachari, the father of Kristnama, applied to be made a defendant in the suit and the application was granted. He denied that he was divided from his son or that the estate was the self-acquisition of his son, and claimed either to be jointly entitled with defendant No. 2 (if her marriage was valid) or solely entitled to the estate. He also pleaded that plaintiff was estopped from claiming the estate by the release of the 26th January 1857.

The issues settled by Innes, J., on 8th March 1883 were:—

(1) Whether plaintiff on, or since, the conversion of Kristnama ceased to be his lawful wife, and, as such, entitled to share in his estate under the Indian Succession Act.

(2) Whether defendant No. 2 is the lawfully married wife of Kristnama, and, as such, entitled to share in his estate.

[171] (3) Whether defendant No. 3, as father of the deceased, is entitled under the Indian Succession Act to share in his estate.

(4) To what shares each of such persons is entitled.

On the 5th of April 1883, on the application of the solicitors for defendant No. 1, another issue was framed by Kernan, J., *viz.*,

Whether the plaintiff, by virtue of the document of the 26th of January 1857, released her claim, if any, to the estate of Kristnama, and what effect has such document on the rights of the several parties to the said estate.

Mr. *Devarajayyar*, for plaintiff.

Mr. *Norton*, for defendant No. 1.

Mr. *Johnstone* and Mr. *Shaw*, for defendant No. 2.

Defendant No. 3 did not appear.

The case was heard by Kernan, J., on the 26th and 27th April 1883, and judgment was reserved. Before judgment was delivered, defendant No. 2 died in September 1883 and the suit was revived on 7th February, 1884. The facts and arguments appear sufficiently for the purpose of this report from the judgment of the Court.

JUDGMENT.

KERNAN, J. (after reading the plaint, written statement and issues, proceeded as follows) :—There are certain facts not disputed, *viz.*, that plaintiff is a Brahman and the late A. Kristnama was a Brahman, and that in 1849 or 1850 the plaintiff, being then of about or less than eight years old, went through a ceremony of marriage according to the rites and ceremonies of the Hindu law to A. Kristnama, who was then a young man. It was not a betrothal merely that took place. The consummation ceremony and consummation never took place, but *otherwise* the marriage was completed with all the ceremonies necessary to constitute a Hindu marriage between Brahmans. I offer no opinion whether such ceremony not followed by consummation amounted to a valid legal marriage according to Hindu Law. The view I take of the case does not require that I should express an opinion on this question in respect of which there was much argument before me. After the ceremony of marriage, while the plaintiff was still in the mother's or aunt's house, the late A. Kristnama abjured or abandoned the Hindu faith and religion and became Christian. In [172] 1857, after plaintiff attained puberty, Kristnama proposed to plaintiff and her friends that the plaintiff should go to reside with him as his wife. She refused to do so on the ground that Kristnama, by becoming Christian, was an outcast. Her friends, aunt, mother and brother-in-law assisted her in her refusal. Kristnama endeavoured to oblige her to comply with his request by appealing to the magistracy, but by exhibit No. 5, dated the 19th January 1858, signed by her, addressed to A. C. Whittington, Magistrate of Chittur zila, she declared that she would not go to live with him as he had become Christian and was an outcast. In that document the plaintiff stated that on the 21st of January 1857, Kristnama had sent to her a farikhut (release), executed by him, to remove the marital tie, and that she had executed a farikhut attested by witnesses, and she says to the Magistrate "you will therefore come to know the removal of the marital tie between myself and him." The farikhut, exhibit A (1), was produced, signed by the plaintiff, dated 26th of January

(1) *The deed of release executed by Sinamma, daughter of Krishnamachari, aged 16, caste Brahman, residing at Sholinghur, zila Chittur, to A. Kristnama, late head gumasta of Sholinghur, lately a Brahman and now Christian.*

Though I married you a few years ago while you were a Brahman, and since you have been adopting Christianity for the last few years, I have no intention of living with you. I have no claim whatever against you or anybody in connection with you. In case I prefer any claim for maintenance against you, such claim becomes invalid by this release.—SINAMMA. 26th January 1857.

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1857, and it is proved to have been signed by several of the witnesses whose names are signed thereto, amongst others by Ramanujachari, her brother-in-law. Ramanujachari proved that Kristnama wrote a similar farikhut at that time, and that it was given to the plaintiff's family, and that he believes plaintiff has got it. Plaintiff never lived with Kristnama and he never had intercourse with her. On the 14th of January 1858, the late defendant No. 2 Mangalam, a native of the East Indian Christian Presbyterian Church was married to, or rather went through the ceremony of marriage with Kristnama according to the rites of the Presbyterian Church. This supposed marriage was made by the parties under the *bona fide* belief that it was a valid marriage binding in law and in conscience. Kristnama informed Mangalam that he had been married to the plaintiff, but that he had divorced her as she would not live with him, and he gave Mangalam exhibit 5 and exhibit A as [173] divorce documents. She kept and proved them before me. She stated he was divided from his father and brothers and that all the property he realized was the result of his own exertions. Under what circumstances or when any division took place was not proved. Kristnama died in December 1881 and defendant No. 1 is his administrator under grant of letters of administration. Kristnama never had a child. Upon the first issue I am of opinion that plaintiff did not cease to be the wife of Kristnama upon or after his conversion. She refused to live with him and so deserted him, as she lawfully might, because he became an outcaste and therefore degraded—Vyavastha Chandrika, Section 722 (vol. ii, p. 488).

Desertion does not mean divorce or dissolution *inter vivos* of the marriage—Vyavastha Chandrika, vol. ii, p. 490. There cannot be said to be any such divorce in Hindu law, though there may be justifiable abandonment or desertion. The Act XXI of 1866 was passed to meet circumstances such as this case presents between plaintiff and Kristnama. According to Parashara (Vyavastha Chandrika, vol. ii, p. 489), if a husband be degraded, it is lawful for a woman to have another husband. Plaintiff did not take another husband. But, although the plaintiff did not cease to be the wife of Kristnama, she had not on his death any of the rights of a widow. According to the Hindu law, husband and wife are one—Manu, ch. ix, Section 45. Brahaspati, says, "In scripture and in the code of law, as well as in popular practice, the wife is declared to be half the body of her husband Of him whose wife survives half the body survives." Vyavastha Chandrika (vol. ii, p. 489).

If Kristnama had not been an outcaste and degraded, plaintiff would inherit from him at least for life, his property, and she should have performed his funeral ceremonies by herself or by deputation. But, as he was and died an outcaste, and his degradation was unatoned for, then, according to Hindu law, the marriage became absolutely dissolved and the relation of husband and wife. In Vyavastha Chandrika, vol. ii, p. 490, it is said: "Nor is the marriage dissolved by the natural death of either of them, for then the person surviving, if without son, must, as widow or widower of the deceased, perform the funeral obsequies and continue to offer the oblation of food and libation of water to the manes.....of his or her deceased consort." A note is referred to in which it is stated that change of religion is regarded by Hindu [174] law as degradation, and the case of *Muchoo* v. *Sahoo*(1) is quoted in which a husband, who was repudiated by his wife on his conversion to Christianity, was held not entitled

(1) 5 W.R. 235.

to restitution of society. Vyavastha Chandrika then proceeds thus: "The circumstance of one of the married couple refusing to associate with his or her degraded spouse, or that of the other dying in a state of degradation unatoned for, and the surviving one remaining pure at that time, is the only one that causes absolute dissolution of their marriage or the relation of husband and wife; as then ceases entirely all connection of the deceased with the survivor, who, in that case, is not to perform the deceased's funeral obsequies, not to offer periodically and annually the oblation of food and libation of water to his or her manes. Thus Sankha and Likhita: Of him who has been formally degraded, the right of inheritance, the funeral cake, and the libation of water are extinct." The passage means the refusal continuing until the death of the degraded one. This is precisely what happened in this case. It is not alleged that plaintiff performed any ceremonies for Kristnama after his death. Plaintiff cannot therefore take the property of Kristnama by inheritance. She has no sacrifice, no pious duty to perform as regards Kristnama. Her connection with the deceased in the relation of wife ceased absolutely according to the Hindu law on his death. I think that by virtue of the farikhut mutually executed between plaintiff and Kristnama, plaintiff has released all claim on him. I do not think the release was of maintenance only. Whatever a widow takes of her deceased husband's property is partly for maintenance. Plaintiff alleged and gave evidence that Kristnama gave her money from time to time after their separation and during the time of Mangalam. I have very great doubt of the truth of this evidence, but, even if true, it does not alter my view or get rid of the effect of plaintiff's repudiation of him up to the time he died degraded. Mangalam does not admit the allegation. I am of opinion that plaintiff's case has failed and that the suit should be dismissed with costs to the first and second defendants and her representatives. Let notice of the decree be given to the Government Solicitor as plaintiff is pauper. As this suit is to be so dismissed, I do not see that I ought to try [175] the second and third issues between the co-defendants. If plaintiff succeeded in establishing a title to any share of the estate of Kristnama, I could try the rights of the other parties, co-defendants *inter se*.

Solicitor for plaintiff: *Tiruvengadasami Pillai.*

Solicitors for defendant No. 1: *Branson and Branson.*

Solicitor for defendant No. 2: *Carr.*

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8 M. 175.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

PARVATHI (*Plaintiff*), *Appellant v.* MANNAR (*Defendant*), *Respondent.**
[21st July and 17th November, 1884.]

Defamation—Slander—Action for abuse, no special damage being alleged—Damages, Measure of.

The rule of English law which prohibits, except in certain cases, an action for damages for oral defamation unless special damage is alleged, being founded on no reasonable basis, should not be adopted by the Courts of British India.

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* Second Appeal 77 of 1884.

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If defamatory expressions are used under such circumstances as to induce in the plaintiff reasonable apprehension that his reputation has been injured, and to inflict on him pain consequent on such belief, the plaintiff is entitled to recover damages without actual proof of loss sustained.

Semble: An action will not lie for vulgar abuse or hasty expressions; but for malicious or culpable oral defamation an action will lie.

Vindictive damages should not be awarded, and a distinction should be drawn in awarding damages when the defendant acts from carelessness and when he acts maliciously. In the latter case the plaintiff is entitled to full compensation for the pain suffered, and in the former to a sum sufficient to establish his innocence of the charges made.

[**N.F.**, 28 C. 452 (464); **F.**, 12 C. 424; **R.**, 10 A. 425 (448); 34 C. 48=4 C.L.J. 388; 26 M. 653 (665, 675); U.B.R. (1905), 1st Qr., Tort—Defamation 1; **D.**, 11 A. 104 (107).]

THIS was an appeal from the decree of E. K. Krishnan, Subordinate Judge of Tinnevelly, reversing the decree of T. Adinarayana Chetti, District Munsif of Ambasamudram, in Suit 303 of 1881.

The plaintiff, Parvathi Ammal, sued the defendant, Mannar Ayyar, for Rs. 1,000 damages. She alleged that, on the 29th June **[176]** 1881, defendant, with the intention of defaming her publicly, abused her at Kadambadu Valavu, in the presence of the Village Munsif and others, by falsely declaring that she was not the legally married wife of her husband, but a woman who had been ejected from several places for unchastity, and that her reputation had suffered thereby.

The defendant denied having used the alleged defamatory expressions, and pleaded that, even if he had used them, the occasion was privileged, inasmuch as he wished to prevent a marriage, then imminent, between his wife's brother's son with a girl brought up by plaintiff and her alleged husband.

The defendant attempted, in his defence, to prove the identity of the plaintiff with a woman of questionable character bearing the same name. The Munsif disbelieved the evidence and awarded the plaintiff Rs. 300 damages and Rs. 145 costs, on the ground that she was a Brahman and had been slandered publicly in the presence of the Village Magistrate and others of her caste.

On appeal the Subordinate Judge of Tinnevelly, E.K. Krishnan, reversed this decree, holding that the defendant acted *bona fide* in making the imputations and trying to prevent the marriage of his kinsman with plaintiff's foster daughter.

Plaintiff appealed to the High Court.

Ambrose, for appellant.

Bhashyam Ayyangar, for respondent.

JUDGMENT.

The judgment of the Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.) was delivered by

TURNER, C.J.—The question raised in this appeal is whether an action for damages for slander can be maintained without proof of special damages in cases in which it would not be allowed in English Courts. In two cases—*Subbaiyar* v. *Kristnaiyar* (1) and Appeal 2 of 1878 (unreported) the question was not decided.

In *Kashiram Krishna* v. *Bhada Bapuji* (2) it was held under the special Regulation that an action would lie for abuse without proof of special damage.

(1) 1 M. 383. (2) B.H.C.R. A.C. 17.

In Bengal the authorities are conflicting. 1884

In the later cases it was decided there could be no suit without an averment of special damage. *Phoolbasee Koer* v. *Parjun* [177] *Singh* (1), *Chundernath Dhur* v. *Issuree Dossee* (2), *Nilmadhub Mookerjee* v. *Dooke Ram Kottah* (3), and in *Gopal Gurain* v. *Gurain* (4), special damage was found. The decisions which are apparently to the contrary are *Moulvee Gholam Hossein Vakeel* v. *Hur Gobind Dass Tahsildar* (5), *Shaikh Tukee* v. *Shaikh Khoshdel Biswas* (6), *Gour Chunder Puteetundee* v. *Clay* (7), where, however, the slander was of professional character, and *Sreenath Mookerjee* v. *Komal Kurmokar* (8). The latest case cited from the Bengal reports is to be found in the Calcutta Law Reporter.

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It appearing, then, that no rule on the subject has been so definitely established by decided cases as to be imperative on us, we feel ourselves at liberty to discuss the propriety of the question on its merits.

The English law recognizes that defamatory words are actionable even without proof of special damage, although they may not impute a felony nor affect professional character, provided that they are written or printed and published, although the same words are not actionable if uttered *viva voce*. This distinction has been defended on the ground that the committal of the words to writing implies more deliberation, and that their publication in writing or in print is likely to be more extensive than a publication by oral utterance. Legitimate exception may be taken to both these grounds.

The essence of the cause of action is the harm suffered by the person defamed, and the question as to whether the injury was caused with more or less deliberation ought not to deprive the injured person of a civil remedy for the injury, though it may properly be considered if the Court is at liberty to award what are called exemplary damages. The difference between the extent of the publication of defamatory terms according as to whether they are committed to print or uttered orally is in reality accidental. Defamatory matter, when written, is frequently addressed only to a single person; when printed, its publication may be arrested immediately.

The publication of a defamatory imputation in a newspaper circulated extensively in a place where the person defamed is [178] unknown may cause him far less injury, whether pecuniary or sentimental, than its publication orally, in the neighbourhood in which he resides, to his acquaintances or to persons who can influence his advancement in life.

In this country we are not bound to adopt the rules regulating compensation for injuries which are recognized by the English Courts, though it has been the practice of Judges in British India to regard the decisions of the English Courts with the highest respect as embodying the wisdom and experience of a judiciary whose reputation is second to none for independence and ability.

But the distinction drawn by the English law between written or printed and oral slander, which is said to have had its origin in the circumstance that the most frequent instances of oral slander were at one time punishable by Ecclesiastical Courts (2 Salkeld, 694), has been condemned by many eminent English lawyers. Mr. Starkie observes that the distinction "must be regarded as an absolute peremptory rule not founded in

(1) 12 W.R. 369. (2) 18 W.R. 531. (3) 15 B.L.R. 161 (166).
(4) 7 W.R. 299. (5) 1 W.R. 19. (6) 6 W.R. 161.
(7) 8 W.R. 256. (8) 16 W.R. 83 (84).

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any obvious reason or principle." In *Roberts* v. *Roberts* (1), Cockburn, C.J., and Crompton and Blackburn, JJ., pronounced the law of England unsatisfactory and regretted they were bound by it. In *Lynch* v. *Knight* (2), the Lord Chancellor Campbell expressed the same views, and Lord Brougham, in the same case, declared that the English law was in this respect not only unsatisfactory but barbarous.

The Indian Law Commission, of which Lord Macaulay was a member, in its report on the proposed Penal Code, demonstrated that the English law regarding defamation was inconsistent and unreasonable. (Introductory Report, Note, p. 7, Macaulay's Works, p. 546).

The civil law does not recognize the distinction, nor does the law of Scotland; and the recommendations of Lord Macaulay's commission were approved and accepted by the British Indian Legislature. We therefore feel justified in giving effect to our conviction that the rule we are considering is not founded on natural justice and should not be imported into the law of British India.

It appears to us that disregarding the distinction between the [179] method of publication adopted, the questions which demand serious consideration are whether or not actions may be maintained for injury to the reputation which may result only in mental pain, and whether damages may be awarded which are in their nature more or less punitive.

If in any case it is allowable to bring such actions, it appears to us they should be permitted where a mischievous or malicious person has without foundation set in circulation defamatory charges against his neighbour.

It is often impossible to bring specific proof of the damage which a man may suffer in his business or in his friendships from such an injury.

The injury may be occasioned before he has any opportunity of rebutting the slander, and the memory of the slander may survive its contradiction, and may, at any time, influence his neighbours unconsciously to his disadvantage; nor is the suffering trivial which such a wrong may inflict on its victim.

It was observed by Best, C.J., in *DeCrespigny* v. *Wellesley* (3) that "if we reflect on the degree of suffering occasioned by loss of character and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter;" and by Holt, C.J., in *Baker* v. *Pierce* (4), "For my part, wherever words tend to take away a man's reputation, I will encourage such actions, because so doing will contribute much to the preservation of the peace."

And in *Button* v. *Heyward* (5) Fortescue, J., observed in reference to the *dictum* of Holt that it was also Hale and Twisden, JJ.s' rule, and he thought it a very good one. Wider experience has persuaded English Judges that frivolous and vindictive litigation is countenanced by conceding too great liberty for the institution of suits for defamation, and it has been the object of the English law so far as possible to set limits to such aetions. Some of the restrictions are already recognized by Indian law. Words of mere vulgar abuse are not punished as defamation. But we are not prepared to accept the limitation of the English law which denies a civil remedy unless pecuniary damage is established or may be predicted as almost certainly probable.

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(1) 33 L.J.Q.B. 248=2 B. & S. 384. (2) 9 H.L. 593
(3) 5 Bing. 406. (4) 6 Mod. 23. (5) 8 Mod. 24.

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[180] We conceive that beyond the difficulty of estimating mental pain, there is no greater reason for refusing a man compensation for a wrong resulting in such pain than for refusing compensation for a wrong resulting in other physical suffering or in pecuniary loss, and that the true test of the right to maintain the suit should be whether the defamatory expressions were used at a time and under such circumstances as to induce in the person defamed reasonable apprehension that his reputation had been injured and to inflict on him the pain consequent on such a belief.

Mere hasty expressions spoken in anger or vulgar abuse to which no hearer would attribute any set purpose to injure character would of course not be actionable, but when a person either maliciously or with such carelessness to enquire into truth as is sometimes described as legal malice, deliberately defames another, we conceive that he ought to be held responsible for damages for the mental suffering his wrong-doing occasions. Without accepting the very wide rule of the Scotch law that anything is actionable which produces uneasiness of mind (Starkie, p. 30), we consider the action should be allowed where the defamation is such as would cause substantial pain and annoyance to the person defamed, though actual proof of damage estimable in money may not be forthcoming.

In the present instance the appellant had, in our judgment, established a *prima facie* case, which, on the principles we have held applicable, would entitle her to relief. The Subordinate Judge finds that the defamatory statement was made, and he also finds that its truth is not proved; but he considers the respondent had some grounds for suspicion; that he, in fact, believed the statement to be true; and that, standing almost in the relation of a parent to a youth who was to be married, he made use of the defamatory expressions imputed to him in order to prevent the marriage.

If the expression has been used in a private place and only to the youth concerned, or to any of his relations who could influence him to renounce the marriage, the respondent might possibly have successfully pleaded privilege; but the evidence accepted by the Court shows he uttered them in the open street and to persons who had no concern with the marriage: the occasion, then, was not privileged.

We have already observed that one of the questions which [181] present some difficulty in actions for defamation is the question, on what principle damages are to be assessed where no pecuniary injury is shown.

We are unwilling to give our adhesion to the principle of vindictive damages. The object of civil litigation should be the remedying of civil injuries. Recourse should be had to the penal law if public interests require the punishment of an offender or an example to deter others from the commission of the offence.

Nevertheless, reason suggests that a distinction should be drawn between cases where the slanderer acts from mere carelessness, or in an honest but mistaken belief as to his duty, and cases where the slanderer is insolent without any provocation or is influenced by a desire to gratify his enmity. The person defamed may be content to accept a sum sufficient to establish his innocence of the charges made in the former case; in the latter he is entitled to full compensation for the pain inflicted on him.

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As to the good faith of the respondent, it is not shown that he made any reasonable inquiry into the truth of the defamatory statements to which he gave circulation. On the contrary, it appears that he made them after they had been proved untrue, and in this suit he has again maintained their truth and has given evidence to establish it. Under the circumstances, we consider the appellant entitled to reasonable damages, and we shall reverse the decree of the Appellate Court and restore that of the Munsif. As to costs, it is usual in such cases to allow costs on a scale somewhat in excess of the amount of damages actually awarded, because it is impossible for a plaintiff to value his claim precisely. We shall affirm the order of the Munsif as to the costs in his Court and award the appellant her costs in this Court and in the Appellate Court on the sum decreed.

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8 M. 182.

[182] APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

VENKATRAYUDU (*Third Defendant*), *Appellant v.* PAPI REDDI (*Plaintiff*), *Respondent.** [25th July and 20th November, 1884.]

Registration—Unregistered conveyance—Covenant to pay money contingent on ejectment—Suit for money dismissed.

By an unregistered document A stipulated that B should enjoy certain land for a term of years in order that a debt and interest might be liquidated by receipt of profits, estimated at a fixed sum, and it was provided that, if B's possession was disturbed in the meantime, A should pay the balance of the principal then due and interest from the date of the loan. B, having been ejected, sued A upon the covenant to pay.

Held, that, as the covenant to pay depended on the principal contract, which could not be proved for want of registration, B could not recover.

[R , 13 M. 308 ; U.B.R. (1904), 4th Qr , Registration, 1.]

THIS was an appeal from the decree of J. Wallace, District Judge of Cuddapah, dated 9th July 1883, reversing the decree of V. Subramanya Sastri, District Munsif of Proddatur, in Suit 81 of 1882.

The plaintiff, Velugoti Papi Reddi, sued to recover Rs. 682 from the defendants, Karnam Venkata Subbaya and three others. The plaintiff alleged that defendant No. 1 executed a usufructuary mortgage bond in his favour on the 8th July 1873 for Rs. 528. By this bond it was provided that plaintiff should enjoy certain land for a term and credit Rs. 24 per annum towards the debt until it was liquidated, and that, if plaintiff's possession should be disturbed, the balance then due should be paid with interest at the usual rate from the date of the bond.

The plaintiff having been ejected claimed Rs. 336 principal and Rs. 346 interest. Defendants 1, 2 and 4 were *ex parte*. Defendant No. 3 pleaded that defendant No. 1 was divided from him in interest and was not the owner of the land mortgaged, and that the bond could not be received in evidence as it was not registered.

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[183] The judgment of the District Munsif was as follows :—

"In *Stri Seshathri Ayyangar* v. *Sankara Ayen* (1) and *Guduri Jagannadhan* v. *Rapaka Ramanna*(2) the Court held that a document required by s. 17 of the Legislative Act to be registered, but not so registered, could be received in evidence for the purpose of proving the money claim. But in *Mattongeney Dossee* v. *Ramnarain Sadkhan*(3) the Calcutta High Court held that even for the purpose of proving the money claim such a document could not be received in evidence. There is thus a conflict of decisions between the learned Judges of the two Courts, but I think a distinction may be drawn in the nature of the documents sued on. In the two Madras cases the bonds were mere hypothecation bonds, under which the obligors bound themselves to pay the money borrowed with interest and charged the immoveable property as collateral security, so that, independent of any transaction affecting immoveable property, there was an obligation to pay the money; and to prove that obligation it was held that the bond could be received in evidence. In the Calcutta case the bond provided that in default of the payment of the money secured by it within a specified time the property mortgaged should be sold in satisfaction of it. The learned Chief Justice of the Calcutta High Court doubted whether the obligee had a personal remedy against the obligor for the money, but apart from this his Lordship held that the document was not divisible and disclosed one transaction only, and that the transaction which the plaintiff must necessarily prove for the purpose of making out his case.

"Notwithstanding the distinction in the nature of the bonds, it does seem to me that there is a conflict of opinion between their Lordships of the Madras High Court and those of the Calcutta High Court, as the latter expressed their concurrence in the opinion of the Lower Court that the borrowing and lending was in itself a transaction affecting the property comprised in the document, and that, therefore, the document not being registered could not be received as evidence of the transaction, *i.e.*, the borrowing and lending. If, therefore, the document in this case were similar to those in those cases, the question might arise as to which decision is to be followed; but it seems to me to be quite of a different nature. Under this document plaintiff was to enjoy the **[184]** lands comprised in it until the amount secured by it was discharged at 24 rupees a year, and it goes on to make a contingent provision that, if plaintiff should at any time be deprived of possession of the lands, he should be entitled to recover the balance with interest. The document is, therefore, in my opinion, indivisible, as observed by the learned Chief Justice of the Calcutta High Court. There is no primary obligation under it for payment of money, while, on the other hand, it is made contingent on the plaintiff being dispossessed of the lands. If this contingent provision is set aside, the obligation to pay the money does not arise, and this provision is, in my opinion, a transaction affecting the immoveable property comprised in the document within the meaning of s. 49 of the Registration Act, and the document cannot be received in evidence to prove it. It was argued for the plaintiff that, as he does not claim the immoveable property comprised in the document, the reception of it in evidence does not in any way affect such property. But the section of the Act not only lays down that the document shall not affect the immoveable property, but that it shall not be received

(1) 7 M.H.C.R. 296. (2) 7 M.H.C.R. 348. (3) 4 C. 83.

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as evidence of any transaction affecting such property. Now, dispossession of lands usufructually mortgaged to the plaintiff is, in my opinion, a transaction affecting such property, and unless that provision is proved, plaintiff cannot succeed. In this case it is not sufficient to prove the bare transaction of lending and borrowing. Plaintiff cannot succeed without proving the transaction of usufructuary mortgage, and the contingent provision in case of dispossession, and, to prove that, the document cannot be received in evidence. I must, therefore, hold that the document A cannot be received in evidence for the purpose of this suit."

On appeal, the District Judge decreed for plaintiff on the ground that the bond A might be regarded as a mere memorandum of money due and of the mode in which it became due.

Defendant No. 3 appealed.

Sankaran Nayar, for appellant.

Mr. *Shvw* and Mr. *Norton*, for respondent.

The Court (TURNER, C.J., and HUTCHINS, J.) delivered the following

JUDGMENT.

The transaction mentioned in the plaint was not a mortgage in the strict sense of that word, but a sale for a term of years for 132 pagodas. A condition was incorporated in the deed [185] for the protection of the term, *viz.*, that if the grantor failed to observe the stipulations of the deed, he would pay the principal after deducting the profits received and interest from the date of the bond.

The bond was not registered. Default has been made in the provisions of the deed and the property has been resumed by the brothers of the grantor.

Suit is now brought to enforce the covenant, and the question is raised whether, inasmuch as the bond was ineffectual to create title, a suit can be maintained upon the covenant.

It appears to us that the covenant was a contract depending upon the principal contract, and that if the first contract was, as it must be held to be, invalid, the second fails.

The decree of the Judge is reversed and that of the Munsif restored, but, under the circumstances, without costs.

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8 M. 185=9 Ind. Jur. 23.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

MALLIKARJUNUDU *(Plaintiff)*, *Appellant v.* MALLIKARJUNUDU AND OTHERS (*Defendants*), *Respondents.**
[24th September and 22nd October, 1884].

Mortgage of 1832 *by way of conditional sale—Regulation XXXIV of* 1802—*Muhammadan mortgagor.*

In 1832 a Muhammadan mortgaged certain land with possession on condition that if the money lent was not repaid within eight years, the land should be enjoyed by the mortgagee after that period as if conveyed by sale.

In 1883 a suit was brought to redeem.

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* Second Appeal 463 of 1884.

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Held, that the title of the mortgagee became absolute by virtue of the terms of the contract on default of payment within the time specified.

The obligation cast by Regulation XXXIV of 1802 upon a mortgagee to account for profits does not prevent a mortgage by way of conditional sale from becoming, after the period for redemption has elapsed, an absolute sale where no account has been rendered by the mortgagee.

The rule laid down in *Pattabhiramier's case* (13 M.I.A., 560) applies to a mortgage executed by a Muhammadan.

[D., 50 P.R. 1906.]

[186] THIS was an appeal from the decree of J. Kelsall, District Judge of Godavari, confirming a decree of T. R. Mulhari Rau, District Munsif of Ellore, in Suit 9 of 1883.

The facts and arguments appear sufficiently for the purpose of this report from the judgment of KERNAN, J.

Bhashyam Ayyangar, for appellant.

The Advocate-General (Hon. *P. O. Sullivan*), for respondent.

KERNAN, J.—The Original Suit 9 of 1883 stated that Sherif Ali Sahib and others received a loan of Rs. 1,500 from the father of defendants Nos. 1 and 2 and gave a usufructuary mortgage of lands set out in the plaint, and that the sons of the mortgagor transferred their interest in the lands to the plaintiff in order that he might redeem the mortgage on payment of Rs. 1,500.

The mortgage relied on was proved (Exhibit A); it is dated the 5th of January 1832, and after acknowledging receipt of Rs. 1,500, it proceeded thus: "we have mortgaged and put in your possession all the lands within the boundaries (there stated), and delivered over the deeds specified to you." "Therefore, whenever the said money is paid in one instalment, before the expiry of eight years, payment should be credited on this bond." "On account of the interest of the mortgage you should cultivate (the land) and enjoy the profits thereof." "If the money be not paid within the period fixed for payment, you should enjoy the said lands immediately after the expiry of that period as (if conveyed by) an absolute sale for the current price.

The eight years for redemption mentioned in Exhibit A expired on 6th of January 1840; default was made in payment within the eight years; the grantee or mortgagee and his descendants have been in possession of the lands since the 5th of January 1832. The lands are stated by defendants Nos. 1, 2, 3, and 4 to have fallen to the share of the defendant No. 2 on a partition between the members of his family. Defendant No. 2 is the principal defendant. Defendants 5 and 6 are *ex parte*, but appear to have no interest in the lands.

The only issue necessary to refer to is the first, *viz.*, whether, on occurrence of the default, the stipulation for sale has or has not executed itself.

The Munsif in the first instance, and the District Judge on appeal, held that the conditional sale became absolute and dismissed [187] the suit with costs, following the decision of the Privy Council in *Pattabhiramier* v. *Vencatarow Naicken* (1), approved of by the Privy Council in *Thumbusawmy Moodelly* v. *Hossain Rowthen* (2) followed by *Bapirazu* v. *Kamarazu* (3).

The second ground of appeal is "that the mortgage in question was executed in 1832, at which time only the equivalent to 12 per cent., interest

(1) 13 M.I.A. 560. (2) 1 M. 1=2 I.A. 241. (3) 3 M. 26.

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8 M. 185 = 9 Ind. Jur. 28.

could be allowed out of the produce of the land and no further interest could be allowed."

The third ground is "that the instrument" of 1832 could not have 'executed itself' as a conveyance in 1840, as an account should have to be taken as to whether any amount was due to the mortgagee at that time."

At the hearing of this second appeal, it was not contended that the grantor covenanted to pay the amount of Rs. 1,500 or that the terms of the instrument of 1832 showed that the parties contemplated that any account of profits or produce of the land should be taken before the sale became absolute. Therefore the principle of the decision in *Pattabhiramier's case* and *Thumbusawmy's case*, followed in *Bapirazu* v. *Kamarazu* applies this case.

But for the appellant it was argued that in applying that principle there should have been a decree for the plaintiff upon the ground that the effect of Regulation XXXIV of 1802 was in point of law to annex to, or import into, the usufructuary mortgage of 1832 an obligation on the mortgagee to account for profits, and that interest in the shape of profits beyond 12 per cent., per annum on the amount borrowed should in such to account be credited to principal.

It was further contended for the appellant that the parties to the mortgage of 1832 must be treated as having contracted subject to the provisions of the Regulation of 1802 (repealed in 1855), and as the object of that Regulation was for the public purpose of preventing usury, it was not competent for the mortgagor to waive the benefit of the account given by that Regulation or to agree that the sale should be absolute before such account was taken. On these grounds it was contended that, as the mortgagor was in point of law bound to render an account before the contract could [188] execute itself, the case comes within the decision in *Thumbusawmy's case*. In that case, hower, the Privy Council held that, by the terms of the contract, the parties expressly provided that an account should be taken at the end of the period of enjoyment by the mortgagor, and did not contemplate, as in *Pattabhiramier's case*, that the sale should become absolute on the non-payment of the mortgage money within the period agreed on.

The case of *Bapirazu* v. *Kamarazu* was that of a mortgage of 1846 with possession, and with a provision that if the mortgage money was not paid within the time limited, the sale should be absolute: the time expired in 1848.

Mr. Justice Innes, in giving judgment (in which the Chief Justice concurred), after going through *Pattabhiramier's* and the other cases, says: "The question therefore in contracts made before 1858 is narrowed to what was the intention of the parties as gathered from the instrument itself." See also *Ramasami Sastrigal* v. *Samiappana Nayakan* (1). In *Bapirazu* v. *Kamarazu* no doubt the question now raised by the Vakil for the appellant was not in terms put forward or decided. In *Thumbusawmy's case* Mr. *Mayne* suggested this very question. But the Privy Council did not give any weight to it, and held that in the contract in *Thumbuswamy's case* there was an express provision for accounting; that in this respect, the latter case was not governed by the decision in *Pattabhiramier's case.*

(1) 4 M. 179.

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However, the Privy Council in *Pattabhiramier's case* considered the effect of the Regulation of 1802 with reference to the contract in that case, which is in substance the same as the contract in this case. In the judgment it is stated, "The transaction was one of usufructuary mortgage: this usufruct to be taken in lieu of interest; and the first question is, was there any rule of law to prevent the Court from giving effect to such a contract according to the intent and meaning of the parties plainly expressed by its language?" Referring to the Regulation of 1802 as having been introduced into Madras from Regulation XV of Bengal, 1793, the Court say: "Both these Regulations were passed with the object of fixing the rate of interest and preventing the taking of interest in excess of it. The clauses (8 and 9, Madras; 9 and 10 Bengal) in question affected only that part of the contract now under [189] consideration, which related to the usufruct of the property. As to that, they have made it necessary, contrary to the intention of the parties, to take, upon a redemption an account of the rents and profits as between *mortgagor and mortgagee in possession*, compelling the latter to set what he might have received in excess of legal interest against principal; but they have neither *extended the time for redemption, nor imposed on the mortgagee the obligation of taking any judicial or other proceeding* in order to make his title absolute." The Court refers to a case in Bengal, where the contract, similar to that in *Pattabhiramier's* case, was made, subject to the Regulations of 1793 and 1798, similar to the clauses 8 and 9 of Madras Regulation, 1802. There the mortgagor sought to redeem after the period of redemption had expired, but the suit was dismissed on the ground that the sale had become absolute and was not therefore affected by the provisions of the Regulations of 1793 and 1798. The agreement of the parties to the contract, as specified in the contract itself, is the test whether the instrument of contract is to be treated as a continuing mortgage liable to be redeemed or an absolute sale.

The argument for the appellant that the mortgagor had, up to the day of the expiry of the period for redemption, to pay or tender the amount due and file a suit to require an account, does not meet the case. No doubt within the period of redemption the mortgagor had that right, and if he exercised it within the limited period, he would have had the benefit of the Regulations, and limited the mortgagee to 12 per cent. per annum interest. But, as decided by the Privy Council, the Regulation did not extend the time for redemption nor impose on the mortgagee any obligation to take any proceedings to foreclose or any other proceeding to make his title absolute. It is clear that the obligation to account imposed by the Regulation was not considered by the Privy Council to affect the absolute right of the mortgagee when the mortgagor failed to redeem within the limited period. There was no accountability on the mortgagee after the limited period of redemption expired. Therefore the arguments founded on the existence of the mortgagee's obligation to account fails. The contention that it was not open to the parties to waive the benefit of the Regulation is answered by the decision that the Regulation did not make the contract for absolute sale, without account, illegal. The Regulation [190] enabled the mortgagor, contrary to his contract, to have account of profits taken and to limit the mortgagee to 12 per cent. in the case of ordinary mortgage contracts, and also in the case of mortgages by conditional sale where payment was made within the period limited; but did not provide that account should be taken after a mortgage by conditional sale became, under the contract, absolute by the failure of the mortgagor

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to redeem within the limited period. The Regulation provided for cases where the relation of mortgagor and mortgagee was continuing either in fact or law and not for cases where that relation legally ceased. In Bengal the Regulation XVII of 1806 was introduced to meet such cases, but there was no such Regulation passed for Madras. The appellant's Vakil alleged that the profits of the land were 300 rupees per annum, but there was no proof given of the fact. If such were the fact, no doubt the interest received would have exceeded 12 per cent. per annum. But that fact would be immaterial after the plaintiff allowed the limited period to elapse without redeeming, unless he alleged in his plaint that the real object of the contract was to evade the usury laws. There is no such allegation in the plaint, and the mortgagee and defendant No. 2 claiming under him have been in possession for upwards of forty years under the contract of 1832, which "executed itself" in 1840.

It was objected that the decisions do not apply as the mortgagors are Muhammadans. But in *Pattabhiramier's case* the Court states that such contracts are recognized and enforced between Muhammadans, and the case of *Surreefoon-nissa* v. *Shaik Enayet Hossein*(1) and other cases referred to by the Privy Council were between Muhammadans. I am of opinion—

(1) That the Regulation XXXIV of 1802 applied to Muhammadans.

(2) That the question whether interest exceeding 12 per cent., could be allowed out of the produce of the land does not arise as it was competent to the mortgagor and mortgagee to enter into the contract of 1832, whereby the transaction became an absolute sale on the admitted failure of the mortgagor to redeem at the expiration of the limited time.

[191] (3) The mortgage not having been redeemed within the limited time, the contract of 1832 executed itself, and the mortgagee was not after that time bound to render any account to the mortgagor, nor could the mortgagor after that enforce such account or redemption.

This appeal is dismissed with costs.

BRANDT, J.—I concur in thinking that the appeal fails. It was argued that the mortgage by way of conditional sale is still redeemable by reason of the liability of the mortgagee to account; that no such mortgage by way of conditional sale can become absolute so long as there is accountability between the mortgagor and mortgagee. Admitting the last proposition for the sake of argument, it appears to me that the case for the appellant is disposed of by the fact that the liability to account continued only so long as the relationship of mortgagor and mortgagee subsisted, and that that relationship ceased when the period limited by the contract between the parties expired; the contract then executed itself and the sale became absolute, "without any further act of the parties *or accountability between them.*"

It was, in my opinion, the clear intention of the parties in this case that, on default made as contemplated, the land should become the absolute property of the creditor, and that, on that event happening, as it did, all privity between the parties ceased.

Even if the appellant is not directly concluded by the decisions of the Privy Council quoted at length by my learned colleague, there is certainly, as it appears to me, nothing in those decisions to support the contention of the Vakil for the appellant, and no authority, and no principle

(1) 5 W.R. 88.

of law on which it can be held that the appellant is, in the year 1883, in a position to call for an account in respect of, and to redeem, a mortgage by way of conditional sale which became absolute in 1840, by reason of the existence, at the time when the contract was entered into, of a Regulation passed to prevent the taking of interest in excess of a rate then fixed by law, under which Regulation, had the mortgagee offered to redeem within the time limited under the terms of his contract, the mortgagee would have had to account for all profits received in excess of profits equivalent to the rate of interest then allowed by law.

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[192] I also entirely concur in thinking that there is nothing in the argument that the decisions quoted are not applicable by reason of the parties to the agreement of 1832 having been Muhammadans.

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8 M. 192.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

SESHADRI (*First Defendant*), *Appellant v.* KRISHNAN AND OTHERS (*Plaintiffs*), *Respondents.** [4th September and 17th November, 1884].

Civil Procedure Code, Sections 544, 622—Appeal against appellate decree by party to suit who did not appeal against original decree.

S having mortgaged land to K as security for a debt, sold it to V, who undertook to pay the debt. K, alleging that C had undertaken either to make V pay the debt or to execute a mortgage of his own land to secure its repayment, and that V had dispossessed him, sued S, V and C to recover the debt by sale of the land mortgaged, mesne profits from V, and costs from S, V and C.

The District Munsif decreed payment against S; mesne profits, and in default of payment by S, a sale of the land against V; and costs against S, V and C.

V and C appealed against this decree.

The Subordinate Judge found that the debt had been paid and held that, even if the debt had not been paid, K had no cause of action against V or S, but, if at all, against C, and dismissed the suit as against V. The Subordinate Judge also held that he had no jurisdiction to interfere with the decree against S, and saw no reason to interfere with the decree against C.

S appealed against this decree.

Held, that even if S was not entitled to appeal in order to have the decree against him set aside, the error of the Subordinate Judge could be corrected under Section 622 of the Code of Civil Procedure by a direction to exercise the discretionary power given by Section 544 of the said Code.

[Appr., 30 M. 470 = 17 M.L.J. 119 = 2 M.L.T. 104; R., 11 M. 220 (229) (F.B.); D., 17 M. 265.]

THIS was an appeal from the decree of P. Tirumal Rau, Acting Subordinate Judge of Tinnevelly, dated 21st August 1883, modifying the decree of T. Adinarayana Chetty, District Munsif of Ambasamudrám, in suit 138 of 1881.

The facts and arguments appear from the judgment of the Court (TURNER, C. J., and MUTTUSAMI AYYAR, J.).

Bhashyam Ayyangar, for appellant.

Mr. *Wedderburn*, for respondents.

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* Second Appeal 1047 of 1883.

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JUDGMENT.

[193] Seshadri Ayyangar mortgaged ·77 of an acre of land to the father of the plaintiffs, Krishna Chetti and his two brothers (minors), and borrowed from him Rs. 750 on the 4th of April 1877. On the 11th August 1877, he sold the land to Vyravan Pandaram, defendant No. 2, subject to the mortgage, which defendant No. 2 undertook to discharge.

The plaintiffs alleged that Chinna Ramanujayyangar, defendant No. 3, who was indebted to them in a sum of Rs. 350, undertook either to cause defendant No. 2 to pay the mortgage amount or himself to execute a deed mortgaging his own lands for Rs. 1,100, to be made up of the mortgage debt contracted by defendant No. 1, and of his own mortgage debt.

The defendant No. 2 pleaded that the mortgage debt in suit had been discharged by payment.

The defendant No. 3 denied the alleged agreement on his part, and asserted that his own mortgage debt had also been discharged.

Defendant No. 1, while admitting the mortgage, contended that he had been unnecessarily made a party to the suit.

The Court of First Instance accepted the evidence adduced by the plaintiffs to prove that the defendant No. 3 had undertaken to execute a mortgage deed for the combined amounts of the mortgage debt due by him and the mortgage debt due by defendant No. 1, and found that the allegation as to discharge of the mortgage debt contracted by defendant No. 1 was disproved; it therefore passed a decree for the recovery of the amount from defendant No. 1, and, in default, from the mortgaged property, and charged all the defendants with the costs of the suit.

The defendants Nos. 2 and 3 appealed from the decree.

The defendant No. 1 did not appeal.

The Subordinate Judge found that the mortgage debt was discharged by payment, and, on this ground, he reversed the decree against defendant No. 2.

It is apparent that this ground was a ground common to all the defendants, and that it was incongruous that the claim should be dismissed against defendant No. 2 on the ground that the mortgage was satisfied, and the decree of the Munsif left subsisting against defendant No. 1 on the ground that the mortgage had not been discharged. It was to prevent such incongruities that the [194] Procedure Code conferred upon an Appellate Court, when an appeal is presented against the whole decree, a power to interfere as well on behalf of parties who had not appealed as on behalf of parties who had appealed.

The Subordinate Judge appears to have misapprehended the power he possessed, for he intimates in his judgment that he had no jurisdiction to interfere with the judgment of the Munsif so far as it related to defendant No. 1.

Another incongruity appears in the face of the judgment of the Subordinate Judge in that he expressed himself unable to see any reason to interfere with the Munsif's order directing defendant No. 3 to bear his costs. It is obvious that if the judgment of the Subordinate Judge is correct as to the discharge of the first mortgage, there were no grounds why a suit should have been brought against defendant No. 3, and he should therefore, in accordance with the ordinary practice, have recovered his costs from the plaintiffs.

The defendant No. 1 has presented a second appeal to this Court, and it is objected that inasmuch as he did not appeal from the decree of the

Munsif to the Appellate Court, he has no *locus standi* to maintain the appeal.

The learned pleader for the appellant contends that a right of appeal accrued to his client because the Subordinate Judge neglected to discharge the duty cast upon him by the Code. He argues that in conferring the power upon an Appellate Court to interfere on behalf of a party to the suit who was not a party to the appeal, it was the intention of the Legislature that this power should be exercised in every case unless there were substantial reasons for not doing so.

Without going so far as to rule that in every case an Appellate Court is bound to interfere, we admit that the case before us is one in which it could hardly have been justified in refraining from interference if its finding on the issue as to the discharge of the mortgage is correct. The appellant, so long as the judgment of the Court of First Instance subsisted, may well have been unconcerned to present an appeal from it, for he had a right to call upon defendant No. 2 to discharge the debt if he was compelled to do so; while the mortgaged property in the hands of defendant No. 2 was still liable for the satisfaction of the mortgage, and it [195] might reasonably be presumed that if the property was adequate, the decree-holder would take the most assured way of realizing his decree by proceeding against it. When, however, the Appellate Court declared the property no longer subject to the mortgage, the position of the appellant was materially altered.

We have felt some difficulty in holding that a person who thus abstains from presenting an appeal can afterwards present a second appeal with a view of specifically raising the question which he should have raised by an appeal; and had the Subordinate Judge apprehended the power he possessed, and reasonably exercised it, we should have held that there were no grounds for allowing the appellant to maintain a second appeal. But inasmuch as the Subordinate Judge believed that he was not allowed to interfere on behalf of the appellant, we conceive that the appellant may be permitted to insist in this Court on the Subordinate Judge's error and to require that the Subordinate Judge shall be called upon to exercise the power which has been conferred upon him. If the appellant has no right of second appeal, the error which he brings to the Court's notice is one which we may at least correct under Section 622, and, in order that justice may be done, we shall direct the Appellate Court to consider whether, in the reasonable exercise of its powers under Section 544, the decree should not be set aside as against this defendant, and, if it comes to the conclusion that it ought to exercise the power, we shall direct it to give effect to that conclusion. It will, of course, be understood that the respondents must be allowed to appear and show cause, if they can do so, why the power should not be exercised in the appellant's favour.

We shall direct each party to bear his or their own costs of this appeal.

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APPELLATE CIVIL.

8 M. 196 = 9 Ind. Jur. 70.

8 M. 196 = 9 Ind. Jur. 70.

[196] APPELLATE CIVIL.

Before Sir Charles A. Turner Kt., Chief Justice, and Mr. Justice Hutchins.

BASKARASAMI AND OTHERS (*Defendants*), *Appellants. v.* SIVASAMI (*Plaintiff*), *Respondent.** [4th and 20th November, 1884.]

Rent Recovery Act, Section 2—Tenant—Lessee of zamindar—Limitation.

In 1869 a village in the zamindari of R was granted by the zamindar to S at a favourable rent, in consideration of S renouncing a claim to the zamindari. The village was not separately assessed and divided off from the zamindari. The rent having fallen into arrears, the village was sold in 1875 under the provisions of the Rent Recovery Act and purchased at the sale by the Agent of the Court of Wards on behalf of the defendants, minor sons of the deceased zamindar.

In a suit brought by S in 1883, to recover the village:

Held, that the sale was binding on S and that the suit was barred by limitation.

[Overruled, 27 M. 465 (470) (**F.B.**); **R.**, 21 M. 116 (119) (**F.B.**).**]**

THE plaintiff, Sivasami Sethupati, sued the defendants, Baskarasami and Dinkarasami, minor sons of Mutturamalinga Sethupati, late Zamindar of Ramnad, represented by the Collector of Madura, as Agent of the Court of Wards, to recover the village of Káruttanendal and mesne profits for three years prior to suit.

By an agreement made on the 11th July 1868 between plaintiff and the father of the defendants, the father of the defendants promised, in consideration of a promise by plaintiff to renounce his claim to the zamindari, to grant to plaintiff Rs. 4,000 for a house, a monthly allowance of Rs. 50, and the village now sued for, upon which the kist was to be fixed and which was to be registered in plaintiff's name.

By a subsequent agreement, dated 25th August 1869, the plaintiff, in consideration that the village had been granted to him at a low kist, at his request, agreed that the village should not be registered in his name and separated from the zamindari, and also renounced his claim to the monthly allowance. The kist of the village was fixed at Rs. 350.

[197] In 1871, plaintiff (repudiating these agreements) sued the father of the defendants to recover the zamindari, and his claim was eventually rejected by the Privy Council.

In 1875, while the litigation was pending, a notice was issued by the Assistant Collector on 7th May, under Section 39 of Act VIII of 1865 (Madras), to the plaintiff to pay arrears of rent due on the village.

The arrears were not paid and the village was sold under the provisions of the said Act and purchased by the Agent to the Court of Wards (the Collector) on behalf of the defendants.

The plaintiff charged that the sale was illegal on the ground that the notice was not duly served upon him.

The defendants pleaded that the sale was valid and that the suit was barred by limitation.

The Subordinate Judge of Madura, A. Mangalam Pillai, found that there was no proof that plaintiff was aware of the sale and held that he was not bound by it, and, therefore, held that the suit

* Appeal 63 of 1884.

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was not barred by limitation. Upon the other principal issues in the suit, *viz.*,

ii. Whether the defendants were competent to institute proceedings under the Rent Recovery Act against the plaintiff.

iv. Whether the sale was valid.

The judgment of the Subordinate Court was as follows :—

" The second and fourth issues are the material issues in the suit. They concern the question whether the defendants' proceedings which eventuated in the sale of the property are legalized by the Rent Recovery Act under which those proceedings began and ended. This involves the determination of the point whether the relationship between plaintiff and defendant is that of a landlord and tenant as defined by that Act. This relation has been clearly expounded by the highest tribunal. I refer to the decision of the Privy Council in *Ramasami* v. *Baskarasami* (1). The relation of a landlord and tenant has been explained to be the relation existing in respect of the cultivation of land independently of the exchange of patta and muchalka, and giving the right to both the landlord and tenant to demand written agreements of each other. [198] These written agreements are called pattahs and muchalkas. These documents are liberated by the Registration Act from the obligation of registration and there are no other documents defined or described in the Rent Recovery Act as pattas and muchalkas.

" Now, it cannot be controverted that, under the Rent Recovery Act, Section 7, no proceedings can be initiated for recovery of rent in the absence of exchange of patta and muchalka. It is urged that the documents under which plaintiff obtained the village supply the place of patta and muchalka. These documents purport to embody the stipulations of a perpetual lease granted to plaintiff for a favourable rent, and are therefore documents much akin to the document considered by their Lordships of the Privy Council in the decision above cited and pronounced by their Lordships to be other than a patta. They have also decided in the case under reference that there is no relation of landlord and tenant such as is contemplated by the Rent Recovery Act in reference to the execution of pattas and muchalkas, between persons who are privy to a lease made for money lent and received. This decision is applicable to the present case for the simple reason that here we have a lease granted in consideration of a renunciation of certain rights which the lessee laid claim to against the lessor. So that, for two reasons, *viz.*, that the relation of landlord and tenant does not subsist between the plaintiff and defendants, and that assuming such relation to exist, there has been no exchange of patta and muchalka between them, the entire proceedings that eventuated in the sale of the plaint-village are illegal *ab initio*.

" About the service of notice it appears from the evidence that it was stuck upon a tamarind tree near the Pilliar's (Belly-God's) temple in the plaint-village, because plaintiff was not found in his own residence at Menati—see exhibit I. There was therefore proper service of the notice under Section 39 of the Rent Recovery Act."

The plaintiff obtained a decree for possession of the village and for Rs. 397-0-8 mesne profits.

The defendants appealed to the High Court.

The Government Pleader (Mr. *H. H. Shephard*), for appellants.

Bhashyam Ayyangar, for respondent.

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(1) 2 M. 67.

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The Court (TURNER, C.J., and HUTCHINS, J.) delivered the following

JUDGMENTS.

[199] TURNER, C. J.—Looking to the course of legislation in this Presidency, it was held in *Subbaraya* v. *Srinivasa* (1) by Mr. Justice Muttusami and me that the word 'tenant' in Act VIII of 1865 was intended to include a farmer or lessee, and that such tenants have as against the superior landlords and the landlords against such tenants under the Act the same summary remedies as they respectively enjoyed under the Regulation. In this view the sale was valid, if the respondent was a lessee.

It is impossible to hold that he was not a lessee at the time of the sale. It had been originally intended that he should hold the estate as a sub-division of the zamindari with a separate assessment payable directly to Government; but it was subsequently arranged that he should hold it at a favourable rent under the zamindar, so that the 50 rupees' allowance which he was to receive from the general revenues of the zamindari should be permanently secured to him.

Most unwisely he thought fit to repudiate the arrangement, and the zamindar, as he was entitled to do, took advantage of the default to bring the lease to sale.

The suit is, in my judgment, barred by limitation and must be dismissed with costs. I at the same time express a hope that the minor zamindar when he comes of age may waive the default of his kinsman and restore the village to him.

HUTCHINS, J.—The respondent would certainly come within the definition of a 'tenant' given in Section 2 of the Act; and though the subsequent sections, dealing with the two classes of landholders and the tenants under them, respectively, raise some doubt whether a lessee of a zamindar is a tenant intended to be affected by the Act, I find the point has already been considered by this Court, and I am content to accept the conclusion then arrived at.

I, therefore, agree that the suit should be dismissed with costs.

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8 M. 200.

[200] APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

MUTHA (*Third defendant*), *Appellant v.* SAMI (*Plaintiff*), *Respondent.** [20th November, 1884.]

Pledge of mortgage bond—Fraudulent sale by mortgagor—Suit to enforce mortgage against bona fide *purchaser.*

A prior encumbrancer will not be postponed to a subsequent encumbrancer unless he has been guilty of gross negligence.

A mortgaged land to B. B having bought certain land from C pledged his mortgage deed to C to secure the unpaid purchase money. C gave the bond to A who was his brother-in-law.

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* Second Appeal 390 of 1884.

(1) 7 M. 580.

A representing to D that the mortgage was redeemed, sold the land to him giving him the bond as a title-deed.

In a suit by B against D to recover the mortgage amount by sale of the land.

Held, that D, even although *bona fide* purchaser, could not resist the claim.

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8 M. 200.

[R., 12 M. 424.]

THE plaintiff, Sami Nayakan, sued to recover Rs. 1,023-2-5* principal and interest due on two mortgage bonds for Rs. 380 and Rs. 95, respectively, executed by Yellappa Nayakan (defendant No. 1) in 1876 and 1877.

Plaintiff alleged that on the 7th April 1880 he purchased certain land from Kandasami Nayakan (defendant No. 2, brother-in-law of defendant No. 1) and handed over the said mortgage bonds to him as security for the unpaid purchase money and that Yellappa Nayakan and Kandasami Nayakan had fraudulently sold the land mortgaged to Mutha Nayakan (defendant No. 3). Defendant No. 1 pleaded that he had discharged the first and had not executed the second bond. Defendant No. 2 denied having received the bonds. Defendant No. 3 alleged that on the 15th June 1881 he purchased the land mortgaged to plaintiff for Rs. 380 from defendant No. 1 (who handed to him plaintiff's mortgage bond for Rs. 380 alleging that it was discharged) and pleaded that he was a *bond fide* purchaser.

The District Munsif of Coimbatore, T. Ramasami Ayyangar, [201] found that defendant No. 1 executed both the bonds; that defendant No. 2 received both bonds as alleged by the plaintiff, and that defendant No. 3 had conspired with defendants Nos. 1 and 2 to defraud the plaintiff, and held that, even if defendant No. 3 was a *bona fide* purchaser, plaintiff's mortgage being prior was not affected by the subsequent sale, and decreed for plaintiff.

On appeal by the defendants the District Judge of Coimbatore (H. Wigram) found that there was no evidence of any fraud on the part of defendant No. 3, but held that as defendant No. 2 had misappropriated the bond for Rs. 380 entrusted to him by plaintiff, defendant No. 1 could give no title to defendant No. 3.

Defendant No. 3 appealed to the High Court on the grounds, *inter alia*, that the plaintiff was guilty of gross negligence in entrusting the bond to defendant No. 2 and that his claim must yield to that of an innocent purchaser induced to purchase by such negligence.

Krishna Ayyar and *Krishna Ayyangar*, for appellant.

Balaji Rau, for respondent.

The Court (TURNER, C.J., and HUTCHINS, J.) delivered the following

JUDGMENT.

By a registered instrument dated on the 26th March 1876 the defendant No. 1 hypothecated his lands in Vilankurichi to the respondent. In April 1880 the respondent deposited his mortgage deed with defendant No. 2 by way of equitable mortgage to secure the unpaid balance of the purchase money in respect of a sale of land made to him by the defendant No. 2 and one Appu Nayak. The defendant No. 2, who is the brother-in-law of defendant No. 1, gave the plaintiff's mortgage deed to the defendant No. 1, who sold the mortgaged property to the appellant and handed to him the mortgage deed. The appellant pleaded that he purchased in good faith believing that the mortgage had been redeemed.

The mortgage deed is not endorsed as satisfied, but, assuming that the appellant purchased in the *bona fide* belief that it had been satisfied,

* [Another reading is "Rs. 1,083-2-5."]

1884 Nov. 20. — Appellate Civil. — 8 M. 200.

we are not prepared to hold that the respondent has lost his priority. In the cases in which it has been held that a mortgagee is postponed to a subsequent purchaser in good faith because he has parted with his title deeds, something more has been shown than the mere parting with the deeds.

[202] Although the English Courts in the later cases—*Hunter* v. *Walters* (1), *Briggs* v. *Jones* (2)—have held that if the inference of fraud be rebutted, the negligence may nevertheless be so gross as to create an equity in favour of a *bona fide* purchaser, slight negligence has not been considered sufficient to deprive an encumbrancer of his right.

The rule of equity is that a prior encumbrancer would not be postponed to a subsequent encumbrancer unless he has been guilty of gross negligence amounting to fraud in its qualified legal sense per Wood, V.C., in *Dowle* v. *Saunders* (3), *Roberts* v. *Croft* (4), *Somasundara Tambiran* v. *Sakkarai Pattan* (5). Here it cannot be said that the respondent has been guilty of any negligence, and the only ground on which it could be held that he has lost his priority would be that he had, to some extent, put it in the power of the equitable mortgagee to commit a fraud.

This is what every one does who, in the course of business or for convenience, entrusts the possession of his property to another; nevertheless, where the transferee or depositary wrongfully assúmes to create a larger title in a third party than he himself possesses the law ordinarily refuses to give effect to the transaction as against the true owner.

The appeal fails and must be dismissed with costs.

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8 M. 202 = 1 Weir 664.

APPELLATE CRIMINAL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

QUEEN-EMPRESS *v.* KHASIM SAHIB.* [19th December, 1884.]

Arms Act, Section 19—Unlicensed possession of gunpowder used for making crackers.

The possession of gunpowder without a license, whether intended for the manufacture of fireworks or not, is an offence under Section 19 of the Indian Arms Act, 1878. *The Queen* v. *Suppi* (I.L.R., 5 Mad. 159), distinguished.

[203] THIS was an appeal under Section 417 of the Code of Criminal Procedure from the judgment of W. F. Grahame, Sessions Judge of Cuddapah, dated 18th August 1884, reversing on appeal a conviction under Section 19 of the Indian Arms Act, 1878, by the Sub-divisional First-class Magistrate of Cuddapah.

The facts of the case appear from the judgment of the Sessions Court, which was as follows:—

"The appellant was convicted by the Deputy Magistrate under Section 19 of the Arms Act of a breach of the law in having in his possession ten seers of gunpowder and in having sold fireworks to the manager of a temple, and was sentenced to two months' rigorous imprisonment which he has undergone. In the face of the finding recorded in the *Queen* v. *Suppi* (6) that conviction is wrong. The High Court have ruled in that

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* Criminal Appeal 412 of 1884.

(1) L.R. 7 Ch. App. 75. (2) L.R. 10 Eq. 92. (3) 34 L.J. Eq. 87.
(4) 27 L.J. Eq. 220. (5) 4 M.H.C.R. 369. (6) 5 M. 159.

1884 DEC. 19. — APPELLATE CRIMINAL. — 8 M. 202 = 1 Weir 664.

finding that 'the manufacture or possession of fireworks without a license is not contrary to the Arms Act,' and the short heading to the report is 'Gunpowder and rockets for fireworks not ammunition.' If gunpowder for fireworks be not ammunition, its possession without a license is not a contravention of the Arms Act. The finding and conviction were therefore wrong and are hereby reversed. As the defendant has suffered his imprisonment and been released, I can do no more than express regret that the ruling of the High Court was not brought to the notice of the Deputy Magistrate, and suggest that it be published in the District Gazette."

The Government Pleader (Mr. *Shephard*) in support of the appeal.

Prisoner was not represented.

JUDGMENT.

The judgment of the Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.) was delivered by

TURNER, C.J.—In this case Khasim Sahib received from the trustees of a temple an advance of Rs. 40 to get ready some fireworks for display during a procession of the idol. He accordingly procured some powder from a license-holder and made up the fireworks and supplied them to the temple. The attention of the authorities having been aroused by the display of fireworks, inquiry was made, and it was discovered that Khasim Sahib was the manufacturer. As he had not obtained a license under the Arms Act, he was prosecuted for the offence of keeping ammunition and was **[204]** sentenced to undergo rigorous imprisonment for two months. He appealed to the Sessions Judge There was considerable delay in the disposal of the appeal, and the sentence had expired when the Sessions Judge pronounced the conviction illegal, inferring that it was so from a ruling of this Court in the *Queen* v. *Suppi* (1). The term "ammunition" is defined by the Arms Act as meaning, among other things, any explosive material. Read in combination with the terms "Arms and military stores," it is not unreasonable to infer that the intention of the Act was to deal with an explosive material capable of being used for purposes of warfare. No doubt powder may be so used, and a person who possesses a quantity of powder without a license is, in our judgment, liable to conviction, although he may intend to employ the powder in the manufacture of fireworks or other harmless purpose. What the Court ruled, whether rightly or wrongly, in the case referred to was that, if the powder when it came to the possession of a person charged under the Act had been actually made up into fireworks, an offence would not be committed. It would seem unreasonable that a child found in the possession of a cracker without a license should be taken to have committed an offence under the Act. The provision of the law has no doubt been wisely devised for the preservation of the peace and tranquillity and for the protection of the public from danger, and we are bound to follow the terms of the law when those terms are clear; but it is a law which should be applied with considerable discretion, and seeing that the object which the accused had in the possession of the powder was an innocent one, and that his offence in reality consisted in his omission to take out a license, we are bound to say, we think, he would have been better punished with a fine rather than with imprisonment. We must, however, observe that the Magistrate was aware that the accused had previously held a license, that he had failed to take one out for the current year, and had been warned of his default.

(1) 5 M. 159.

1884 DEC. 19. — APPELLATE CRIMINAL. — 8 M. 202 = 1 Weir 664.

We set aside the order of the Judge acquitting the accused, and we confirm the conviction. No further orders are necessary as the imprisonment to which the accused had been sentenced has been already undergone.

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8 M. 205.

[205] ORIGINAL CIVIL.

Before Mr. Justice Brandt.

EVERET *v.* FRERE. [30th January, 1885.]

Civil Procedure Code, Section 648—*Residence*—*Arrest before judgment.*

Where an officer proceeding from Burma to England on leave resided a few days in Madras on the way :

Held, that such residence was sufficient, for the purpose of Section 648 of the Code of Civil Procedure, to render him liable to arrest before judgment.

[R., 14 B. 541 (547); 29 M. 239 (276) = 16 M.L.J. 238 = 1 M.L.T. 71 ; 1 L.B.R. 222 (224).]

THIS was a motion before Brandt, J., to order execution of a warrant of arrest before judgment, issued under Section 478 of the Code of Civil Procedure at the instance of the plaintiff in Small Cause Suit 13 of 1885 in the Court of the Subordinate Judge of the Nilgiris, and sent to the High Court for execution under Section 648 of the said Code.

Mr. *Norton*, for plaintiff, refered to Sections 17, 37, 380 of the Code of Civil Procedure, and, in addition to the cases cited in the judgment, to *Ramchandra Sakharam* v. *Keshav Durgaji* (1), and to Morton's decisions (Bengal), pages 148, 149, 160, and contended further that, the functions of the Court under Section 648 being purely ministerial, the Court had no discretion but was bound to execute the warrant.

Defendant was not represented.

The facts appear from the judgment.

JUDGMENT.

BRANDT, J.—I am of opinion that the arrest of the defendant in Civil Suit 13 of 1885 on the file of the Court of the Subordinate Judge, Nilgiris, on the Small Cause side, upon the warrant issued by that Court under Section 478 of the Code of Civil Procedure for arrest before judgment, and sent to this Court under Section 648, must be and it is ordered.

The facts of this case, so far as the Court is informed, are, that **[206]** the plaintiff has filed a suit in the Ootacamund Court of Small Causes against the defendant, Captain Frere, an Officer of Her Majesty's 21st Fusiliers, for rent ; that the defendant was at the time when the suit was instituted with his regiment at Thayetmyo in British Burma, and that he is now on his way to England from Burma on leave, and is, and has been for some days, living within the limits of the ordinary civil jurisdiction of this Court. And the papers sent to this Court show that the Judge of the Court of Small Causes, Ootacamund, has satisfied himself that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant. Upon this the said Subordinate Judge has issued a warrant to arrest the defendant and bring him before the said Court to show cause why he should not furnish security for his appearance.

(1) 6 B. 100.

1885 JAN. 30. ORIGINAL CIVIL. 8 M. 205.

The question as to which I entertained doubt was as to whether the defendant can be properly held to " reside " at the present time within the jurisdiction of this Court for the purposes of section 648.

The word is used in several Sections of the Act, noticeably in Section 17, Section 380, and that now under consideration.

In Section 17 the words are " actually and voluntarily resides ; " in Section 380 the words are " is or are residing out of British India." In the former Act the word used was " dwell." As observed by the learned Chief Justice of the Bombay High Court in *Mahomed Shuffli* v. *Laldin Abdula* (1) little or no distinction can be drawn between the two words and the meaning implied in them. If any distinction can be drawn it would appear that "dwell" has a more extended signification than "reside," *Emritloll* v. *Kidd* (2). It has further been pointed out, and with reason, that regard must be had to the meaning to be assigned to the word in the connection in which it occurs and the intent of the special provision of the Code in which it is used : and the absence in Section 648 of the words " actually and voluntarily " used in Section 17 is not without significance. Bare " residence " then is clearly sufficient under Section 648. In the case of *Morris* v. *Baumgarten* (3) it was held that an officer who was in Calcutta **[207]** for a month only for the purpose of attending race meetings, having no permanent residence elsewhere " dwelt " in Calcutta for the purposes of the Act. The case of *Alexander* v. *Jones* (4) cited by the learned Counsel for the plaintiff is a very strong case. There it was held that a gentleman who had at the time no permanent residence, except that he was staying with a brother-in-law as a guest, must be taken to dwell at the place where he was then abiding, " though such an abode might not constitute a dwelling if he had retained a permanent residence." In the case before me there is nothing to show that the defendant has at the present moment any permanent residence, and I must hold that for the purpose of this application he is at present " residing " within the limits of the ordinary civil jurisdiction of this Court.

Solicitor for plaintiff : *Wilson.*

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8 M. 207.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

JANAKI (*Petitioner*) v. (KESAVALU *Respondent.*)* [28th November, 1884].

Limitation Act, Schedule II, Article 178—*Application for certificate to collect debts of deceased person.*

Article 178 of Schedule II of the Indian Limitation Act, 1877, does not affect an application under Act XXVII of 1860 for a certificate to collect debts due to the estate of a deceased person.

[F., 17 M. 379 (381) ; R., 31 M. 24=17 M.L.J. 441 (443)=3 M.L.T. 19 ; 11 C.P.L.R. 141 (142)]

THIS was an application under Section 622 of the Code of Civil Procedure praying the High Court to set aside an order of J. H. Nelson, District Judge of Chingleput, dated 11th January 1884, rejecting a petition by Janaki

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* Civil Revision Petition 168 of 1884.

(1) 3 B. 227. (2) 2 Hyde 117. (3) Coryton 152. (4) L.R. 1 Ex. 133

1884 Nov. 28. — Appellate Civil. — 8 M. 207.

Ammal for a certificate under Act XXVII of 1860 to enable her to collect a debt of Rs. 800 due on a mortgage bond executed to her sister Mangammal who died at Madras in 1875.

The application was opposed by Kesavalu Nayudu, who claimed [208] to be the sole heir of the deceased, on the ground that it was barred by lapse of time.

The District Judge held that, as the application was made after three years from the death of Mangammal, it was barred by Article 178 of Schedule II of the Indian Limitation Act, 1877.

Visvanatha Ayyar, for petitioner.

Respondent was not represented.

It was contended for petitioner that Article 178 of Schedule II of the Limitation Act did not apply to the case.

JUDGMENT.

The judgment of the Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.) was delivered by :—

TURNER, C.J.—It is argued that no other applications except in *suits* are dealt with by the Act. If we were to hold that Article 178 applies to all applications for which no period of limitation is provided, it would lead to most inconvenient results. Such a limitation could not have been intended to apply to an application for probate, an application under the Religious Endowments Act, an application for the appointment of new trustees, &c.

Hence we feel ourselves at liberty to follow the rulings in *In re Ishan Chunder Roy* (1) and *Bai Manekbai* v. *Manekji Kavasji* (2) at least so far as to hold that Article 178 does not apply to applications for certificates to collect debts. The order of the Judge is set aside and the case remanded that he may pass a fresh order. Costs will abide and follow the result.

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8 M. 208.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

VIRARAGAVAMMA AND OTHERS (*Defendants*), *Appellants*, v. SAMUDRALA (*Plaintiff*), *Respondent*.* [6th January, 1885.]

Hindu law—Debt binding on family—Suit against one of two undivided brothers—Personal decree—Attachment of family property—Effect of decree.

The creditor of a joint Hindu family, consisting of two brothers, sued the elder brother only (the younger being a minor) to recover a debt binding on both [209] brothers, and, having obtained a decree for the payment of the debt, attached the family property.

In a suit by the younger brother to set aside the attachment *quoad* his share in the property attached :

Held, that, inasmuch as the decree was not passed against the elder brother as manager of the family, the younger brother's suit must prevail.

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* Appeal 94 of 1884.

(1) 6 C. 707. (2) 7 B. 213.

Bissessur Lall Sahoo v. *Maharajah Luchmessur Singh* (L.R., 6 I.A. 233), distinguished. 1885 JAN. 6.

[Appr., 10 M. 316 (318); R., 12 M. 325 (329); 35 M. 685 (688) = 10 Ind. Cas. 874 (877) = 21 M.L.J. 508 = (1911) 1 M.W.N. 442 (446).]

APPELLATE CIVIL.

8 M. 208.

SUIT No. 6 of 1882 in the District Court of Kistna was brought by Pillarisetti Samudrala Nayudu to establish his right to a half share (1) in certain lands, (2) in a lease of certain villages, and (3) in certain warehouses and house-sites in the town of Masulipatam. The plaintiff alleged that the defendant, Chandu Virasami Nayudu, brought suit 10 of 1875 on the file of the late Subordinate Court against Venkatachalam, the elder brother of plaintiff (who was then a minor), and obtained a personal decree against him, and that, in execution of this decree, the property mentioned in the plaint was attached. Plaintiff prayed for a decree establishing his right and setting aside the attachment in suit No. 10 of 1875. The defendant having died, his widow, Viraragavamma, defended the suit and pleaded, *inter alia*, that the debt for which the decree was obtained in suit 10 of 1875 was originally contracted by the plaintiff's father, and Venkatachalam merely renewed the bond executed by the father, and that, as Venkatachalam was the manager of the family, the whole family property was liable to be sold under that decree.

Upon this part of the case the judgment of the District Judge, W. J. H. LeFanu, was as follows:—

"I now come to the real question in issue in this case; I have no doubt whatever that the decree in suit No. 10 of 1875 was intended to be passed against the plaintiff's brother in his capacity of managing member of the family. The Subordinate Judge does not say so, and I think that a sufficient reason has been given. Suits Nos. 7 and 10 of 1875 were filed against the plaintiff's elder brother to recover from him debts incurred by his father and for which he had made himself responsible by renewal of the obligations in his own name. In suit No. 7 of 1875 it was distinctly ruled by the Subordinate Judge that it was not necessary to make the defendant's minor brother, the plaintiff in the present suit, a defendant, because the defendant (the elder brother of the [210] plaintiff in the present suit) was the managing member of the family. Suit No. 10 of 1875 was filed after the disposal of 7 of 1875, and by the same vakil who had conducted that suit. He no doubt omitted the name of the present plaintiff from the list of defendants in consequence of the ruling of the Subordinate Judge above referred to in 7 of 1875. I think it is to be regretted that this omission took place, for it obliges me to decide this case in accordance with what I humbly conceive to be the law, but which seems to me to be wholly inconsistent with equity. I should, however, add that it is not only this omission, but also the decision in second appeal No. 135 of 1879 on the file of the High Court of Madras which has guided me to the conclusions which I shall proceed to enunciate.

"I shall now give briefly the events which led to the present suit. The plaintiff's father, Raghava Nayudu, was a dealer in cloth, and appears also to have been engaged in the leasing of villages, and the operations of borrowing and lending which form part of a sowcar's business. He executed exhibit IV to the first defendant in this suit on the 31st July 1869 for a sum of Rs. 3,200. There has been an attempt on the part of the plaintiff to get behind this transaction, but, I consider, that it is sufficiently evidenced by the decision in suit No. 10 of 1875 above alluded to. For my

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own personal satisfaction, I have gone into the transaction and have satisfied myself that it was a proper transaction, and that, even on equitable grounds, there is no reason for wishing to get behind it. After Raghava Nayudu died, his son, Venkatachalam Nayudu, the elder brother of plaintiff, executed exhibit III to the first defendant. This was the suit document in Original Suit 10 of 1875 on the file of the Subordinate Court. This exhibit was executed by the plaintiff's elder brother as the 'eldest son' and 'varsu' (heir) of the late Raghava Nayudu. First defendant got a decree on this exhibit and sued out execution on it, in the course of which the property, which forms the subject of the present suit, was purchased in court sale by the defendants 1 to 6. The plaintiff now comes forward and alleges that the obligor of exhibit III was not the managing member of the family, that the decree in 10 of 1875 was not passed against the said obligor in his capacity of managing member, and that, even if it was, it is not binding on the plaintiff.

[211] "Morally speaking, I have no doubt that the decree in Original Suit 10 of 1875 was intended to be passed against the defendant in that case in his capacity of managing member of the plaintiff's family; but it was not so stated in that case, the Subordinate Judge no doubt thinking that in the recently decided case 7 of 1875, the question of plaintiff's brother being the managing member had been sufficiently decided. The omission, as also that of making the present plaintiff a defendant in that suit, is to be regretted, as the result is not, I think, equitable, though I have no doubt that it is in accordance with the latest rulings governing the case.

"I had at first thought that I would be able to dispose of this case in favour of the defendants, which would have been what I think the equity of the case requires; but I find on further consideration that this course is not open to me. The tendency of later decisions has been to whittle away the equity of *Ponnappa Pillai's case* (1) and surround the rule, which makes ancestral property in the hands of sons liable for debts incurred by fathers for purposes other than illegal and immoral, with restrictions which enable the sons to throw difficulties in the way of creditors who seek to make assets of the father's estate in the sons' hands liable for his debts. I have been referred, on behalf of the defendants, to *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh*, (2) *Jumoona Persad Singh* v. *Dig Narain Singh*, (3) and *Subbayyan* v. *Nagasami* (4). The two latter do not help the defendants, for they are not on all fours with the present case. In the last mentioned case the decree had been passed against the father on his own admission of the debt; in the Calcutta case the distinction was drawn between a son sued 'as representing the joint family' and one sued in his individual capacity. It must be admitted that the first defendant did not expressly sue the plaintiff's brother as the representative of the family. The case cited in the Indian Appeals seems to me to come nearer to what I would term the equity of the present case. In that case the Privy Council dealt first with the case of minors sued expressly through their guardian; there subsequently arose a question as to whether a decree which [212] did not expressly purport to be passed against the representative of the family in respect of a joint debt could be executed against the joint property of the family. In that case I have not facts enough in the report to enable me to say how far the cases tally, but it seems to me that the circumstances of the first defendant's decree in the present case might, if

(1) 4 M. 1. (2) 6 I.A. 233. (3) 10 C. 1. (4) 6 M. 155.

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this precedent was the only one on which I had to form a judgment, be brought within the lines of the Privy Council's ruling; for their Lordships held that, though certain decrees were drawn up with informality, still looking at the substance of the case, they might be held to be decrees against the representative of the family in respect of a family debt and might be properly executed against the joint property of the family. This decision was passed in 1879; and I have been much exercised as to whether I would not be justified in importing the equitable doctrine which this decision contains to govern the present case. I think, however, that it is not the duty of the Mufassal Courts to import equitable doctrines to guide them in their decisions where there are the distinct ruling of tshe law pointing in another direction laid down in later decisions of their own High Courts, and I have no doubt that the present case is governed by the decision in *Subramanian* v. *Subramanian.*(1) In that, which was a Full Bench case, the Chief Justice and another Judge were for modifying the harshness of law by an equitable provision that plaintiff, who sought to recover his share of family property against a mortgage sale purchaser, should, before recovering the share, pay his share of his father's debt, but the Full Bench negatived even this compromise and gave plaintiff his share without making him discharge any part of the obligation. The cases are quite parallel, the only difference being that in the latter case the elder brother had executed a renewed mortgage in place of an old mortgage executed by his father, whereas in the present case it is a renewed promissory note. The High Court held that the omission to make the plaintiff, the younger brother, a party to the decree was fatal to the decree-holder's claim against the younger brother's share and that the decree must be held as personal against the mortgagor only. Following this decision, I hold that the omission in the present case to bind the plaintiff by the [213] decision in Original Suit No. 10 of 1875 and to describe the plaintiff's brother in that suit as managing member of the family, is an objection which cannot be got over, and the plaintiff's claim to a half-share in the immoveable property referred to in the plaint so far as it has been sold in execution of the decree in Original Suit No. 10 of 1875 on the file of the Subordinate Judge must be allowed. The first defendant will pay the plaintiff's costs and the defendants will bear their own costs."

Sundaram Sastri, for appellants.

Anandacharlu, for respondent.

JUDGMENT.

The material portion of the judgment of the High Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.) was as follows:—

The second objection is that Original Suit 10 of 1875 was in reality a suit to recover a debt due by the father for which both brothers were liable, and it is argued that, although the decree is imperfect, on the authority of *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh* (2), we are entitled to give effect to it as the decree was passed against the family. It is possible, nay probable, that the present respondent was not included in Original Suit 10 of 1875, because the Subordinate Judge had in Original Suit 7 of 1875 held that it was sufficient for a creditor to implead the managing member of the family only, and if we had felt ourselves at liberty to go beyond the decree we should have acceded to the contention of the appellant's pleader that the debt in respect of which

(1) 5 M. 125.

(2) 6 I.A. 233.

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Original Suit 10 of 1875 was brought was a family debt and binding on the respondent. Unfortunately, the elder brother was not sued as manager and the decree was not drawn up as a decree to be executed against him in that character or to be satisfied out of the family property. For aught that appears on the face of the decree, relief was awarded to the plaintiff against the then defendant as for a purely personal liability. It is true that that liability is shown by the decree to have had its origin in the father's debt, but it would be consistent with the decree that the then defendant had been impleaded because he, and he alone, had taken assets, and, as we have observed, there is nothing on the face of the decree to show that the claim was made or relief awarded against the then defendant either in his representative character or as manager of the family. This appears to distinguish the present [214] case from the case cited. In each of the decrees mentioned in *Bissessur Lall Sahoo's* case, there was an express direction that the debts should be recovered not from the property of the judgment-debtors, but from the family property and this direction respecting the fund from which satisfaction should be obtained, sufficiently indicated that the persons impleaded as defendants had been sued in a representative character. We are unable to distinguish the present case from those cases in which the Privy Council has held that a mere money-decree obtained against one member of a co-parcenary family will not justify execution against the interests of all the members of the family.

We must affirm the decree of the Court of First Instance, but looking to the circumstance that the defect in the proceedings was in all probability occasioned by the plea taken on behalf of the respondent in Original Suit No. 7 of 1875, we shall direct each party to bear their own costs of this appeal.

The decree of the Court of First Instance is affirmed.

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APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice and Mr. Justice Muttusami Ayyar.

NARAYANA (*Defendant*), *Appellant v.* KRISHNA AND ANOTHER (*Plaintiffs*), *Respondents.** [28th October & 8th December, 1884.]

Hindu law—Partition suit—Joint property—Stridhanam—Presumption—Procedure—Suit by grandson against uncle in lifetime of grandfather, alleged to be imbecile—Death of grandfather before trial—Objection to suit on appeal disallowed—Civil Procedure Code, Section 561—*Objections to decree* in forma pauperis *disallowed.*

K sued N, his uncle, for partition of the estate of V, the father of N, in the lifetime of V, who was alleged to be of unsound mind. N objected to the suit being entertained on the ground that V was alive. Before issues were settled, V died and the suit was tried and K obtained a decree.

On appeal by N on the ground that when the plaint was filed, K had no cause of action:

[215] *Held,* that the decree could not on this ground be set aside.

Objections by a respondent to a decree under Section 561 of the Code of Civil Procedure cannot be filed *in forma pauperis—Babaji Hari* v. *Rajaram Ballal* (I.L.R., 1 Bom. 75) followed.

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* Appeal 34 of 1884.

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When property stands in the name of a female member of a joint Hindu family, there is no presumption that such property is the common property of the family.

[**F.**, 2 C.W.N. 197 (199); 2 M.L.J. 261 (262); **R.**, 24 M. 504 (506): 12 C.L.J. 173 (180) = 15 C.W.N. 205 (211) = 7 Ind. Cas. 118; 1 N.L.R. 33 (35); **D.**, 4 L.B.R. 262 (263).]

THIS was an appeal from the decree of L. A. Campbell, District Judge of Nellore, dated 26th October 1883, in suit No. 6 of 1882.

The plaintiffs, Vemuganti Krishna Rau and Rama Rau, minors, by their mother Sundaraboyamma, sued to recover Rs. 20,000 from the defendant Vemuganti Narayana Rau, being a moiety of the joint family property in possession of the defendant, the paternal uncle of the plaintiffs. In the plaint it was alleged that the defendant's father Venkata Rau was old and of unsound mind, and that the defendant had taken possession of all the family property, turned the plaintiffs out of the family house, and was wasting the moveable property. It was also alleged that the defendant had secreted property and that plaintiffs were unable to estimate the value of the whole family property, and that if the claim was under-rated, further stamp duty would be paid. The plaint was filed on the 13th February, 1882.

On the 5th April, 1882, the defendant filed a written statement in which he pleaded, *inter alia*, that the plaintiffs had no right to sue in the lifetime of their grandfather Venkata Rau, and that, even if plaintiffs had a right to sue, they were not entitled to a moiety of the estate. Before issues were settled, Venkata Rau died. No issue was raised as to whether the plaint disclosed any cause of action, nor was the plaint amended.

The District Judge gave the plaintiffs a decree for Rs. 10,563-10-10.

The defendant appealed, *inter alia*, on the ground that, as the property was the self-acquisition of Venkata Rau, who was alive when the suit was brought, the suit ought to have been dismissed, and that the subsequent death of Venkata Rau could not cure the defect.

The plaintiffs filed objections to the decree claiming property to the extent of Rs. 20,000 in excess of the amount decreed by the District Court.

These objections were allowed to be filed without payment of stamp duty, subject to any objection which might be taken at the **[216]** hearing of the appeal, upon proof that the plaintiffs were unable to pay stamp duty, the defendant having obtained an *ex parte* order from the High Court staying execution of the decree pending appeal.

Mr. *Branson* and *Ramachandra Rau Saheb*, for appellant.

Mr. *Wedderburn*, for respondents.

At the hearing, the Court having confirmed the Lower Court's decree except as to a sum of Rs. 505 which were allowed to the appellant on account of funeral expenses, objection was taken to the hearing of the respondents' claim on the ground that objections *in forma pauperis* could not be filed under the provisions of the Code of Civil Procedure—*Babaji Hari* v. *Rajaram Ballal* (1).

For the respondents it was contended that, inasmuch as it was by the *ex parte* order of the Court issued at the request of the appellant, upon grounds since shown to be insufficient, that the respondents had been prevented from realizing the decree and so obtaining funds sufficient to enable them to pay the stamp duty on their memorandum of objections, the respondents ought to be allowed to pay the stamp duty *nunc pro tunc*.

(1) 1 B. 75.

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JUDGMENT.

The further facts and arguments necessary for the purpose of this report appear from the judgment which was delivered by

TURNER, C. J.—This suit was instituted by Sundaraboyamma, the mother and guardian of the two minor sons of Vasudeva Rau, against Narayana Rau, the brother of Vasudeva Rau, claiming on behalf of the minors a partition of the family property.

It was alleged in the plaint that Venkata Rau, the grandfather of the minors, was old and of unsound mind, and that the appellant had taken possession of all the property; that he had refused to maintain the minors, had turned them out of the house, and was wasting the estate; that in January 1881, the guardian of the minors had called upon him to make a division of the property, but that he had refused it.

Venkata Rau was not made a party to the suit.

Although the Procedure Code contains no provision for the representation of persons of unsound mind, unless thay have been adjudged to be so under Act XXV of 1858, or under some other law for the time being in force, a Court ought not to entertain a [217] suit for the disposition of the property of a person of unsound mind until he is duly represented. The course which it is incumbent on the party desiring to institute proceedings for the administration of the estate of a person of unsound mind to take is to apply first that the person of unsound mind may be adjudged to be so and then to make him a party to the suit represented by a curator appointed under the Act.

In this suit, however, before the Court had settled issues Venkata Rau had died: and the suit then proceeded as it would have proceeded had the proper persons been originally made parties and had the suggestion been placed on the record that Venkata Rau had died; under these circumstances, although we consider that the plaint as framed should have been returned for amendment before the death of Venkata Rau on the ground that all proper persons were not made parties, we are not prepared to set aside the proceedings, seeing that when the trial commenced the relief which was sought was such as could be granted on the facts then appearing on the record.

[After disposing of the other questions raised by the appeal the judgment proceeded as follows:—]

We agree with the decision of Mr. Justice West in *Babaji Hari* v. *Rajaram Ballal* (1) that the Civil Procedure Code does not provide for the admission of objections, even when preferred by a pauper, without payment of Court fees. We can hardly believe that this omission was intentional, but the language of the provisions relating to the admission of appeals on the part of paupers is so precise that we do not feel justified in applying it to the case of a pauper presenting objections. It would have been open to the respondents to have presented a pauper appeal in this case if they had desired to contest any part of the decree of the Court of First Instance which was unfavourable to them. It is explained that they had no desire to avoid payment of the Court fees, and they were preparing themselves by using diligence to execute their decree, to collect a sum which would have sufficed to pay the stamp on their objections if an appeal were preferred. An *ex parte* order was, however, obtained by the appellant, restraining the respondents from

(1) 1 B. 75.

executing the decree, and they have thus been [218] unable to provide themselves with funds for payment of stamp duty.

We shall now discharge the order staying execution and allow the respondents three weeks to file the stamp on their memorandum of objections.

[The above order having been complied with, the objections raised by the respondents were heard on the 8th December. The first objection related to a sum of Rs. 12,000 in Government promissory notes standing in the name of the deceased mother of appellant. The respondents claimed a moiety thereof on the ground that there was no evidence that the money was stridhanam, and that the legal presumption was that it was joint family property. Maynes' Hindu Law, Sections 261, 262, *Sreemutty Chunder Monee Dossee* v. *Joykissen Sircar.* (1) Upon this question the judgment of the Court was as follows:—]

There is not, so far as we are aware, any case in which it has been held that, where property stands in the name of a female member of a Hindu family, it is to be presumed that it is the common property of the family, and that it is incumbent on a person who asserts that it is the property of the lady in whose name it stands to prove it. Nor is there any ground on which such a presumption could be founded.

Where a family lives in co-parcenary, the presumption which exists in the case of male members arises from the circumstance that they are co-parceners. On the other hand, the ladies are not in an undivided family co-parceners; whatever property they acquire by inheritance or gift is their separate estate, and, although it is not unusual for property to be transferred to the name of a female member to protect it from the creditors of the male members or to place it beyond the risk of extravagance on the part of the male members, such dealings are exceptional and can afford no ground for a general presumption.

With regard to the promissory notes which form the subject of the first ground of objection, all that is proved is that, many years before the appellant's father died, notes were bought in the name of the father on which he drew the interest and other notes in the name of the mother on which she drew the interest. It is not shown out of what funds these notes were purchased, probably [219] it was with funds acquired by the father; but if it be so, the presumption is that he intended that the notes transferred to his wife should become her property, and this presumption would be confirmed if it is found that, in the lifetime of her husband in the presence of sons jealously watching dispositions of the family wealth, she is allowed to deal unchallenged with the property standing in her name.

That the appellant's mother had separate property and dealt with property as such to the knowledge of the family is shown by exhibit A in which she professes to dispose of no less than Rs. 5,000 and still to have a surplus of property which would descend to her sons. It is not shown that there was any property with which she had power to deal other than the notes which stood in her name, and it appears to us the Judge was justified in finding that this property was her separate property which, if it was of such a nature that it descended to sons, would have descended to the appellant as son to the exclusion of the respondents as grandsons.

We disallow the objections, and with regard to the whole costs of this suit, we direct that each party bear his own costs in both Courts.

(1) 1 W.R. 107.

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PRIVY COUNCIL.

8 M. 219 (P.C.) = 12 I.A. 16 = 4 Sar. P.C.J. 598 = 9 Ind. Jur. 121.

8 M. 219 (P.C.) = 12 I. A. 16 = 4 Sar P.C.J. 598 = 9 Ind. Jur. 121.

PRIVY COUNCIL.

PRESENT:

Lord Fitzgerald, Sir B. Peacock, Sir R. Collier, Sir R. Couch, and Sir A. Hobhouse.

[*On appeal from the High Court at Madras.*]

SRI RAJA RAU VENATA MAHIPATI GANGADHARA RAMA RAU, RAJA OF PITTAPUR, (*Plaintiff*) *v.* SRI RAJA RAU BUCHI SITAYYA AND OTHERS (*Defendants*). [20th and 21st November 1884.]

Res judicata—*Act X of* 1877, *Section* 13—*Estoppel—Privity in estate—Costs of inserting irrelevant matter in the printed record.*

A competent Court having decided upon an issue directly raised in a suit brought by a person alleging himself to have been adopted, that this adoption had not taken place, it was *held*, that the present suit was barred under Act X of 1877, [220] Section 13, as *res judicata*, having been brought by the son of the defendant in the former suit, claiming through his father, to establish the same adoption; and that the section applied, although the suits related to different properties. The establishment of the adoption alleged in the first suit would have obliged the father of the present plaintiff to share with the adopted son his ancestral estate. That adoption having been negatived, the son, in this suit, ought to be estopped from making title on the ground that the adoption had placed the person, from whom he claimed to inherit, in the relation of father's brother to him.

Where irrelevant matter had been introduced into the record, the Registrar was directed to tax the costs as if the record had not contained what he might consider to have been inserted unnecessarily.

[F., 11 A. 148 (157); 9 C.L.J. 597 = 12 C.W.N. 739 = 4 Ind. Cas. 81 (84) = 6 M.L.T. 363; R., 27 A. 37 (43); 13 B. 25 (33); 14 B. 206 (210); 26 M. 760 (772); 35 M. 216 (227) = 10 Ind. Cas. 75 = 21 M.L.J. 344 = 10 M.L.T. 533; 13 C.L.J. 547 = 10 Ind. Cas. 434 (438); 17 Ind. Cas. 445 (453) = 23 M.L.J. 543 (571) = 12 M.L.T. 500 = (1913) M.W.N. 1 (22); D., 1 C.L.J. 337 (353).]

APPEAL from a decree (1st December 1880) of the High Court of Madras, affirming a decree (18th August 1879) of the Subordinate Judge of Cocanada.

The suit, for a declaratory decree, out of which this appeal arose, was brought by the appellant the Raja of Pittapur, to establish his right as reversionary heir to the Kirlampudi zamindari, expectant upon the decease of Buchi Sitayya, the first respondent, who was mother of the last male inheritor, Surya Rau, a minor, deceased, without issue, in 1860. These latter were the widow and minor son of Buchi Tamayya, the owner of the zamindari, who died in 1857, leaving besides them two daughters who were co-defendants in the suit, and respondents with their mother in this appeal.

On the death of the boy, Surya Rau, in 1860, his mother, Buchi Sitayya, as a Hindu widow, was placed in possession of the estate of Kirlampudi, and in January 1870, in a petition to the Collector of Godavari, she stated that, in consideration of money lent to her by her two daughters to pay her late husband's debts, she had arranged to assign to them each a one-third share of the estate; asking the Collector, accordingly to register their names as co-proprietors. This entry having been made

the Raja of Pittapur brought the present suit, alleging the adoption of Buchi Tamayya by Raja Niladri Rau, his (the Raja's) grandfather; and he, claiming to treat the entry of the widow's daughters' names as an alienation beyond her powers, sought a declaratory decree, on the ground of his title to the reversionary estate in Kirlampudi, expectant on the widow's death. The Raja's claim thus depended on his establishing that Buchi Tamayya had been adopted by Niladri Rau. It having been decided, as between Buchi Tamayya and the father of the present appellant, that no such adoption had [221] taken place, the question was whether this suit was barred, under s. 13 of Act X of 1877, as *res judicata.*

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At the hearing, before the District Judge, it appeared that the adoption was alleged to have taken place in 1807, while Niladri was childless, and that, after some previous litigation, the matter of the adoption was brought forward on the death of Niladri Rau, which occurred in 1828. In that year Buchi Tamayya filed his plaint in the Provincial Court of Masulipatam against Venkata Surya, the son of Raja Niladri Rau, and the Collector of Rajamandri, claiming possession of the zamindari of Pittapur. He rested his claim upon the adoption, and also upon a testamentary disposition in his favour.

On the 14th September 1840, the Provincial Court dismissed the claim, being of opinion that neither the adoption nor any will had been established by the evidence.

On the 10th July 1842, Buchi Tamayya filed a razinama petition in the Provincial Court of Appeal, which recited the decree of the 14th September 1840, and the steps taken in order to prefer an appeal, and also stated an arrangement whereby, in lieu of the zamindari of Pittapur, the sum of Rs. 30,000 was to be received by instalments, the plaintiff withdrawing his appeal. A petition agreeing to these terms was filed by Venkata Surya.

The District Judge, on the above, decided that the present suit was barred as *res judicata,* there being, in his opinion, no foundation for the plaintiff's contention that the subsequent razinamas had got rid of the effect of the judgment of 14th September 1840.

On appeal, the High Court (TURNER, C.J., and FORBES, J.) confirmed this decision, giving judgment as follows:—

On 18th August 1879 the plaintiff, appellant, the Raja of Pittapur, instituted the present suit in which he claims to dispute the interests created by the respondent, Sitayya in favour of her daughters, on the ground that Buchi Tamayya was his adopted brother, and that he is therefore the next reversioner entitled to succeed to the estate of Surya Rau on the determination of the interest of Sitayya, the mother of the last full owner.

The adoption of Buchi Tamayya by the appellant's father was denied by the respondents, who pleaded that the matter had been directly and substantially put in issue and finally determined [222] by a Court of competent jurisdiction in a suit to which the father of the appellant and Buchi Tamayya were parties, and that the appellant was bound by that decision. This plea was allowed by the Court of First Instance and the suit dismissed. It appears that the grandfather of the appellant, Niladri Rau, and his first wife lived on bad terms with one another, and in the result the lady left the Raja's house and shortly afterwards instituted a suit, in 1820, claiming to obtain an award of maintenance for herself and for Buchi Tamayya, who, as she alleged, had been adopted by the Raja. This suit was dismissed on the ground that the lady

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had not shown that her husband had refused to provide for her in his own house, and that she had no sufficient excuse for withdrawing from his protection, and that the object of the proceedings was to establish by a side wind that the defendant had adopted the first plaintiff, his wife's nephew, and made him his heir. In this suit the question of adoption might have been, but was not, decided, but subsequently a suit in 1828 was brought after the death of Niladri Rau against Venkata Surya, admittedly his natural-born son, by Buchi Tamayya, in which Buchi Tamayya averred that he had been adopted by Niladri Rau, and that Niladri Rau had by testamentary and other instruments executed before and after the birth of his natural son conferred on him, Buchi Tamayya, as his adopted son, the ancestral zamindari of Pittapur.

We have called for and examined the plaint filed in that suit, and it appears that Buchi Tamayya not only asserted that by virtue of the instruments on which he principally based his claim he was entitled to the estate of Pittapur, but that independently of such instruments he was, as an adopted son, entitled to a provision.

A testamentary instrument executed before or after the birth of the natural-born son would not have been valid to defeat the succession of the natural-born son unless Buchi Tamayya had been adopted. The Provincial Court of the Northern Division held that the material point on which the suit hinged was the adoption of the then plaintiff, and after full investigation it found the adoption was not proved and dismissed the suit. Venkata Surya was the father of the present appellant. Buchi Tamayya took steps to present an appeal to the Sadr Court. For that [223] purpose he made an application to the Provincial Court and thereupon Venkata Surya presented a petition that Buchi Tamayya might be required to furnish security for the costs of the appeal.

While these proceedings were pending, the parties came to a compromise, whereby, in consideration of a sum of Rs. 30,000, Buchi Tamayya abandoned his claim and withdrew his appeal.

The original judgment thereupon became final, and in our judgment estopped all parties to the suit, and those claiming through or under them, from again asserting the fact of the adoption.

We therefore affirm the decree of the Court of First Instance and dismiss this appeal with costs.

On this appeal Mr. *J. D. Mayne* and Mr. *Frederick Laing*, appeared for the appellant.

Mr. *R. V. Doyne* and Mr. *G. P. Johnstone*, for the respondents.

For the appellant it was argued that the rule of *res judicata* under Section 13 of the Code of Civil Procedure was inapplicable here. There was no identity of subject-matter in this suit and the former one of 1840, in which a different inheritance was claimed. Moreover, although parties might be bound by the decision of an issue, they were not bound by decisions on the points which formed the successive steps upon which the conclusion of the Court had been reached. The question as to the adoption was only part of the case disposed of in 1840.

Reference was made to *Outram* v. *Morewood* (1), *Barrs* v. *Jackson* (2), *Brunsden* v. *Humphrey* (3), *Flitters* v. *Allfrey* (4).

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(1) 3 East T.R. 346. (2) 2 Smith's L.C. (8th ed.) 830.*
(3) L.R 11 Q.B.D. 712 reversed on appeal. See L.R. 14 Q.B.D. 141.
(4) L.R. 10. C.P. 39.

* In the footnote at p. 226 it is noted as "2 Smith's L.C. 805."

For the respondents it was argued that, as the issue was substantially the same in both the present and the former suits, *viz.*, whether the adoption of Buchi Tamayya by Niladri Rau had taken place or not, the decision of the Provincial Court in 1840 was conclusive on the point.

1884 Nov. 21. — PRIVY COUNCIL. — 8 M. 219 (P.C.) = 12 I.A. 16 = 4 Sar. P.C.J. 598 = 9 Ind. Jur. 121.

Tekait Doorga Persad Singh v. *Tekaitni Doorga Konwari* (1), *Soorjomonee Dayee* v. *Suddanund Mohapatter* (2), *Chinniya Mudali* v. **[224]** *Venkatachella Pillai* (3), *Nuthoo Lall Chowdhry* v. *Shoukee Lall* (4), were referred to.

Mr. *J.D. Mayne* replied.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR B. PEACOCK.—This is a suit brought by the appellant against the mother and sisters of Surya Rau, deceased, and the object of the suit is to have it declared that the plaintiff is entitled as reversionary heir of Surya Rau to certain property which he claims in the plaint. In consequence of Surya Rau's having died without a son, the mother succeeded to his property and took a Hindu mother's estate therein, and she has conveyed the estate absolutely to her daughters, who are also made defendants. Surya Rau was the son of Buchi Tamayya, and the plaintiff is the son of Venkata Surya. The plaintiff by his plaint claims as reversionary heir to the property left by the son of the first defendant, and now in her possession and enjoyment, and he also asks a declaration that the alienation of the property mentioned in the plaint which the first defendant has made in favour of the second and third defendants was made without any legal necessity or justifying cause, and is void and inoperative beyond the lifetime of the first defendant, and that the plaintiff is entitled as reversionary heir to the portions so alienated.

The case of the plaintiff is that Venkata Surya, the father of the plaintiff, was the brother of Buchi Tamayya, the father of Surya Rau, the deceased, and he says he was the brother of Buchi Tamayya because Buchi Tamayya was adopted by Niladri Rau, his father's father. The defendants contend that the plaintiff's father and Buchi Tamayya were no relations, and that the plaintiff is estopped from saying that Buchi Tamayya was his father's brother; that he was not his brother by birth, and that he has no right to say that he was his brother by adoption, because in a former suit between the father of the plaintiff and Buchi Tamayya it had been conclusively determined, upon an issue raised in a Court of competent jurisdiction, that Buchi Tamayya had not been adopted. Thereupon an issue was raised in the present suit, "whether the suit is barred by *res judicata.*" The Courts below have both found that the suit is barred by *res judicata*, and the appellant now contends that the judgment of the High Court, **[225]** which affirmed the judgment of the first Court, ought to be reversed upon the ground that the suit is not so barred. One of the contentions of the learned counsel for the plaintiff is that although in the suit between Venkata Surya and Buchi Tamayya it had been found upon an issue raised between them that Buchi Tamayya was not the adopted son of Niladri Rau, still he is not bound by it, because this suit does not relate to the property which is the subject of the present suit. It is true that the former suit did not relate to the same property as that which is the subject of the present suit; but the issue has been tried between them by a Court of competent jurisdiction whether Buchi Tamayya was adopted

(1) 5 I.A. 149. (2) 12 B.L.R. 304. (3) 3 M.H.C.R. 320. (4) 10 B.L.R. 200.

1884 Nov. 21. — Privy Council. — 8 M. 219 (P.C.) = 12 I.A. 16 = 4 Sar. P.C.J. 598 = 9 Ind. Jur. 121.

or not. In fact, the allegation of the plaintiff is substantially this: that Venkata Surya had a right to say that Buchi Tamayya was not adopted when the establishment of his adoption would have given him a right to participate in the property of Niladri Rau to which Venkata Surya in the former suit claimed to be solely interested; but that the plaintiff, deriving title through his father Venkata Surya has a right to say that Buchi Tamayya was adopted when the fact of his adoption would entitle the plaintiff to inherit property as the reversionary heir of Tamayya's son. If ever there was a case in which the law of estoppel ought to apply, it appears to their Lordships that this is such a case.

It appears to their Lordships that the High Court was right in holding that the decision of the Provincial Court in 1840, upon an issue directly raised in a cause which they were competent to try, that Buchi Tamayya was not adopted, would have been conclusive against Venkata Surya, the father of the plaintiff, and is also conclusive against the plaintiff himself, who cannot make a title except through his father.

It was contended on the part of the plaintiff, by his learned counsel, that the cases do not establish that an estoppel is binding unless the suit relates to the same subject-matter, but it appears to their Lordships that the cases which have been referred to do not establish that position. In the case of *Outram* v. *Morewood* (1) the second action was not brought for the same subject-matter for which the first action had been brought. The first action was for [226] damages sustained by the plaintiff in consequence of the wife of Morewood having entered upon certain mines and taken coal from them before she was married. The wife contended that she was entitled to those mines by virtue of a certain conveyance; but it was found by the Court that the wife was not entitled to the mines, and the Court gave damages against her. Another action was brought subsequently against Morewood, who had afterwards married the lady, for a second trespass committed by them upon the same mines, and the question then arose whether the finding in the first suit, with reference to the damages claimed in that suit, was binding upon the two defendants in respect to the damages claimed against them in the second suit. It was held that it was. There were two distinct claims. The damages claimed in the two actions were distinct; the trespasses were distinct, and yet it was held that the decision in the first case with regard to the damages claimed in the first case was binding in the second case as an estoppel, the matter having been conclusively tried between the plaintiff and the defendant's wife when a *femme sole* in the first case.

The case of *Barrs* v. *Jackson* (2) was also referred to, but there the subjects of the two suits were different. In that case it was held that a decision of an Ecclesiastial Court, holding that the plaintiff was a next-of-kin for the purpose of obtaining letters of administration, was binding in a suit brought in the Court of Chancery for the distribution of the estate. The Ecclesiastical Court decided that the plaintiff was a next-of-kin for the purpose of having administration and managing the property. Subsequently the question was raised in the Court of Chancery whether he was a next-of-kin for the purpose of taking a share of the property. Those were perfectly distinct claims. Yet it was held that inasmuch as the Ecclesiastical Court would have had concurrent jurisdiction with the Court of Chancery to try the question with respect to distribution, the decision of the Ecclesiastical Court between the same parties with reference to

(1) 3 East T.R. 346. (2) 2 Smith's L.C. 805.

administration was binding upon the Court of Chancery with reference to distribution. The learned Vice-Chancellor Kt. Bruce had held that it was not binding, but his decision was overruled by the Lord Chancellor, who held that it was binding.

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[227] Certain remarks of the Vice-Chancellor Kt. Bruce in that case have been referred to, but in their Lordships' opinion they are not applicable to the present case, inasmuch as it depends upon the construction of an Act of the Legislature of India. It may be as well to refer to the remarks which were made by their Lordships in the case of *Krishna Behari Roy* v. *Brojeswari Chowdranee* (1). The question there was with regard to the construction of the expression "cause of action," in the 2nd Section of Act VIII of 1859. That Act is not so extensive as the Act of 1877, because it merely declares that a second trial shall not take place upon a cause of action which has already been decided. The question arose as to what was the meaning of "cause of action" in that section, and it was there said: "Their Lordships are of opinion that the expression 'cause of action' cannot be taken in its literal and most restricted sense, but, however that may be, by the general law where a material issue has been tried and determined between the same parties in a proper suit and in a competent Court as to the status of one of them in relation to the other, it cannot in their opinion be tried again in another suit between them." The point here has been determined in the first suit. It was there determined that the plaintiff's father and Buchi Tamayya were not brothers, because it was found that Tamayya had not been adopted. In the present suit the plaintiff says the parties to the first suit were brothers, and the Courts below have held that he is estopped from saying that they were brothers because it was determined in the former suit that they were not brothers.

The Act which governs the present case is the Procedure Code of 1877, by Section 13 of which Act it is enacted that "No Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they, or any of them, claim, litigating under the same title." The issue which was tried in the former suit in this case was whether Buchi Tamayya was adopted by Niladri Rau, and the issue which the plaintiff wishes to try in the present case is the same, whether Buchi Tamayya was the adopted son of Niladri Rau.

Their Lordships are clearly of opinion that the issue which was [228] tried in the former suit is the same as that which the plaintiff wished to be tried in this suit, and that the plaintiff is estopped from making the allegation which he attempts now to support.

It was contended further, that even if the decision on the issue in the former suit was an estoppel between the parties as to the fact of the adoption of Buchi Tamayya, still that estoppel has been got rid of by reason of an arrangement which was afterwards come to by the parties by a razinama, of which there were two parts. Looking to those documents it appears to be clear that the object of them was not to get rid of the judgment which was passed in the Provincial Court, but, on the contrary, to maintain it. Buchi Tamayya was about to appeal against the decision of the Provincial Court to the Sadr Court, and thereupon Venkata Surya entered into this razinama, by which he agreed that if Buchi Tamayya would

(1) 2 I. A. 283 (285).

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withdraw his appeal Venkata Surya would pay him Rs. 30,000. It was further stipulated that if Venkata Surya should break that agreement and not pay the Rs, 30,000, Buchi Tamayya should be at liberty to apply to the Court to enforce the payment of the Rs. 30,000 in the same way as if Buchi Tamayya had obtained a judgment against Venkata Surya for the amount. But that did not get rid of the judgment of the Provincial Court, in which it was held that Buchi Tamayya was not the adopted son, and that he was not entitled to recover the property. It was a judgment intended to prevent Buchi Tamayya from proceeding with his appeal and to allow the judgment of the Provincial Court to remain in force. The decision, therefore, of the Provincial Court stands, and being an estoppel between the parties the razinama does not prevent it from having the effect which would have been given to it if the razinama had not been entered into.

Their Lordships are clearly of opinion that the High Court was right in affirming the decision of the Lower Court, and thereby holding that the plaintiff was barred by the finding of the Provincial Court in the suit between his father, Venkata Surya, and Buchi Tamayya. They will therefore humbly advise Her Majesty to affirm the decision of the High Court, and to dismiss the appeal. The appellant must pay the costs of the appeal.

Their Lordships wish to make a remark with reference to the record which has been sent up. It appears that over 900 pages of the record have nothing to do with the question raised by the [229] appeal. It is a great abuse for parties to bring before this tribunal a record with 900 pages of documents and figures, none of which have the least bearing upon the case. It does not appear that they were ever proved in the first Court or that they were ever referred to by that Court or by the High Court. The whole of them which were sent by the first Court to the High Court have been incorporated in the record which the High Court has sent up to the Judicial Committee for the purpose of determining this appeal. Their Lordships have frequently called attention to similar abuses, and a circular has been issued directing the High Courts not to send up documents or evidence which have no bearing upon the case. The expenses of this appeal must have been enormously increased by that portion of the record which has been unnecessarily sent up. Under these circumstances their Lordships, in order to prevent a repetition of such an abuse, think it right to direct that the Registrar, in taxing the costs, shall tax them in the same manner as if the record had not contained such parts as the Registrar may consider to havebeen unnecessarily and improperly introduced into it.

Solicitors for the appellant: *Frank Richardson & Sadleir.*

Solicitors for the respondents : *Burton, Yeates, Hart & Burton.*

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APPELLATE CIVIL.

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APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice and Mr. Justice Muttusami Ayyar.

SHUNMUGAM AND ANOTHER (*Plaintiffs*), *Appellants* v. MOIDIN (*Defendant*), *Respondent*.* [9th December, 1884.]

Civil Procedure Code, Section 503—*Receiver, Appointment of, after decree*—*Limitation Act, Section* 15—*Injunction.*

In a suit brought in 1880 by the widow of a deceased partner to wind up the partnership, the surviving partner was prohibited by the Court, at the instance of the plaintiff, from collecting debts due to the firm; but leave was given to apply for the recovery of debts which might become barred by limitation.

[230] After decree, on the application of the plaintiff, a receiver was appointed under Section 503 of the Code of Civil Procedure to collect outstanding debts for the purpose of executing the decree.

The receiver having sued in 1883 to recover a debt which was due to the firm in 1879, the suit was dismissed (1) on the ground that the appointment of a receiver after decree was *ultra vires*; (2) because the debt was barred by limitation:

Held (1) that the appointment of the receiver was valid; (2) that under Section 15 of the Limitation Act the suit was not barred.

[**Diss.**, 14 A. 162 (168); **R.**, 34 C. 305 (317)=5 C.L.J. 270; 13 C.L.J. 487 (491)=15 C.W.N. 672=9 Ind. Cas. 1027 (1029.]

THIS was an appeal from the decree of E. N. Overbury, District Judge of Salem, in suit No. 13 of 1883.

The facts of the case appear from the judgment of the District Court, the material portion of which was as follows:—

"One Sevoloyammal, widow of Subbaraya Chetti, filed original suit 17 of 1880 on the 20th October against Appaji Chetti, who is second plaintiff in original suit 13 of 1883, and another, who were partners with her husband in trade at Salem. She prayed the Court to take the accounts of the firm, to realize its assets, and for an order directing Appaji Chetti to pay into Court any balance due by him. She also asked the Court to discharge the firm's debts and to distribute the surplus among the partners according to their respective shares.

"On the 29th October 1880 an injunction was issued at the instance of Sevoloyammal prohibiting the said Appaji Chetti and another from collecting outstanding debts and compelling the former to produce in Court all accounts, &c., relating to the partnership. These were duly produced and retained in Court. At Sevoloyammal's request a commission was appointed to examine the accounts, and then a second commission for the same purpose. On the final report being received the Court tried the suit and passed a decree on the 20th September 1882.

"The decree was 'that the sum of Rs. 47,863-12-6, being the amount due to, or in the hands of, the firm, be applied as follows:—

"1*st*. In payment of the debts due by the partnership, amounting in the whole to Rs. 4,737-7-9.

"2*nd*. In payment of the sum of Rs. 34,131-3-6 to the plaintiff as her husband's share of the partnership assets, including the amount of his capital Rs. 25,136-2-3.

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* Appeal 74 of 1884.

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" *3rd.* In payment of the sum of Rs. 8,995-1-3, being the residue due to the defendant as his share of his partnership assets.

[231] " And it is ordered accordingly that the plaintiff is entitled to recover the said sum of Rs. 34,131-3-6, and it is further ordered that the defendant do deliver to the plaintiff possession of the houses and lands specified below, and do pay her her costs in the suit as specified below.'

" Thereupon Sevoloyammal put in a petition for the execution of the decree. A portion of the decree was then executed. On the 25th November 1882 she put in petition No. 580 of 1882 to execute the remainder of the decree, praying also for the return of the books, accounts, &c. She again put in petition No. 29 of 1883 for a return of the books to which Appaji Chetti objected on the ground that the debts should be collected by both parties. After presenting another petition to the same effect, she put in miscellaneous petition No 56 of 1883, requesting the Court to appoint a receiver under Section 503 of the Code of Civil Procedure on the ground that most of the debts could not be collected without resorting to law suits and that she being a female, was unable to conduct them.

" In compliance with her request Mr. Wilkinson appointed Shunmugam Pillai, who was nominated by her, as receiver. The receiver has, by virtue of that appointment, brought the present suit.

"The plaintiff alleges that he is the receiver appointed by this Court to realize the outstanding debts, &c., found due to the firm in original suit No. 17 of 1880. The defendant in this suit carried on extensive money dealings with the firm which ceased on the 29th November 1879. The mutual accounts were balanced from time to time and the sum due by defendant up to the 20th March 1880 is Rs. 8,925-5-0. This sum was not collected in consequence of the injunction issued in the said suit on the 29th October 1880, as well as in consequence of the Court holding custody of the books, &c., relating to the firm and which were only handed over to the plaintiff in March 1883. The defendant delaying payment of the above amount, this suit is brought to recover that debt with interest.

" The defendant, among other pleas, contends that the appointment of the plaintiff as receiver was *ultra vires*, hence this suit is unsustainable; it is also barred by limitation, and that the above injunction will not prevent this suit from being barred.

" Mr. *Pritchard*, counsel for defendant, contended that the appointment of a receiver was *ultra vires* under Section 503 of the Code [232] of Civil Procedure, as the property ceased to be the " subject of a suit " after the final decree was passed in original suit 17 of 1880, and relied on certain authorities for his contention (Collett on Specific Relief Act, Section 44. Collett on Injunction, pp. 198, 200).

" The plaintiff's vakil supported the appointment of receiver on the ground that the books, accounts, &c., were virtually under attachment of this Court.

"I have no doubt whatever that Section 503 refers only to the appointment of a receiver *during the pendency* of a suit. It seems to me that this Court should have in its order to the commissioner, appointed a receiver also, to collect all outstandings due to the firm. His duties might have continued after decree until final adjustment. As it is the decree does not provide for the realization of the debts. Hence the plaintiff found a difficulty in executing it, and so applied for a receiver. In this the plaintiff erred. She or the other parties to the decree should have

asked for a review of this Court's judgment or appealed to the High Court. To appoint a receiver after a final decree is passed is opposed to the spirit of the Section 503, which, though not expressly, yet tacitly refers to proceedings *pendente lite* (see Collett's Specific Relief Act, pp. 234, 237. Collett on Injunction and Appointment of Receiver, pp. 198 and 200).

"It is also argued that the books and accounts, &c., 'were under attachment.' This is not the case as the documents were produced into Court by Appaji Chetti upon notice under Section 130 issued at the instance of Sevoloyammal in petition No. 514 of 1880.

"I now pass to consider the plea of limitation. It is argued by defendant's counsel that so long as Mr. Hannyngton's order, dated 29th October 1880, made special provision for the recovery of the debts which might be barred by limitation or otherwise, the injunction issued will not save the bar.

"Mr. Hannyngton's order on petition No. 516 of 1880 is clear. He forbids first and second defendants from collecting any debts due to the firm, but directs special application to be made in regard to debts, the recovery of which might be barred by limitation or otherwise. Hence the plaintiffs' powers of recovery of debts were in no way restrained, while the first and second defendants could have applied to this Court within the statutory period for the recovery of debts liable to be barred.

[233] "It is further apparent that the plaintiff might argue that, since the Court had possession of the accounts, books, &c., she had no means of ascertaining what debts were or were not barred. This is not the case, as before decree, the parties or their agents had access to the accounts in the Commissioner's hands and they had ample time and opportunities to make themselves informed of the nature of the debts.

"It might be argued that the decree in original suit No. 17 of 1880 is not final. I think it is final, for it has awarded that the plaintiff is entitled to recover Rs. 34,000 and odd, &c., and all the other reliefs prayed for excepting the mode of realization have been granted. The parties treating the decree as such took out execution.

"For the above reasons I find on the first issue that the suit is not sustainable, and on the second that the debt is barred.

"I therefore dismiss the suit. Each party to bear his own costs."

The plaintiffs appealed to the High Court on the following grounds:—

(1) The appointment of the receiver is not *ultra vires* as held by the lower Court.

(2) Even if it were, the suit is sustainable, inasmuch as he holds the appointment by virtue of the order of the Court and inasmuch as the parties really interested in the suit are made plaintiffs already and one of them is ready to verify the plaint.

(3) The suit is not barred.

(4) The lower Court did not properly construe the injunction order and its effect has not been rightly understood.

Mr. *Grant*, for appellants.

The Advocate-General (Hon. *P. O' Sullivan*), for respondent.

JUDGMENT.

The judgment of the Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.) was delivered by :—

TURNER, C. J.—There is nothing in the Code of Civil Procedure which limits the power of the Court to appoint a receiver after decree

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where this course is necessary or proper. The Judge's ruling on this point cannot be sustained. The further question arises whether the suit is barred by limitation. It is barred unless the provisions of Section 15 of the Limitation Act apply.

It appears that one of two partners died. His widow brought [234] a suit against the surviving partner to wind up the partnership, and on 25th October 1880 she obtained an order prohibiting the surviving partner from collecting any sums due to the firm. The Judge, in granting the order, intimated that application might be made for the recovery of any debts which might become barred by limitation or otherwise.

It is argued that this injunction did not prevent the institution of suits; but an order prohibiting the collection of debts is an order prohibiting their collection by suits or otherwise. Again, it is argued there might have been an application for a special order. This is true, but the persons having the right to sue were not bound to make such application.

The law places the person interdicted from collecting debts under a disability, and Section 15 of the Limitation Act was intended to prevent the accrual of any injury to the person so interdicted from such disability. The surviving partner could not have sued without violating the injunction laid upon him. The widow of the deceased partner could have sued alone if the surviving partner had refused to join her in the suit, but as she was aware of the prohibition imposed on him, we consider she was justified in not filing a suit. Under the circumstances, the section in our judgment applies, and the plaintiffs are entitled to deduction of the period from the date of the injunction up to date of the appointment of receiver.

The decree will therefore be set aside and the case remanded for retrial on the other issues including an issue as to whether, notwithstanding the deduction of the period of time, the suit is not barred by limitation.

All costs of this appeal incurred hitherto will abide and follow the result.

As to the memorandum of objections, if the suit is dismissed, there is no reason why defendant should not receive all his costs.

The costs of the objections will also abide and follow the result.

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8 M. 235.

[235] APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Kernan.

VYDINATHA AND ANOTHER (*Defendants Nos.* 2 *and* 3), *Petitioners v.* SUBRAMANYA AND ANOTHER (*Plaintiff and Defendant No.* 1), *Respondents.** [18th April, 1884.]

Madras Civil Courts Act, Section 12—Jurisdiction—Suit for partition—Subject-matter of suit.

In suits for partition the value of the property of which the plaintiff claims a share, and not the value of the share claimed, determines the jurisdiction of the Court under Section 12 of the Madras Civil Courts Act, 1873.

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* Civil Revision Petition 272 of 1883.

[Diss., 22 B. 315 (316); 20 M. 289 (291); N.F., 15 M. 69 (70); F., 11 M. 197 (198); R., 16 M. 326 (328); 6 Bom. L.R. 403 (404); 1 C.W.N. 136 (137); D., 12 A. 506 (508) = 10 A.W.N. (1890) 128; 11 M. 140 (141); 13 M. 25 (26).]

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APPELLATE CIVIL.

8 M. 235.

THIS was an application to the High Court under Section 622 of the Code of Civil Procedure by Vydinatha Ayyan and Panchapakasa Ayyan, defendants Nos. 2 and 3 in Suit No. 1 of 1882 on the file of the District Munsif of Tanjore, to set aside the decree in the said suit passed under Section 522 of the Code of Civil Procedure, confirming an award of arbitrators. The fourth ground on which the award was impugned was that the District Munsif's Court had no jurisdiction to entertain the suit, inasmuch as the subject-matter exceeded Rs. 2,500, the pecuniary limit of the jurisdiction of the Court. The suit was brought by Subramanya Ayyan against his three brothers for partition of family property, and one-fourth share claimed by the plaintiff was valued in the plaint at Rs. 1,641-12-0.

Mr. *Subramanyam*, for petitioners.

Mr. *Devarajayyar* and *Bhashyam Ayyangar*, for respondents.

The Court (TURNER, C.J., and KERNAN, J.) delivered the following

JUDGMENT.

The suit, as brought, properly asked for a partition of the whole of the family property and the award of possession to the plaintiff of such a share therein as might fall to him. **[236]** Unless there was an agreement avoiding the necessity for a general partition among the several members, the share of any one member could hardly be ascertained; but, whether this be so or not, the whole property is subjected to the Court for the purpose of partition, and the relief claimed can only be awarded by a Court which has a pecuniary jurisdiction sufficient in amount to allow it to entertain a suit for the partition of the whole estate. It is not denied that the value of the whole property is in excess of the pecuniary limits of the Munsif's jurisdiction. We must, therefore, set aside the proceedings subsequent to the institution of the suit and direct the Court of First Instance to return the plaint to the plaintiff for presentation in the proper Court. Each party will bear his own costs incurred up to this date.

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8 M. 236.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

SUBBARAYANA AND ANOTHER (*Defendants Nos.* 2 *and* 3), *Appellants v.* SUBBAKKA AND ANOTHER (*Plaintiff and Defend and No.* 4), *Respondents.** [22nd October, 1884.]

Hindu Law—Parent and child—Duty of son to maintain aged mother.

According to Hindu Law, a son is bound to support his aged mother whether or not he has inherited property from his father.

[R., 31 M. 338 = 18 M.L J. 254 = 3 M.L.T. 266.]

THIS was a suit brought, *in forma pauperis*, by Satiralla Subbakka to recover from her sons Satiralla Ramanna, Subbarayana, Pedda Munappa,

* Second Appeal 550 of 1883.

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and Muni Rachappa, Rs. 68 a year for life for her maintenance and Rs. 50 for "house and utensils."

The plaintiff alleged that the defendants turned her out of their house in October 1880 and refused to maintain her.

The District Munsif of Palamaner (T. Swami Rau) dismissed the suit on the ground that the defendants had taken no property from their father, and were, therefore, not bound to maintain the plaintiff.

[237] On appeal, the District Judge of North Arcot (D. Buick) found that by agreement between the defendants Muni Rachappa had undertaken to support the plaintiff, and, citing *Savatribai* v. *Luximibai* (1), Manu, ch. VIII, pl. 389; *Thakoobai* v. *Ramabai* (2), held that all the defendants were bound to support the plaintiff whether or not they inherited property from their father. The District Judge decreed that the defendants should pay to plaintiff Rs. 5 a month from the date of the plaint, *viz.*, on the 1st of October and 1st of March in each year Rs. 30, for maintenance.

Subbarayana and Pedda Munappa appealed to the High Court, making Subbakka and Muni Rachappa respondents to the appeal, on the grounds—

(1) that the plaintiff was a party to the arrangement by which Muni Rachappa contracted to support her;

(2) that sons were not bound to support their mother unless they inherited property from their father.

Anandacharlu, for appellants.

Mr. *Powell*, for respondent No. 1.

The Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.) delivered the following

JUDGMENT.

Respondent No. 1, the plaintiff Subbakka, is the appellants' mother, and the respondent No. 2 is their brother. Subbakka brought this suit against her sons for maintenance, and the appellants denied their liability for the claim. They alleged that they inherited no property from their father, and contended that at a division among the brothers made in 1868 it was arranged that the respondent No. 2 should take a house and jewels of Rs. 150 in value, which had been left by their father, and maintain the first respondent, that the appellants should pay their father's debts amounting to about Rs. 1,000, and should not be liable for their mother's maintenance. The District Judge held, on appeal, that the appellants were bound to maintain their aged mother, though they had inherited no property from their father, and that, if the arrangement which they set up were true, it would only enable them to claim contribution. It is argued, on appeal, that respondent No. 1 was a party to the arrangement made with the respondent No. 2, and that the son's obligation under Hindu Law to maintain his aged mother irrespective of paternal property is [238] not legally enforceable. It was not alleged in the Courts below that the mother was a party to the arrangement set up by the appellants, and we are not at liberty to permit new questions of fact to be raised on second appeal. The texts cited by the District Judge show that sons are bound to maintain their aged parents, and we are referred to no authority by the appellants in support of their contention. This appeal fails, and we dismiss it with costs.

(1) 2 B. 573. (2) Borr. 487 (cited at 2 B. 592).

8 M. 238.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

1884 Nov. 20. APPELLATE CIVIL. 8 M. 238.

CHATHUNNI AND OTHERS (*Defendants*), *Appellants* v. SANKARAN AND OTHERS (*Plaintiffs*), *Respondents*.* [20th November, 1884.]

Malabar Law and Custom—Inheritance—Issue of parents governed by different systems of law.

Where a woman belonging to a Malabar tarwad governed by the Marumakatayam law (succession by nephews) has issue by a man who is governed by the Makatayam law (succession by sons), such issue are *prima facie* entitled to their father's property in accordance with the Makatayam law and to the property of their mother's tarwad in accordance with the Marumakatayam law.

[R., 4 Ind. Cas. 1081=19 M.L.J. 736=7 M L.T. 221 (222).]

THIS was an appeal from the decree of V. P. deRozario, Subordinate Judge of North Malabar, in suit 29 of 1881, dated 30th October 1882.

The plaintiff, Nangileri Sankaran, and his two younger brothers sued Nangileri Odenan and eight others (1) to remove Odenan from the office of karnavan of the Nangileri tarwad; (2) for a declaration that defendants 5 to 9 were not members of that tarwad; (3) to prevent defendant No. 5 from interfering with the management of the tarwad property; (4) to have Sankaran made karnavan; (5) to recover certain tarwad property conveyed by Odenan to defendants 2 to 4 by way of gift.

The Subordinate Judge decreed claims (2), (3) and (5).

[239] Defendants 5, 6, 7 and 9 appealed against the decree on claims (2) and (3) making the plaintiffs and defendant No. 1 respondents.

The appellants and respondents belonged to the Tiyan caste.

The plaintiff's case was that they and defendant No. 1 belonged to the Nangileri tarwad, which was governed by the Marumakatayam law (succession by nephews), and that Katkandi Chathunni Vydier and his brothers (defendants 5 to 9), who were the issue of a woman called Chiruda, a member of the tarwad, by Katkandi Chandu, a Tiyan of South Malabar, who followed the Makatayam law (succession by sons), had no right or connection with the Nangileri tarwad. Upon this question the judgment of the Subordinate Judge was as follows:—

"Defendants 5 to 9 are the issue of this marriage, and the question before the Court is as to the law by which they are governed—whether it is Marumakatayam, which would make them members of their mother's tarwad, or Makatayam, by which they would become members of their father's family, or whether they are governed by both laws. There has been no decision on the status of the offspring of a Makatayam Tiyan by a Marumakatayam woman. The judgment in Original Suit 28 of 1873 of the late Subordinate Judge of Calicut. K. Raman Nayar, merely decided that a Tiyan woman, governed by Marumakatayam, does not forfeit her right to her family property by her having been once married to, but subsequently divorced by, a Tiyan who followed the Makatayam rule. The decision of the late Principal Sadr Amin of Tellicherry, K. Krishna Menon, in Original Suit No. 29 of 1865 cited at the hearing was on the question whether the son of a Mapilla following the Makatayam rule by a woman

* Appeal 50 of 1883. ["Appeal 50 of 1882" is another reading.]

1884 Nov. 20. — Appellate Civil. — 8 M. 238.

of a Marumakatayam family was entitled to a share in his father's property. The question was decided in the affirmative. The Sadr Amin observed that the father was a Muhammadan, and that, as far as he was concerned, the Muhammadan law was the guide; that the son's succession to the karnavanship of the tarwad was a pure accident, and did not in the least extinguish his right of succession to his father's estate; and that 'the fact of a man's status being governed by two opposite rules of descent may appear at first sight somewhat ludicrous, but a moment's thought will show that it is not an impossibility in a country where a man of a family whose right of inheritance runs through the male line is allowed to marry from a [240] family whose right of inheritance runs through the female line. The occurrence of such anomalous cases as this must last as long as the anomalous system of inheritance is permitted.' This decision, notwithstanding the language employed, does not affirm what some of defendants' witnesses assert that a man of a Marumakatayam tarwad whose father is a Makatayam man is governed by two opposite laws by which the tarwad property passes to his nephews and his self-acquired property to his sons. This double law of inheritance is what Mr. Holloway in Appeal Suit No. 110 of 1861 termed a 'piebald' system of descent. He decided against the validity of the custom. Mr. Wigram in his Commentary on Malabar Law, page 152, observes 'that the custom exists, notwithstanding the attempts of the Courts to stifle it, seems to be undoubted.' In this work Mr. Holloway's judgment is referred to, as also two other cases, one in which the late Sadr Court questioned the propriety of two distinct laws of inheritance prevailing in the same family, and the other before the Privy Council in which the custom was held not sufficiently established.

"In Appeal Suit No. 144 of 1875 on the file of this Court the question arose whether the issue of a Makatayam Mapilla by a Marumakatayam woman was governed by the Makatayam or the Marumakatayam rule. My decision upholding the former rule was upheld by the High Court in Second appeal No. 815 of 1880. The High Court observed 'that it is not the legal consequence of the marriage of a Muhammadan in whose family succession is governed by the Makatayam law with a Muhammad an lady in whose family such succession is governed by the Marumkatayam law that succession to the property of the husband will be governed by the Marumakatayam law; and if, under the circumstances, it would be competent for the husband or the descendants of the marriage to elect that succession should be governed by the one or the other law, it is found that, so far as evidence can be gathered of an intention from the manner in which the property was enjoyed, the husband and his descendants in the case before us intended to retain the Makatayam law."

"In *Thathu Boputty* v. *Chakayath Chathu* (1) a Tiyan governed by the Marumakatayam rule claimed the guardianship over his [241] children by his deceased wife who followed the same rule. The High Court observed 'the karnavan is as much the guardian and representative for all purposes of property of every member within the tarwad as the Roman father or grandfather; moreover, the relation of husband and wife does not in Malabar disturb this condition. These children have no claim whatever upon the property of their father, but their rights are entirely in that of their karnavan's family.' The reasonable deduction, from the language employed by the High Court, appears to me to be that if marriage disturb

(1) 7 M. H.C.R. 179.

the condition, and the children had a claim upon the property of their father, the decision would have been the other way. 1884 Nov. 20.

"These are nearly all, if not all, the decisions which have any bearing upon the question now before the Court, and none of them is decisive on the point in dispute." Appellate Civil.

After discussing the evidence, the judgment proceeded as follows :—

"The evidence on the side of defendants is wholly insufficient to outweigh the evidence on the part of plaintiffs showing the existence of custom acted upon by which the issue of Marumakatayam woman by a Makatayam man become members of their father's family, losing all right to their natural tarwad. In the present case defendants 5 to 9 lived with their father, assumed his family name, inherited his property, and discharged his debts. Fifth defendant has further contracted a marriage in Calicut with a Makatayam woman, and his son examined as a witness (fourth witness) by plaintiff states, truly enough, that he is heir to his father's property and is entitled to his acquisition including what his father derived from his own father, the witness' grandfather. From this it is clear that if defendants are to be held governed by Makatayam to enable them to inherit to their father and Marumakatayam to succeed to their tarwad, the two systems will come into conflict, for according to Marumakatayam defendants' acquisitions will be claimed by their tarwad and according to Makatayam by their offspring. Which is to prevail? If Marumakatayam, then all the descendants of the mixed marriage now recognized as Makatayam will become Marumakatayam, a transformation which no Court will lend its aid in effecting, for it cannot be concealed that there is a wide feeling of discontent with the Marumakatayam system among the classes which are governed by it. and by none [242] is the hardship of the rule more felt than by Tiyans, who, having adopted a system of marriage and acquired with it, as the natural consequence, a love for their offspring, are debarred by this system from transmitting to them their acquisitions which descend to some remote relation who is not unfrequently a third or fourth cousin of the acquirer. In the present case their is sufficient evidence of the existence of the custom asserted by plaintiffs, in justifying my holding defendants 5 to 9 to be members of their father's family governed by Makatayam rule, and that they have no right to be considered members of plaintiffs' tarwad." 8 M. 238.

The grounds of appeal were as follows :—

"(1) Because the lower Court was wrong in assuming the existence of the institution of marriage among the Tiyans in the sense in which marriage is recognized in Hindu Law.

"(2) The lower Court was wrong in saying that a female member of a Marumakatayam tarward and her issue lose their interest in her tarwad by her marriage with a man who follows a different law.

"(3) The Subordinate Judge ought to have found that by custom the defendants 5 to 9 have not lost their interest in their natural tarwad by the marriage of their mother.

"(4) Because the conduct of the parties shows that the appellants have not given up or forfeited their right.

"(5) Because the injunction prayed for ought not to have been granted, the fifth defendant being the karnavan.

"(6) Because the fifth defendant has the right to manage the tarwad properties."

1884 Nov. 20. — APPELLATE CIVIL. — 8 M. 238.

Mr. *Shephard*, for appellants.

The Advocate-General (Hon. *P. O'Sullivan*), for respondents.

The Court (TURNER, C.J., and HUTCHINS, J.) delivered the following

JUDGMENT.

The question raised in this appeal is whether or not the children of a lady governed by Marumakatayam Law and of her consort who was governed by the Makatayam Law lose all right in the property of their mother's tarwad.

[243] One of the appellants' witnesses, who claims to be an authority on matters of succession, indicates what appears to us the right principle for the decision of the question. He says that it is the natural right of the children of the lady to derive from their mother such rights of inheritance as would ordinarily pass to children under the peculiar Law of Marumakatayam. It lies on those who would deprive them of that right to prove that the customary law disallows their succession.

It has no doubt been asserted that the descent of property from a father according to Makatayam Law and from the mother according to Marumakatayam Law in one and the same family is an incongruity. But similar incongruities are not unknown to the law elsewhere. Ordinarily, no doubt, the succession to immoveable property is governed not by personal but by local law.

Where this is the case, as in England, we may find property descending according to the General law, and property descending according to a special local law, to different members of one and the same family. Thus, the eldest son may succeed to one estate in virtue of the general law of primogeniture and the youngest to another in virtue of the custom of Borough English, and all the sons in equal shares to a third in virtue of the custom of Gavelkind. Again, if an Englishman has married a lady enjoying property governed by the law of a foreign country, the children would inherit their father's immoveable property in England according to English law and their mother's immoveable property in the foreign country according to the law of that foreign country.

Prima facie then, where a Makatayam man has married a Marumakatayam lady, the issue would be entitled to their father's property in accordance with the rules of Makatayam Law and to the property of their mother's tarwad in accordance with the Marumakatayam Law.

In this case the evidence adduced by the respondents to prove a custom to the contrary is far too slight.

Five witnesses were examined by the respondents on this point. The first, no doubt, asserted the existence of this custom, but was unable to illustrate it by any case in which there has been an actual devolution of property. He too is contradicted by his own close connexion, the fifth witness for the respondents, who supports the appellant's case, claiming his father's property under the **[244]** Makatayam Law and his mother's under the Marumakatayam Law. The second witness asserts the existence of the custom, but he too can give no instance in which children have been deprived of their rights in the property of their mother whose family followed the Marumakatayam Law.

The third witness, a vakil in the Munsif's Court of Painad, affirms that the custom exists, but he is unable to explain it, and he cannot give any instance in which it has operated.

All that the fourth witness says is that his mother is a Marumakatayam lady, and that he has no right in the property of her tarwad.

The evidence of the first witness for the respondents explains what is possibly the foundation of the opinions given by him and other witnesses for the respondents. He says that in some families the ladies receive dowers in extinguishment of their claims upon the family property, whether the family follows Makatayam or Marumakatayam Law. This makes against the respondents' contention and tends to show that the custom alleged may be a mere matter of contract. The fifth witness, whose mother is a member of the Nangileri tarwad to which the respondents belong, asserted he was in the enjoyment of rights under both laws, that he followed Marumakatayam Law as far as his mother's properties were concerned, and Makatayam so far as his father's properties were concerned, and he explicitly denied the existence of the custom alleged by the respondents. The third witness for the appellants, who professed to be a referee in caste disputes among Tiyans (the caste to which the parties belong), supported the appellants' allegation that, on the marriage of a Marumakatayam lady to a Makatayam husband, neither she nor the children who may be born to her lose their right by Marumakatayam Law to the property of their mother's tarwad He gave as an instance the case of a vakil whom he mentioned, and whose house-name shows he is a member of his mother's tarwad.

The fourth witness for the appellants supports their case and asserts, as we have observed, that the right of the children is derived from their relationship by blood. He mentioned that his niece had married a Makatayam husband who had died, and that, although she continued to reside with her brother-in-law, her children lived with him in their mother's tarwad.

The case cited by the Subordinate Judge decided that a Tiyan [245] woman following the Marumakatayam Law does not forfeit her right in the property of her tarwad by having been once married to, and subsequently divorced from, a Tiyan who followed the Makatayam rule. This case, in so far as it has a bearing on the question before us, supports the appellants' case. So also does the decision of the Principal Sadr Amin Mr. K. Krishna Menon, in Original Suit 29 of 1865, where it was held that the son of a Marumakatayam lady was not deprived of the right to inherit from her Makatayam father. Against the opinion of Mr. Justice Holloway, when Judge of Malabar, we may set that of Mr. Wigram, who asserts that the custom of double inheritance exists, notwithstanding the attempts of the Court to stifle it. In Appeal Suit No. 144 of 1875 all that the Court decided was, that the property of the Makatayam husband would be governed by Makatayam Law. There is nothing in any of these cases which compels us to a conclusion different from that which the better evidence in this case establishes as to the practice of the people and which is in conformity with natural justice.

We are not expressing any opinion on the question as to whether it is or is not optional to the issue of such marriages to adopt, in respect of the property over which they have absolute power, either law of inheritance. According to the principle enunciated in *Abraham* v. *Abraham* (1), respecting converts to a religion which imposes a law of inheritance differing from that imposed by their original faith, it would seem they have such a right. All that the respondents' witnesses have shown is, that it is usual for the descendants of such marriages to elect the Makatayam Law.

(1) 9 M.I.A. 195.

1884 Nov. 20. — APPELLATE CIVIL. — 8 M. 238.

No objection was taken to the finding of the Subordinate Judge that the gifts, which it was in part the object of the suit to set aside, were invalid.

So much of the decree of the Court of First Instance as declares that the defendants 5 to 9 have no right in the plaintiffs' Nangileri tarwad, or to its properties, and as restrains the defendant No. 5 from interfering with the management of the tarwad property must be reversed.

The respondents must bear the appellants' costs of this appeal, and each party will bear his own costs in the Court of First Instance.

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8 M. 246=9 Ind. Jur. 146.

[246] APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

GANGADHARA (*Plaintiff*) *Appellant v.* SIVARAMA AND OTHERS (*Defendants*) *Respondents.** [21st August and 17th November, 1884.]

Mortgage—First mortgage paid off by third mortgagee in ignorance of second mortgage—Registration—Notice—Intention to keep alive first mortgage presumed.

S mortgaged land to P. G subsequently obtained a decree, by consent, against S, creating a charge on the same and other land, and registered the decree. A, in ignorance of G's decree, paid off P's mortgage, but took no assignment thereof, and took a mortgage from S of all the land covered by G's decree. In a suit by G against S and A to enforce payment of his mortgage debt:

Held, that A, not having had notice of G's decree, was entitled to stand as first incumbrancer in respect of the money paid to discharge P's mortgage, and that, even if registration was legal notice, an intention to keep alive P's mortgage was to be presumed in favour of A, in accordance with the ruling of the Privy Council in *Gokul Doss Gopal Doss* v. *Rambux Seochand.* (L.R., 11 I.A. 126.)

[**F.**, 15 M. 268 (277); **Appl.**, 22 C. 33 (44); **R.**, 13 A. 432 (**F.B.**); 35 M. 183 (185)=12 Ind. Cas. 412 (413)=22 M.L.J. 12 (14)=10 M.L.T. 380=(1912) M.W.N. 158 (161); 16 Ind. Cas. 877 (880); 21 M.L.J. 213 and 475=9 M.L T. 431 and 499=(1911) 1 M.W.N. 165 (170); **D.**, 18 B. 86 (90).]

THIS was an appeal from the decree of J. C. Hughesden, District Judge of Tinnevelly, dated 30th July 1884, reversing the decree of P. Tirumal Rau, Subordinate Judge of Tinnevelly, in suit 40 of 1882.

The suit was brought by Gangadhara Ramayyar against Sivarama Mudali (1), Ayyavayyar (2), Parasuramayyar (3), and Muttukrishnayyar (4) to set aside certain orders of the Subordinate Court, dated 28th March and 29th June 1881, releasing, on the petition of defendants 2, 3, and 4, certain land from attachment made in execution of the decree in suit 39 of 1877 obtained by plaintiff against defendant No. 1.

The Subordinate Judge decreed for plaintiff; defendant No. 1 to pay the costs of all parties to the suit.

On appeal, the District Court dismissed the suit.

The plaintiff appealed to the High Court.

The facts appear sufficiently for the purpose of this report [247] from the judgment of the Court (TURNER, C.J. and MUTTUSAMI AYYAR, J.).

Mr. *Shephard* and Hon. *Rama Rau*, for appellant.

Bhashyam Ayyangar, for respondents.

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* Second Appeal 387 of 1884.

Brajeshware Peshakar v. *Budhanuddi* (1) was cited for appellant. For respondents *Gokul Doss Gopal Doss* v. *Rambux Seochand* (2) was relied on, and it was contended that there was no difference between the case of a purchaser and a third mortgagee. In reply it was contended that the decision in the latter case did not go beyond the decision in *Adams* v. *Angell* (3).

1884 Nov. 17. — **Appellate Civil.** — **8 M. 246 = 9 Ind. Jur. 146.**

JUDGMENT.

On the 17th day of November the following judgment was delivered by

TURNER, C.J.—Sivarama Mudali, the respondent No. 1, was the owner of the five plots of land mentioned in the plaint.

In 1866 he mortgaged plots 1, 2, and 3 to Pushpavanalingam Mudali, who, in October 1877, obtained a decree for the enforcement of his mortgage.

In the same year the appellant, Gangadhara Ramayyar, brought Original Suit No. 39 of 1877 against Sivarama Mudali, and, in February 1878, he obtained a decree on a compromise, providing for the payment of the judgment-debt, as therein mentioned, and declaring the lands now in suit hypothecated as security for the payment in accordance with the terms arranged. The petition in which the terms of the compromise were notified to the Court contained the following statement:—"The defendant assures that he has not till now encumbered the mortgaged property either by mortgage, hypothecation, &c., to any other person." The decree was duly registered. On 23rd May 1878 the respondent No. 1 borrowed Rs. 3,500 from the respondents 2, 3, and 4 and mortgaged to them the five plots of land. Of the sum of Rs. 3,500, Rs. 1,900 were paid to Pushpavanalingam Mudali, who, in consideration of the payment, released his lien on the plots mortgaged to him—Nos. 1, 2, and 3.

Default having been made in payment of the sums due under the decree in Original Suit No. 39 of 1877, the appellant attached the properties hypothecated; the respondents 2, 3, and 4 filed an objection and the properties were released. The appellant then [248] instituted this suit to obtain a declaration that the properties hypothecated are liable to be sold in execution of his decree, and that, inasmuch as his lien is prior to that held by the respondents, he is entitled to have the sale made free from the incumbrance held by them.

Respondents 2, 3, and 4 pleaded that the hypothecation of the lands to the appellant was fraudulent and relied on their mortgage deed. No evidence was given in support of the allegation that the hypothecation in the appellant's favour was contrived fraudulently.

The Subordinate Judge held, in the absence of such proof, that it was to be presumed the compromise had been accepted by the appellant in good faith, and, finding that respondents 2, 3, and 4 had not obtained a transfer or assignment of the prior hypothecation, which had been discharged with the loan obtained from them, he held, in advertence to previous decisions of this Court and to the decision of the Privy Council in *Pandoorung Bullal Pandit* v. *Balakrishen* (4) that the appellant's lien was entitled to priority. On appeal, the Judge considered that the statement made in the petition to the Court that no prior liens subsisted made out a *prima facie* case of fraud against the appellant, and that, as the appellant had not rebutted it, the plea that the lien was obtained by fraud

(1) 6 C. 268. (2) 11 I.A. 126. (3) L.R. 5 Ch. D. 634. (4) 2 M. I. A. 60.

1884 Nov. 17. APPELLATE CIVIL. 8 M. 246 = 9 Ind. Jur. 146.

was established. While he agreed with the Subordinate Judge that the respondents 2,3, and 4 were not, on the other grounds urged, entitled to priority, he on this ground reversed the decree of the Subordinate Judge and dismissed the suit. In appeal, it is contended that the suit should not have been wholly dismissed, assuming that the appellant had failed to establish that he was entitled to the sale of the lands Nos. 1, 2, and 3 free of the lien held by respondents 2,3, and 4, for, as there was not any question that the sum decreed to him was a *bona fide* debt, he was at least entitled to the sale of the lands subject to the incumbrance held by these respondents.

This objection must be allowed. Again it is argued that no case of fraud was, *prima facie*, established against the appellant, and to this contention we also accede. The statement in the petition of the 5th February 1878, if it proved anything, proved no more than that the appellant had been himself deceived. There **[249]** being no other evidence that the lien asserted by the appellant was procured by fraud, the question arises whether the respondents 2,3, and 4 are entitled to priority to the extent to which they satisfied the lien of Pushpavanalingam Mudali. It has not as yet been held in this Court that registration is notice; for all that appears, the respondents 2,3, and 4 had no notice of the lien created by the decree in the appellant's favour; without such notice they would be in no worse position than purchasers for value, who, ignorant of the insecurity of their title, had discharged an incumbrance, that is to say, they would be entitled, in respect of the sums paid by them to discharge the lien of Pushpavanalingam Mudali to stand as first incumbrancers. Even if they had had notice, they are entitled under the recent ruling of the Privy Council in *Gokul Doss Gopal Doss* v. *Rambux Seochand* (1) to have an intention to keep alive the security presumed, unless the contrary is shown. Under these circumstances, the decree of the Appellate Court in so far as it reversed the decree of the Subordinate Judge in its entirety and dismissed the suit must be reversed and the decree of the Subordinate Judge must be modified as to Nos. 1, 2, and 3 by declaring that the sale must be made subject to the lien of the respondents for Rs. 1,900, the sum paid to Pushpavanalingam. Each party will bear his own costs in all Courts, as neither has fully established his contention.

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8 M. 249 (F.B.) = 9 Ind. Jur. 185.

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

VENKATA (*Defendant*) *Appellant v.* RAMA (*Plaintiff*) *Respondent.**
[7th October, and 25th November, 1884.]

Regulation IV of 1831—Act IV of 1866 (Madras)—Karnam's inam land—Hereditary office—Enfranchsement—Inam Commissioner's title-deed—Title to emoluments of office.

The lands forming the emoluments of an hereditary village office having been separated from the office by Government, were enfranchised and granted by the **[250]** Inam Commissioner to V, who had been appointed to, and, at the date of enfranchisement, held the office without possessing any hereditary claim thereto.

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* Second Appeal 195 of 1884.

(1) 11 I. A. 126.

1884 Nov. 25.

FULL BENCH.

8 M. 249 (F.B.)=9 Ind. Jur. 185.

In a suit by R, who claimed to be of the family of the hereditary office-holders, to recover the land from V.

Held, by the Full Bench (Hutchins, J., dissenting) that R could not recover.

[F., 9 M. 214 (217); 15 M. 284 (286); 21 M. 47 (48); Cons., 26 M. 339 (359); R., 20 M. 454 (456)=10 Ind. Jur. 94; 27 M. 16 (19); 30 M. 434=17 M L.J. 101 (102) =2 M.L.T. 101; 31 M. 526=18 M.L.J. 603 (604)=4 M.L.T. 282; 7 M.L.J. 248; D., 10 M. 226 (227)=11 Ind. Jur. 332; 22 M. 204 (206).]

THIS was an appeal from the decree of J. D. B. Gribble, District Judge of Cuddapah, dated 28th November 1883, confirming the decree of V. Subramanya Sastri, District Munsif of Proddatur, in Suit 567 of 1881.

The suit was brought by Settipalle Rama Subbayya against Ballavaram Venkata Ramayya to recover certain land valued at Rs. 660, which, the plaintiff alleged, had belonged to his ancestors as karnam's inam. The Collector of the District had given this land to the defendant when the defendant was appointed to the office of karnam on the 13th October 1877, and, when the inam lands were enfranchised, the Inam Commissioner gave the title-deed to the defendant. The defendant pleaded, *inter alia*, that the plaintiff had no right to sue, inasmuch as the order appointing him karnam in 1877 had not been cancelled.

The plaintiff's claim was decreed by the District Munsif. On appeal, the District Court reversed this decree on the ground that the Civil Courts had no jurisdiction.

This decree having been reversed on appeal by the High Court (KINDERSLEY and HUTCHINS, JJ.), the suit was remanded and the decree of the Munsif was then confirmed.

Sadagopacharyar, for appellant.

Gurumurti Ayyar and *Sadasiva Ayyar*, for respondent.

On the 3rd September 1884 the case was heard by a Division Bench (HUTCHINS and BRANDT, JJ.) and was referred to a Full Bench for decision by HUTCHINS, J., who delivered the following

JUDGMENT.

The main facts of this case are identical with those of the cases relied on by the appellant—*Kamatchi* v. *Agilanda*(1), *Srinivasa* v. *Lakshmamma*(2). *Bada* v. *Hussu Bhai* (3), and S. A. 390 of 1883 (4). The subject-matter is an enfranchised service inam, and the appellant was the office-holder at the time of the enfranchisement, while the respondent is the representative of a former incumbent and sued to recover the land.

[251] It is admitted that the lands were appurtenant to the office of karnam, and that such office belonged hereditarily to the respondent's family. If the lands had not been enfranchised, the respondent might unquestionably have instituted a suit before the Collector under Regulation VI of 1831, and I think there can be no doubt whatever that, unless the respondent was personally unfit for the office, the Collector would have been bound to give it him with all its emoluments. It seems hardly worth while to cite authorities to show that all suits under Regulation VI of 1831 were decided upon this principle. To ensure the office being held by a qualified person, the Executive was compelled to reserve to itself the determination of all claims, but subject to this one condition the absolute right of hereditary succession has been repeatedly recognized. The office was of course impartible and inalienable, but it was repeatedly laid down that, even when a village officer was dismissed for misconduct,

(1) 6 M. 334. (2) 7 M. 206. (3) 7 M. 236. (4) Not reported.

1884 Nov.25. — Full Bench. — 8 M. 249 (F.B.)=9 Ind. Jur. 185.

his nearest heir should be appointed in his place, unless either manifestly unfit or a participant in the misconduct. It was only when there was no member of the family hereditarily entitled, who was fit for the duty, that the Executive considered itself at liberty to confer the office on a stranger; and even then it was distinctly laid down that the stranger's incumbency was to last only as long as the life of the dismissed servant, and on the death of this party the office is to revert to the family, and to be filled by his next-of-kin fit for service. The hereditary right even of a female has been repeatedly recognized by both the Board and the Government. In such cases it was usual to appoint a gumasta from the relations of the family, or, failing them, a stranger, but such gumasta or stranger was always removeable at pleasure. In my judgment, it can hardly be questioned that if the respondent had preferred his claim before the Collector prior to the enfranchisement of the inam, the office would have been given to him and some other person, possibly the respondent, enrolled as his gumasta.

What really happened was this. The plaintiff's adoptive father died in 1870, and his death rendered the office vacant. The plaintiff was then a child and a claim was lodged on his behalf; but in 1874, probably on the ground that he claimed through an adoption, the Divisional Officer directed that he should produce a certificate of [252] heirship, and that meanwhile the inam should be classed as siwaijama—in other words, that the full assessment should be collected from the cultivators and credited to Government as extra land revenue.

On the other hand, the appellant was appointed karnam in 1877, and at the Inam settlement, made a year or two later, the lands were enfranchised in his name as the person at the time in possession. It is admitted that he had no hereditary claim, and he has since been removed from office on that very ground. As the Munsif has pointed out in an able and well-considered judgment, the appellant's claim to retain the lands rests solely on what the Munsif calls the casual incident of his having held the office and the inams at the time of settlement.

What then was the effect of the Inam settlement is the question to be determined. When Mr. Justice Kindersley and myself remanded this suit, the District Court having held that it had no jurisdiction, it appeared to me, and I believe to my learned colleague also, that the intention of the Legislature, as well as of the Executive under whom the Inam Commissioner acted, was that any person, who could have sued before the Collector for the office and its emoluments prior to the enfranchisement, would now be entitled to sue for the lands before the Civil Courts. In other words, any person hereditarily entitled and whose claim had not been considered and rejected by the Collector, can now enforce his right to the enfranchised lands through the Courts. I thought that the effect of the enfranchisement of the lands from the condition of service was simply to prevent unfitness for service being pleaded to a suit for the lands, and that the only advantage given to the person in whose favour or name the enfranchisement was made was to throw on any other claimant the burden of proving his claim. And this is no slight advantage when it is remembered that the lands must be deemed to have been the sole property of the office-holder or person entitled to the office, and that Madras Act IV of 1866, Section 3, expressly provides that no decision already passed by a Revenue Officer under Regulation VI of 1831 shall be called in question by the Civil Courts.

On the other hand, it is contended that the Government had the absolute disposal of these service inams, and that they have [253] chosen to give them to the appellant. Is that the effect of what the Government has done? I think not, and I shall endeavour to show this hereafter. For the present I merely wish to point out that, if it had been intended that the enfranchisement in favour of the actual incumbent should be conclusive, nothing could have been simpler than to say so, whereas all that Act IV of 1866 provides is that the lands shall be no longer subject to the condition of service, and that the previous Revenue decisions shall not be questioned. A decision under the Regulation need not, perhaps, be a formal adjudication in an actual suit, but it must be an order to which the claimant or some one on his behalf was a party and against which he might have appealed. A mere order of appointment made behind the claimant's back cannot, in my judgment, be deemed a decision at all.

Before considering further the effect of the Inam settlement, I will notice the decisions already given by this Court, and I will at once admit that, if the *dicta* contained in the judgments are correct, the view which I am disposed to adopt is wrong. But it seems to me that in none of the cases yet decided did the precise point now at issue arise, and that the principles to be applied ought to be more fully considered.

In *Kamatchi* v. *Agilanda* (1), the plaintiff's brother had been dismissed and the defendant appointed in his stead. On attaining his majority the plaintiff applied for the office, but the Collector rejected his claim. It was held, and I think quite rightly, that this was a decision against him, and that his only remedy was to have appealed to the Revenue Board. In the course of the judgment, however, it was pointed out that the Civil Courts were still debarred from taking cognizance of claims to hereditary offices, and it was said that, until the plaintiff obtained the office, he was not entitled to the emoluments, and that, as the emoluments were severed from the office before he obtained a recognition of his right to the office, the Civil Courts cannot award them to him. The existence of a decision against the plaintiff was fatal to his claim : the correctness of the other principle laid down appears to me open to serious question.

[254] In *Srinivasa* v. *Lakshmamma* (2), the plaintiff had himself been dismissed as unfit for the office, and it was held, no doubt rightly, that, when he was removed from the office, he lost his right to the lands. Here, again, there had been a decision which the Civil Courts could not question.

In *Bada* v. *Hussu Bhai* (3), the plaintiff's mother had applied for his deceased father's share, the plaintiff himself being in jail, and the Revenue authorities had declined to recognize the private division set up by her, and again relied on by the plaintiff before the Civil Courts. Consequently the whole inam had been conferred on the defendant, who had been admittedly holding the office for more than thirty years. Although the plaintiff was not himself a party to this decision, the claim had been made on his behalf, and it was clearly a question of policy, with which the Courts had nothing to do, whether the alleged division of 1845 should be recognized or not. The plaintiff's claim had been considered and those of another member of the family preferred. It seems to me that this would have been a sufficient ground for rejecting the claim, but the judgment appears to lay down a general principle that no one, who has not held the office, can claim the lands formerly appurtenant to, but now

(1) 6 M. 334. (2) 7 M. 206. (3) 7 M. 236.

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severed from, it. I was a party to this judgment myself, but in agreeing to it I had regard to the particular facts of the case, and did not intend to admit the principle as one of universal application.

There is another case, unreported, *Kakerla Chirra Reddi* v. *Thathi Reddi Pulla Reddi* (Second Appeal No. 390 of 1883). The decision there was expressly put on the ground that the defendant was in possession of the office and its emoluments under a decision of the Collector which stood unreversed, and it appears from the pleadings that the Collector had bestowed the office on the defendant by an order to which the plaintiff had been a party and against which he had appealed to the Board.

Second Appeal No. 170 of 1884 was heard at the same time as the present case. The facts were very similar to those of *Bada* v. *Hussu Bhai*, and we dismissed the suit on the ground that from motives of policy before enfranchisement the Revenue authorities had suppressed the office, or share of the office, held by those under whom the plaintiff claimed.

[255] I had intended, before referring this case to a Full Bench, to go more fully into the effect of the Inam Commissioner's operations, but the papers which I asked for have not yet been submitted, and I do not like to defer the reference any longer. I apprehend that there will be no difficulty in showing that the Government in appointing an Inam Commissioner, and the Commissioner in carrying out the settlement, expressly abstained from going into any disputed title. In this respect I believe there was no difference between personal inams under Regulation IV of 1831 and service inams under Regulation VI of the same year. The one class were as much at the absolute disposal of Government as the other: the Government could have resumed either, or they could have conferred either on any one they pleased: but what they did was, I believe, simply to withdraw their own claim while imposing a quit-rent and to leave all claimants to the land, subject to that quit-rent, to get their respective titles determined by the Civil Courts.

With these remarks, I would refer this case to a Full Bench.

BRANDT, J.—I have no objection to this case being referred to a Full Bench, reserving my opinion on the question referred.

On the 7th of October 1884, the case was heard by the Full Bench (TURNER, C.J., KERNAN, MUTTUSAMI AYYAR, HUTCHINS, and BRANDT, JJ.).

On the 25th of November the following judgments were delivered:—

JUDGMENTS.

TURNER, C.J.—The office of karnam was created for the discharge of *quasi*-public functions. When education was not general, the arts of writing and keeping accounts, like other crafts, were exercised by particular families, and so it came to pass that in very many places the office of karnam descended from father to son, and by custom became hereditary.

Emoluments for the discharge of the duties of the office were provided either in the shape of land exempt from revenue or subject to a lighter assessment, or of fees in grain or cash, or of both land and fees.

The importance of securing the due performance of the duties of the office led at an early period of British administration to the enactment of Regulations respecting it.

Regulation XXIX of 1802, after adverting to the expediency [256] of continuing the office "on an efficient establishment," provides for the maintenance in permanently-settled zamindaries of offices

of record under karnams. It confers on the proprietors the nomination of karnams and, recognizing the custom of hereditary descent in subordination to securing efficiency in the office-holders, it prescribes that in filling vacancies in the office of karnam the heirs of the preceding karnam should be chosen, except in cases of incapacity proved before the Zilla Judge, in which cases the landholders are to be free to exercise their discretion in the nomination.

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The Regulation goes on to declare the duties of the karnams so appointed, and provides penalties in the shape of fine and imprisonment for the neglect or fraudulent performance of such duties. The Regulation does not provide for the performance of such duties by deputy. It treats the office as it might any other public office as one of which the duties are to be discharged personally, and prescribes personal penalties for the breach of them. Even while allowing a customary right by inheritance to create a preferential title to the office, it does not treat it as creating an unqualified right, but makes the personal capacity of the claimant a condition essential to its recognition.

It is noticeable that this Regulation, possibly in order to secure the independence of the office-holders, makes no provision for their dismissal when once they have been appointed.

Regulation II of 1806, Section 7, declared that certain of the rules of Regulation XXIX of 1802 should not extend to districts where the revenue was not permanently settled, but that in addition to the rules prescribed by Sections 11, 12, 17, 18, 19 of Regulation XXIX other rules mentioned therein where thereby enacted for the due discharge of the duties of karnams. The rules which were thus awkwardly imported from the earlier Regulation were those which relate to the duties of karnams and to the penalties to which they were liable; the further rules enacted by the later Regulation placed the karnams under the immediate authority of the Collectors, empowered Collectors without restriction to nominate persons to the office for the approval of the Board of Revenue, and declared a karnam so appointed liable to removal from office for incapacity, disobedience or the neglect of the Collector's orders, or for falsifying or mutilating accounts, or if having abandoned [257] the duties of his office for other pursuits he failed to return or reassume them within one month.

Here, again, it will be seen that the terms of the Regulation made no provision for the performance of the duties by deputy. On the other hand, the context presumed a personal discharge of the duties of the office, and liability to personal penalties for breach of duty was imported from the earlier Regulation. Regulation II of 1806, Section 7, with the exception of Clause 2, which subjected the karnams in districts not permanently settled to the control of the Collectors, was repealed by Act XII of 1876 (Obsolete Enactments), but I have referred to it as showing what was up to the date of its repeal the law which regulated appointments to the office.

The question as to whether the incapacity which resulted from sex or age is such as is contemplated by Regulation XXIX of 1802 came on more than one occasion before the Court.

In *Alymalummaul* v. *Vencatoovien* (1), a woman, and in *Oolaty Bhoopatyrauz* v. *Vudda Pitty Gurrauze* (2), a minor, were held by the Sadr Court incompetent. The Court was not unaware that in some instances these disqualifications had not been recognized by the Revenue authorities,

(1) 2 M. S. D. 85. (2) M. S. D. (1853) 91.

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but it observed that the chief aim of the Regulation was "not to make the office an hereditary one, but to prescribe rules for having it filled up and the duties thereof efficiently discharged, consistently with which aim alone the claims of heirs to succeed thereto can be respected."

The decisions of the Sadr Court were followed by this Court in *Venkataratnamma* v. *Ramanujasami* (1), and it must be taken, until those decisions are overruled, that in the case of permanently settled estates inability by reason of age or sex to discharge personally the duties of the office is a sufficient disqualification.

It will be observed that Regulation II of 1806 did not impose on the Revenue authorities the obligation to have regard to hereditary claims in appointing karnams in districts not permanently settled. But the Board of Revenue very properly considered such claims should be recognized to the extent to which the Regulation XXIX of 1802 had allowed them. In Proceedings of 25th September 1849, addressed to the Collector of Trichinopoly, the Board observed that when it was hereditary the right would of course be [258] respected so far as was consistent with a capacity to discharge the duties attached by the Regulation to the office.

So far then the Board and the Courts were in accord. The Board inferred as the Court inferred that the primary consideration in making the appointment was the personal competency of the candidate.

But the Board proceeded to interpret the term capacity in a sense which the Court could not accept and which in effect rendered the qualification of capacity unmeaning. It was held that because the Regulation did not positively prohibit the performance of the duties by deputy they might be so performed. It must be at least open to serious doubt whether, when a *quasi*-public office is created or recognized by law and duties imposed on the holder, it is competent to him to devolve those duties on a deputy unless such power is expressly given or may be inferred from the context. Here, if any inference is to be drawn from the context, the Regulations intended that the duties of the office should be performed by the holder and by him only. The earlier Regulation expressly made capacity a qualification for appointment: the later Regulation expressly declared that incapacity was a good ground for dismissal. The Regulations, moreover, prescribed fine and imprisonment as penalties for negligence or misconduct, and it is certainly not probable that the latter penalty would have been authorized except for the breach of a strictly personal obligation.

In the view that the duties of the office might be discharged by deputy, the Board of Revenue has in some cases allowed the appointment of females and minors, though it ordinarily postpones the claims of any female to a male member of the family. If the principle is sound that the duties may be performed by deputy, the privilege so to perform them would attach to males as well as females, and the provisions of the Regulations respecting incapacity will apply only to cases where persons are incapable of appointing deputies.

It can hardly be contended that this was the intention of the Legislature. But while the Regulations appear to have required the appointment of a competent person to the office of karnam, the Revenue authorities were left unfettered by any legislative direction compelling them to recognize the hereditary claims of a person incompetent to discharge the duties of the office. It seems [259] to me not open to question that if the Revenue

(1) 2 M. 312.

authorities disregarded such an hereditary claim and appointed to the office a person who had no such claim, the appointment could not have been pronounced illegal.

The Madras Regulation VI of 1831, after reciting that emoluments derived from lands, &c., had been annexed by the State to various hereditary and other village offices in the Revenue and Police departments as wages for the performance of public services, and that it was necessary that such emoluments should in no case be separated from the offices to which they had been attached by the State, declares that all such emoluments were inalienable from such offices by mortgage, sale, gift or otherwise; that all transfers which might thereafter be made thereof by the holders of such offices should be null and void; that such emoluments should not be liable to attachment or other process in satisfaction of decrees of Court; that claims to the possession of, or succession to, hereditary village or other offices in the Revenue or Police departments or to the enjoyment of any of the emoluments annexed thereto should not be cognizable by the ordinary Courts of Judicature, but should, in the first instance, be adjudicable by the Collector of the district from whose decision an appeal was given to the Board of Revenue. It was further declared that nothing in that regulation should be construed to affect in any way the office of karnam established under Regulation XXIX of 1802 in districts of which the land revenue had been permanently fixed.

The Regulation VI of 1831, it will be observed, recognized the emoluments attached to the office of karnam in districts not permanently settled as annexed to the office by the State and as annexed as wages for the performance of public duties.

When the emoluments consisted of land, the land did not become the family property of the person appointed to the office, whether in virtue of an hereditary claim to the office or otherwise. It was an appanage of the office inalienable by the office-holder and designed to be the emolument of the officer into whose hands soever the office might pass. If the Revenue authorities thought fit to disregard the claim of a person who asserted an hereditary right to the office and conferred it on a stranger, the person appointed to the office at once became entitled to the lands which constituted its emolument.

[260] In course of time it appeared to the Government desirable to substitute money wages for the emoluments theretofore attached to the office of karnam and to allow the holders of the office to enfranchise the lands theretofore held as wages on payment of a quit-rent; and when lands had been so dealt with it no longer became necessary to continue the provisions of the Regulation prohibiting their alienation and exempting them from the jurisdiction of the Civil Courts. Consequently Act IV of 1866, recognizing the right of the Government in the past and in the future to enfranchise such lands, and that the effect of enfranchisement was to place them in the same position as other descriptions of landed property in regard to their future succession and transmission, declared that such lands after enfranchisement should be exempt from the operation of Regulation VI of 1831. But it was provided that nothing in that Act should be construed as authorizing any Court of Civil Judicature to call into question decisions affecting any service inams which might have been passed by Revenue officers acting under the provisions of Regulation VI of 1831 prior to the enfranchisement of such inams.

Although Regulation II of 1806 had expressly declared that the lands attached to the office should be inalienable from the office, it happened in

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some instances that while one member of a family was recognized as the office-holder, other members enjoyed parts of the inam lands which constituted the emoluments of the office. This enjoyment was not and could not be recognized as legal (Circular Orders, Board of Revenue, 26th October 1858; 19th March 1852; Macleane's Standing Orders of the Board of Revenue, p. 244; *Alymalummaul* v. *Vencatoovien*), (1) and could only be held by sufferance on the part of the persons actually appointed to the office. Where the persons having hereditary claims were rejected as disqualified or removed for misconduct, they had no claim to the emoluments and ordinarily did not enjoy them. When a stranger was appointed his appointment did not create an hereditary claim in his descendants, and in some instances it may have been temporary or provisional.

The facts of the case now before the Court in appeal appear to be the following :—

[261] The office of karnam in the village of Pedda Settipalle was actually held by three persons; but there were three other persons, of whom one was the person alleged by the plaintiff to be his adoptive father, who were recognized as having an hereditary claim to the appointment, and who were termed *ghair Misldars*, or men out of office. In this character the plaintiff's father had obtained or been allowed by the office-holders to hold some of the inam lands. It does not appear whether the three karnams and the three *ghair Misldars* were or were not members of one family: nor does it appear whether the same lands were uniformly held by persons appointed to the office from the several families or branches of the family.

The person alleged to be the adoptive father of the respondent having died on the 17th February 1874, the natural father of the respondent applied that the inams held by the deceased should be granted to the respondent as the adopted son of the deceased. Another person made a claim at the same time. An order was passed by the Deputy Collector on 17th February 1874, as follows :—

"There seems to be no reason to grant the inams to petitioners. Both the petitioners will have to establish their right in Court, and until then the lands should be in siwaijama that is to say, at the disposal of Government."—Exhibit A.

The Deputy Collector could not by this order have intended that the claim to the inam should be preferred to a Civil Court. What he meant was that the respondent's status as the adopted son of the deceased should be established in the Civil Court before his application in the Revenue Court could be disposed of.

It appears that the Revenue authorities in 1877 saw reason to complain of the lax manner in which the duties were being discharged. A report was made by the Tahsildar that some of the office-holders were incompetent, and it was suggested that the appellant should be appointed fourth karnam, and that he should receive as his emoluments certain of the lands attached to the office "to which there were no heirs and which were then at the disposal of Government." The Collector sanctioned the appointment of the appellant and directed that he should be put in possession of inam lands calculated to produce an income of Rs. 100 and of which some had in his lifetime been held by the respondent's [262] adoptive father. There is nothing to show that the appointment of the appellant was provisional. The Collector, although he was by the

(1) 2 M.S.D. 85.

rules bound to give a preference to a person having an hereditary claim to the office if duly qualified, was entitled to appoint a stranger if there was, in his judgment, no person having an hereditary claim who was so qualified. His order, until it was recalled or reversed, constituted the appellant a karnam as absolutely as if he had been a person who had been entitled to preference in virtue of hereditary right. The Inam Commissioner in 1880 enfranchised in the name of the appellant the inams then held by him. Certain persons other than the respondent claimed under the Regulation, possession of the lands, but their claims were rejected and the appeal of one of them was disallowed.

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In 1881 it was considered desirable that there should be one karnam only, and the appellant was confirmed as sole karnam; but one of the karnams then dismissed appealed, and, as he had held office longer than the appellant, his appeal was allowed and he was appointed sole karnam in substitution for the appellant.

The respondent brought this suit to recover from the appellant the lands which have been enfranchised to him.

The Courts below have considered whether or not they are at liberty in view of the provisions of Section 3 of Act IV of 1866 to entertain the suit, and have held there has been no decision of the Revenue authorities which estops from so doing.

Under a rule of the Board of Revenue, applications made by persons aggrieved by an order of the Collector assigning inam lands to an office-holder, for the revision of that order cannot be entertained after the lapse of three years from the date when possession has been given, and assuming that the respondent had made an application for the cancelment of the order of 17th October 1877, his application would not have been entertained after three years from the date of that order.

Seeing that the Revenue authorities would not have disturbed the order after three years, although it was not made *inter partes*, I think it possible they would have understood the order as a decision. But I do not think it necessary to determine this point, nor to consider whether, under the order of the Board or the general law, the period for an application to disturb such an order **[263]** can be limited, for it appears to me that the respondent has not shown any title to the relief which he asks.

The averment in the plaint that the lands in suit belonged to the respondent's ancestors is not supported by any proof, and in view of the terms of Regulation VI of 1831 cannot, I think, be maintained.

It may be that in some instances the land is not the emolument of the office but a reduction of the assessment. In such a case the Government could not resume the land, but only deal with the assessment. But in the case before us the orders of the Revenue authorities show that the lands are and were attached to the office, and, though the respondent's father may have improperly obtained possession of them, the Government was at liberty to resume them and to confer them on the office-holder, and it did so confer them on the appellant through the Collector in 1877.

The respondent is one apparently of several persons who have an hereditary right to the office, and, if he had been appointed to the office before the lands were enfranchised, he might have had a foundation for his claim to some of the lands in suit; but he was not appointed to the office, and, if he should now be appointed to it, the lands have ceased to constitute its emolument.

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On the ground that the respondent was not the holder of the office when the lands were enfranchised, I must hold that he has failed to show a title to the lands and that his claim is unfounded. If he had established a title, if he had shown that at the time of the enfranchisement of the inam he had been appointed to the office, the Court would have had jurisdiction to determine whether the enfranchisement in favour of the appellant could be supported. I would reverse the decrees of the Courts below and dismiss the suit with costs.

KERNAN, J.—I agree with the Chief Justice that the decrees should be reversed and the suit dismissed with costs. The plaintiff never was either appointed karnam under Regulation VI of 1831, or in possession of the land attached to and inalienable from the office under that Regulation. His claim now is that he ought to have been appointed to the office and put into possession of the lands: under Sections 1, 3 and 4 of that Regulation, such claim was, and still is, in the words of the Regulation and of Act IV of 1866, exclusively "adjudicable" by the officers of the Government in [264] the Revenue Department. Section 3 of the Regulation declares that such claims shall not be cognizable by the ordinary Courts of Judicature.

Act IV of 1866 does not repeal Sections 3 or 4 of the Regulation, as far as regards the power given to the Government officers in the Revenue Department to appoint karnams. That Act merely enfranchises the lands from the condition of service and permits the grant of them by the Inam Commissioner free from the inalienability and non-liability to execution provided by Section 2 of the Regulation. The ordinary Courts of Judicature cannot determine whether the plaintiff ought to have been appointed or should be considered as entitled to the office of karnam. I do not think the case calls for any decision whether the defendant holds the land granted by the Commissioner as his own or as a member of an undivided family.

MUTTUSAMI AYYAR, J.—The question referred for our decision in this case is whether the respondent—plaintiff—is, upon the facts found, entitled to the possession of the land in dispute. The land was a service inam attached to the office of karnam in the village of Pedda Settipalle, Prodattur Taluk, Cuddapah District. In 1870 the inam was in the possession of one Sivannaghari Narasanna, who, though he had a hereditary claim to the office of karnam, was then one of the three *ghair misldars* (men who did not hold the office), the duties of the office being discharged by three others. Narasanna died in 1874, and the respondent being then a minor, his natural father claimed possession of the inam for him on the ground that Narasanna had adopted him. It appears that there was also a rival claimant. The Deputy Collector in charge of the division, instead of proceeding to adjudicate on the claim under Section 3, Regulation VI of 1831, referred the parties to a Civil Court to establish their rights of succession to Narasanna and directed that the nett proceeds of the inam be credited to Government under the head of siwaijama, so that they might deal with them finally as they thought fit. Against this order the respondent's natural father preferred no appeal. In 1877 the Tahsildar of the taluk complained to the Collector of the inefficiency of the office-bearers, and suggested the appellant's appointment as a fourth karnam, adding that the lands of those who left no heirs might be annexed to the new office, as emoluments. The Collector adopted [265] the suggestion and, appointing the appellant as the fourth karnam, directed that lands yielding an income of Rs. 100 per annum be placed

in his possession. The land now in litigation forms part of them. The appellant entered on the duties of his office as the fourth karnam and got into possession of the land in suit in 1877.

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In 1880 the inam was enfranchised on behalf of Government by the Inam Commissioner. The respondent asserted his hereditary claim before that officer, but he was referred to a Civil Court with respect to this land, the inam being enfranchised in the name of the appellant, who was the party in possession. In 1881 the number of karnams was reduced from four to one, and the Board of Revenue dispensed with the appellant's services on the ground, as is admitted, that he had no hereditary claim to the office. It is found by the Courts below that Narasanna had adopted the respondent. It is not, however, clear when his minority ceased, though the plaint conveys the impression that it continued till 1879. The question for decision is, whether the respondent is entitled to the land because his adoptive father, though a *ghair misldar*, had a hereditary claim to the office and held the inam now in dispute from 1870 to 1874.

It was argued for the respondent that Civil Courts are not competent under Section 3, Act IV of 1866, to question the act of the Collector. On the other hand, it was contended for the appellant that the title-deed issued to him by the Inam Commissioner gave him a valid title to the land. As to the enfranchisement, it was in substance a commutation of the service tenure into a liability to make a fixed money payment, and it operated only to change the tenure and place the inam on the same footing with other private property. The fact that the enfranchisement was made with the appellant only shows that, he was then in possession as ostensible owner. As to the contention that, under Section 3, Act IV of 1866, it is not competent to us to question the Collector's order of 1877, it cannot be supported. Reading Section 3 of Act IV of 1866 together with Sections 3 to 6 of Regulation VI of 1831, the prohibition seems to me to be confined to decisions passed in the exercise of the judicial powers conferred upon the Collector by that Regulation. The order of the Collector in 1877 can only be regarded, in the circumstances in which it was made, not as a judicial decision, but as one passed in the exercise of his general **[266]** authority over the office of karnam. Again, the removal of the appellant from the office of karnam in 1881 and the declaration by the Board of Revenue that he had no hereditary claim are of no avail to the respondent, inasmuch as their jurisdiction over the inam had ceased with its enfranchisement. If the appellant lawfully held the office and inam at the date of enfranchisement, the inam would become his property. The substantial question is whether the respondent's right had lawfully been determined and transferred to the appellant. By reason of the enfranchisement, the inam is exempted from the operation of Regulation VI of 1831 by Section 2, Act IV of 1866. It may be that parts of that Regulation are not repealed because all the village service inams in the Presidency have not been enfranchised. It is therefore open to us, in my judgment, to consider whether the respondent's right was legally determined.

There is no doubt that the respondent's father had a hereditary claim to the office of karnam, but it does not appear that he ever held it. His hereditary right was regulated by Regulations II of 1806 and VI of 1831. According to Section 2 of the last mentioned enactment, all emoluments derived from lands annexed by the State to hereditary village offices were inalienable from such offices either by mortgage, gift, sale or otherwise, and all transfers which were thereafter made by the holders of such offices were null

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and void. The possession of the respondent's father, then as a *ghair misl* karnam from 1870-74, was contrary to the Regulation and therefore illegal. It was probably due to an arrangement made with the office-bearers, not uncommon in this Presidency, whereby the office-bearers discharged the duties of the office, but its emoluments were divided by them with their co-sharers. Such an arrangement being, however, null and void according to the Regulation, the respondent's father had no legal right to continue in possession, and the Collector was at liberty to put an end to it at any time and re-attach the land to the office from which it was illegally severed. Even according to the Standing Order of the Board of Revenue, which as a matter of policy enjoined consideration to the party in possession, Collectors were required, in cases where persons doing no duty were enjoying the profits of the office, to restore the emoluments to persons who actually performed the work when a lapse took place.

[267] According to the law, therefore, as it stood prior to the enfranchisement of the inam, a right to the land could only be legally acquired through the right to the possession of the office, and neither the respondent's father nor the respondent had then any vested interest in the office to sustain an action in the nature of an ejectment. It may be that the respondent's father and the respondent had the chance of a reversion in case there was a vacancy among the office-bearers and the respondent was qualified for the office when the vacancy occurred. Neither event happened in this case. The event that actually occurred was the nomination of an additional karnam owing to the incompetency of the office-bearers whom the Collector was entitled to dismiss. These, who had a vested right to claim possession, did not think it fit to impugn the arrangement. The respondent according to his averment was then a minor, and it cannot be held that an arrangement made under such circumstances to ensure an efficient performance of the duties of the office was illegal. But our attention is drawn to the orders of the Board of Revenue that, when a stranger to the family is appointed on the dismissal of the incumbent for the time being for misconduct and owing to the absence of qualified persons who have not participated in it, he should be appointed with the proviso that his appointment was to last only as long as the life of the dismissed servant, and that females and minors may be appointed, the duty of the office being temporarily performed by deputy. Although if the appellant's appointment was made provisionally or temporarily it might make a difference, still it was not so made in this case. The question is—is such appointment illegal? There is nothing either in Regulation II of 1806 or VI of 1831 to warrant the conclusion that the permanent appointment of a stranger is illegal, when there is no one duly qualified for the office in the family having hereditary claim.

It is provided by Regulation XXIX of 1802, Section 7, which applies to the office of karnam in permanently-settled districts, that in case of incapacity the heirs of the last karnam need not be chosen and that landholders shall be free to exercise their discretion in the nomination of persons to fill vacancies. Though it was not extended by Section 7 of Regulation II of 1806 to districts of which the revenue was not permanently fixed, there is no reason to think, as pointed out by the learned Chief Justice, when the [268] whole Regulation is considered, that the intention was to deny to the Collector the discretion which a zamindar or proprietor had.

The Standing Orders of the Board can only be regarded as suggesting cases in which a strict enforcement of the law in protection of the right

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vesting in the State to the performance of the duties of the office by a qualified person in the family may be temporarily waived either on grounds of policy or from consideration due to the family having a hereditary claim to the office. It seems to me that they cannot be regarded by a Court of Justice as part of the Regulations so as to invalidate an act permitted by them, though they might be accepted as grounds for departmental interference. Even assuming that the Collector's act was not authorised by his superiors, the respondent took no action to impugn it for three years.

It was ruled by the Board of Revenue that no incumbent should be ousted from his office by reason of defective title if he had held it continuously for three years.

On these grounds I am also of opinion that the respondent—plaintiff—is not entitled to the possession of the inam, and that the appellant's appointment was legal owing to the respondent's incompetency when it was made.

Brandt, J.—The respondent-plaintiff—does no doubt allege in his plaint that his alleged adoptive father was in enjoyment of that part of the land, the holding of which land free of assessment constituted the emoluments of the office of karnam, for possession of which respondent sues.

But the respondent does not allege that his adoptive father ever held the office of karnam.

From the exhibits filed in this case, which have now been more fully explained than they were at the hearing of the appeal by the Divisional Bench it would appear that there were three working karnams, while three others, of whom plaintiff's adoptive father was one, were *ghair misldars* or "not registered"—not office-holding—karnams, though they enjoyed some portions of the rent-free lands.

There is nothing to show how long the respondent's minority lasted, and nothing to support the suggestion of the District Judge that the appellant was appointed, *ad interim*, to perform the duties of the office subject to disposal of repondent's application. The [269] appellant was appointed on the ground that another karnam was required in addition to the then working karnams, who were three in number: and the fact that the appellant's services were in 1881 dispensed with under the orders of the Board of Revenue, one of the former three working karnams being appointed in his place, does not appear to me in any way to help respondent's case.

The effect of the enfranchisement, by and under Madras Act IV of 1862, of all inams of the classes described in Clause 1, Section 2, of Madras Regulation IV of 1831, *i.e.*, of personal and hereditary grants of money or land revenue conferred by Government in consideration of (past) services rendered to the State or in lieu of resumed privileges, was, as is stated in *Cherukuri Venkanna* v. *M. L. Narayana Sastrulu*, (1) "to remove from the claimants the disabilities to sue in the ordinary Courts of Judicature which Regulation IV of 1831 and the Acts explaining it had imposed:" and the Court went on to say that "No authority, however, was given to the (Inam) Commissioner to determine the rights of the claimants. The effect of his act, as explained by Madras Act IV of 1862, was to divest the Governor in Council of the jurisdiction to determine such claims and to vest the power of determining in the ordinary Courts."

Again Madras Act IV of 1866 recited that whereas in this Presidency certain inams attached to hereditary and other village offices had been and

(1) 2 M.H.C.R. 327.

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may be enfranchised from the condition of service, the Inam Commissioner's title-deed should be deemed sufficient proof of the enfranchisement of such lands from the condition of service, and exempted lands so enfranchised from the operation of Madras Regulation VI of 1831 which had, among other things, excluded from the cognizance and jurisdiction of the ordinary Courts determination of claims to such offices and to the emoluments attached thereto.

The District Munsif in his judgment in this case, which I admit is a well-considered judgment on a subject open to some doubt, says that he does not see why the decision of this Court above quoted, and another to the same effect, should not hold good in the case of inams formerly held on condition of service, as in the case of inams given for past services, or in lieu of resumed privileges.

[270] And this view appears to meet the approval of my learned colleague at whose suggestion this case is referred to the Full Bench, *viz*, that "it was the intention of the Legislature as well as of the Executive under whom the Inam Commissioner acted, that any person who could have sued before the Collector for the office (of karnam in an unsettled district) and its emoluments prior to the enfranchisement, can now enforce his right to the enfranchised lands through the Courts," provided that the claim of such person had not been considered and rejected by the Collector before the enfranchisement of such inam.

It is conceded that there need not have been a formal adjudication in a suit brought as such under Madras Regulation VI of 1831, but it is said there must have been an order to which the claimant or some one on his behalf was a party and against which he might have appealed; that a mere order of appointment (and an appointment made in pursuance of that order ?) is no decision (and the appointment no valid appointment ?) at all.

It appears to me that there is a very material difference between inams of the class and description specified in Regulation IV of 1831, and those described in Regulation VI of 1831. Whether or not inams of the former class were, as my learned colleague suggests, as much at the disposal of Government as the latter, I do not think it necessary now to consider.

The respondent's claim may, I consider, be disposed of on the following grounds:—

He fails, as it appears to me, to make out any title at all. He does not set up a case of trespass, or of fraud on the part of the appellant. Allowing that the person who, he says, adopted him enjoyed part of the lands attached to the office of karnam,—and that he had a claim as good as, or better than, others of the family, an outsider was appointed to the office of karnam in 1877, and in virtue of that appointment obtained possession of the emoluments then attached to such office; while he so held the office and emoluments, Government enfranchised the service inam land and allowed the then office-holder to retain the land at less than the full assessment. Enjoyment of the emoluments intended as remuneration for the office of karnam by persons not doing the duties of the office was contrary to the express intention and provisions of Regulation VI of 1831, and the mere enjoyment of [271] part of such emoluments by the respondent's father does not, in my opinion, give any support to the respondent's present claim.

The appellant was whether properly or improperly as regards the claim of the respondent, appointed karnam by the Revenue authorities. There was, so far as appears, nothing to prevent the respondent from

presenting a formal claim to, or from suing for the office in the Courts of the Revenue officers after the date of the appellant's appointment and before the land was enfranchised, and I do not think that because there was no formal adjudication on the respondent's claim to the office, we can regard the appointment made as no appointment at all.

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The only ground then on which as it seems to me the respondent's case can be put is, that Government intended that the lands which had hitherto been held free of assessment as remuneration for karnam's service, but which were enfranchised on condition of payment of 5/8ths of the full assessment when the lands were severed from the office, should be made over to the families of the hereditary karnams.

I think it may be taken that such lands were enfranchised in favour not of the family generally but of the office-holder for the time being, in which case they would presumably descend not to all the members of the family, but to the branch or heirs of the person in whose favour it was enfranchised. This would fully satisfy the requirements of the Acts of 1862 and 1866 as to such property "being placed in the same position as other descriptions of landed property, in regard to their future succession and transmission," and in the absence of any express intimation of an intention, or enactment that such lands were enfranchised subject to decision by the Civil Courts as to which member of the family might at the time of enfranchisement have had the best claim to the office, though not actually at that time holding the office, I am not prepared to hold that it is open to a Civil Court, after enfranchisement, to adjudicate on claims for the determination of which it would be necessary to decide that one person was at the time of enfranchisement entitled to the office from which the emoluments of the office have now been severed, and therefore entitled to land to which the obligation of service no longer attaches, in preference to another, who, at the time of enfranchisement, [272] held the office in virtue of appointment made by an authority competent to make it.

HUTCHINS, J.—Having stated my views at some length when I proposed to refer this case to a Full Bench, I shall not again travel over the same ground, more especially as no other member of the Court has adopted them, and my individual opinion is probably wrong and, at all events, has ceased to be of any importance.

The facts of the case turn out not to be precisely what was represented to Mr. Justice Brandt and myself at the former hearing, and I am not prepared to say that this particular plaintiff ought to recover. I have not thought it necessary to considar this point because I understand, and I am glad that it is so, that my learned colleagues, or at all events a majority of them, have seen their way to determine the case on the broad issue which I brought before them, and to re-affirm the principle that no person can recover in the Civil Courts an enfranchised village-servant's inam, unless he was himself the holder of the office, or (possibly) in possession of the land at the time of the enfranchisement.

The principle and the consequences of this proposition will be best seen by putting a simple concrete case, based on the facts of the present case, but without some which merely tend to complicate it. A, the village karnam, died shortly before the enfranchisement. B, his adopted son, applied to succeed him. Without deciding the question, although in my opinion he was bound to have decided it, the Revenue officer referred him to a Civil Court to establish his adoption. Meanwhile he ordered the assessment of the land to be collected and credited to Government as

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siwaijama—this was a mere provisional arrangement and certainly did not amount to a rejection of the claim. Subsequently, though not as a mere provisional arrangement. a stranger was appointed and took possession of the lands and office. The enfranchisement followed and the Inam Commissioner thereby released the land from the condition of service and commuted the Government's claims upon it to a quit-rent. The adopted son having established his adoption now claims the land. My learned colleagues consider that he cannot recover it because he was never in office. My view is that he can recover it, because he was clearly entitled to the lands (as well as to the office, although that is no longer in ques- [273] tion) unless for some reason the Government by its officers chose to reject his claim, because the lands have now been enfranchised from the condition of service, and because such claims to the lands (though not to the office) have again become cognizable by the Civil Courts, subject only to one condition, *viz.*, that they shall respect the decisions of the Revenue Courts.

Suppose a still simpler case—that A died only in 1879 and that B, instead of being an adopted son, was the natural son and undoubted heir of his father; that for some reason B could not or did not come forward until 1880, when the stranger had been appointed and the land enfranchised. Assuming B to have been capable of performing the service he would undoubtedly have recovered both the lands and the office if he had sued before the Collector. Are we to take it that the Legislature, by re-transferring to the Courts the cognizance of claims to the lands, intended to prevent such claims from being litigated at all and to vest the lands absolutely in the office-holder for the time being? If that was the intention, what is the meaning of the provision that decisions already passed must be respected? It seems to me both a useless and a ridiculous provision, unless, in the absence of such a decision, the Civil Courts are to entertain and determine all claims just as they would if the condition of service had never been imposed and the lands never exempted from their jurisdiction.

The Act must be construed with reference not only to the previous positive enactments, but to recognized custom and the established practice of the Revenue Courts. It is quite true that the early Regulations nowhere mention that the office of karnam in unsettled estates is hereditary, and I entirely agree that, with regard to settled estates, the primary object of Regulation XXIX of 1802 was " not to make the office an hereditary one but to prescribe rules for having the office filled up and the duties thereof efficiently discharged." The reason was that the hereditary character of such office was the established common law of the country. Regulation VI of 1831 itself describes the offices as essentially hereditary. There was no need to introduce by enactment the hereditary principle of succession ; on the contrary all the legislation on the subject was designed to prevent this principle being pushed to such an extent as to defeat the condition of service. [274] I need not refer to authorities to show that it continued to be recognized by the Revenue officers. So strongly were they impressed with the absolute hereditary right that, until lately, the Executive did not consider itself at liberty to reject claims which had been allowed to remain dormant for very long periods indeed. It was only in 1880, I think, that it introduced a species of limitation by declaring that, after holding office without dispute for three years, a karnam should be maintained undisturbed for life. But even then the unsuccessful claimant could come forward again after his rival's death.

It was probably on similar grounds that the Executive did not consider itself at liberty entirely to ignore the claims of a female or minor. Up to the passing of Regulation VI of 1831 such claims seem to have been recognized by the Civil Courts. The contrary view was first laid down by the Sadr Court in 1844, but the Revenue authorities seem to have continued to follow the old practice, not being bound by the later decision of the Sadr Court. But it is not necessary to discuss this question in the present case, as it does not affect the construction of Act IV of 1866 (Madras).

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It is however important to bear in mind one other circumstance, and that is, that very many of these inam lands were not orginally granted as remuneration for services, but were the private lands of the family. In such cases the family was bound to supply a person competent to perform the services and the services were remunerated, not by a fresh grant of Government land, but by a remission of the assessment on the family patta. One of the commonest questions in some districts was the question whether the land itself, or only, its assessment, formed the office-holder's emolument. In the latter case some other arrangement than the deduction of the assessment from the patta had to be made upon the appointment of a stranger, or the deduction was made from the stranger's own patta, and notwithstanding the apparently stringent provision in Regulation VI of 1831 that the emoluments shall not be diverted from the office, nothing was commoner than to find a number of *ghair misldars*, as they are called, in enjoyment of shares of the inam. A *ghair misldar* I understand to be a registered member of the family hereditarily entitled; he is registered, not as the actual office-holder, or *misldar*, but as a person holding a portion of the inam lands who has a claim to be [275] considered in the event of another karnam being required. That this is the received interpretation may be gathered from the Deputy Collector's order of October 1877 (I) in this very case. After sanctioning the appointment of the defendant he goes on to say that any of the *misl* karnams who is found quite incompetent may be included in the *ghair misl*, and a competent man out of the *ghair misldars* transferred to the *misl*. I do not of course say that such an order, or the practice which it recognizes, is in accordance with the principle of Regulation VI of 1831, although that Regulation nowhere prohibits the joint enjoyment of the whole family which supplies the working member, but the practice shows that great difficulty arose in carrying out that principle, and I believe that it was this practical difficulty, as much as anything else, which led to a system of cash salaries being substituted for grants of land or land revenue. If I am right in this belief, surely it tends to confirm my view that by the enfranchisement the Government simply commuted its claim and left to the Civil Courts the difficult task of adjusting the several claims upon the land.

Again, if the Government intended to confer the land absolutely on the office-holder for the time being and his heirs, why did they impose only a favourable quit-rent? They still give the office-holder emoluments by way of salary which they consider adequate remuneration for his services. Why should they not have resumed the land absolutely, unless it was that they knew that in a very large number of cases others than the actual incumbent had good claims upon it?

I do not at all shut my eyes to the many difficulties which my view involves. Where there are several persons equally entitled, for instance, it would be a difficult question whether they should all share the land, or if not, on what principle the Courts should discriminate between them.

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I am not sorry therefore that my opinion has not prevailed, but as I find myself unable to subscribe to the view of the rest of the Court, I have felt bound to record my dissent. That my opinion does not materially differ from that held by the Inam Commissioner and Revenue officers acquainted with the former practice, may be gathered from the fact that in this, as in most similar cases, the claimant was expressly referred to the Civil Courts by the Commissioner. I believe I have also come across cases in which Collectors refused to exercise their [276] jurisdiction under Regulation VI of 1831 on the ground that it was about to be transferred to the Civil Courts, which could very much better adjudicate between rival claimants.

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8 M. 276.

ORIGINAL CIVIL.

Before Mr. Justice Kernan.

Ex parte PINSENT. *In re* DORASAMI *v.* VENKATASAMI AND OTHERS.*
[6th February, 1885.]

Civil Procedure Code, Sections 336, 344, 638—*Discharge of judgment-debtor arrested under decree of High Court.*

A judgment-debtor having been arrested in execution of a decree of the High Court in its Original Civil Jurisdiction and brought before the Court under the provisions of Section 336 of the Code of Civil Procedure, claimed to be discharged on the ground that he intended to apply to the Court to be declared an insolvent either under the provisions of chapter XX of the Code or of 11 & 12 Vict., c. 21:

Held that the judgment-debtor on expressing his intention to file a petition and schedule under 11 & 12 Vict., c. 21, and complying with the conditions of Section 336 of the Code of Civil Procedure was entitled to be discharged.

[R., 14 C.L.J. 572 (575) = 12 Ind. Cas. 305.]

ON the 6th of February 1885 C.P. Pinsent, a defendant in suit 165 of 1885, having been arrested in execution of the decree in the said suit and produced before Kernan, J., an application was made by his Solicitor (*A. Champion*) for his discharge under the provisions of Section 336 of the Code of Civil Procedure.

JUDGMENT.

The following judgment was delivered by

KERNAN, J.—The defendant being brought before the Court, arrested in execution, applies to be discharged from custody, stating, under Section 336 of the Code of Civil Procedure, his intention to file his schedule as an insolvent under the general jurisdiction conferred by 11 & 12 Vict., c. 21, or under Section 344 of the Code of Civil Procedure. Though it cannot be said that Section 344 and the subsequent sections of that Act do not *in terms*, by the reference to Section 344 in Section 336, apply to the High Court, yet under Section 638 the jurisdiction of the High Court in insolvency is not interfered with by the Act.

[277] This being so, the High Court, acting under 11 & 12 Vict., c. 21, has power to entertain a petition by a defendant who, if he so desired, might have acted under Section 344 and been declared insolvent.

This result probably was not contemplated by the Act, but as the jurisdiction in insolvency under 11 & 12 Vict., c. 21, is preserved, the only

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* C.S. 165 of 1884.

construction to be put upon Section 336 and Section 344, so as to prevent confusion of jurisdiction in insolvency and to carry out the object of Section 336, is to hold that, in the Presidency towns, a defendant arrested and brought before the Court on stating his intention to file his petition and schedule in insolvency within the time fixed by Section 336 shall be discharged on giving security. If he does not file such petition and schedule, then the consequences contemplated by Section 336 shall follow.

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Section 336 is a substitution for the section of Act VIII of 1859, which enabled a debtor to be discharged upon surrendering all his property as directed by that Act. By adopting the above construction, the rights and remedies of both plaintiff and defendant are preserved and the object of the Legislature is carried out.

Let the defendant on complying with the conditions of Section 336 of the Code of Civil Procedure be discharged.

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8 M. 277 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

MALLAMMA (*Plaintiff*) v. VENKAPPA (*Defendant*).*
[12th October, 1883, and 20th December, 1884.]

Civil Procedure Code, Section 258—Contract to certify satisfaction of decree—Breach—Suit for damages.

The provision in Section 258 of the Code of Civil Procedure, 1882, which forbids any Court to recognise a payment under, or an adjustment of, a decree, unless certified to the Court executing the decree, does not debar a suit for damages for a breach of a contract to certify.

[**F.**, 13 A. 339 (342); 12 M. 61 (62); 12 Ind. Cas. 364 (365)=7 N.L.R. 136; **R.**, 11 B. 6 (32) (F.B.); 20 M. 369 (371); 2 M.L.J. 221 (225); **D.**, 10 B. 155 (163): 11 M. 469 (471); 18 M. 26 (27).]

[278] THIS was a small cause suit for Rs. 42, referred under Section 617 of the Code of Civil Procedure, for the decision of the High Court, by T. Ramachandra Rau, District Munsif of Gooty.

The case was stated as follows.

" The document on which the suit is based runs thus :—

" ' Agreement executed by Mankali Venkappa, Inamdar of Sangala to Chinna Ramanna, son of Siddana Tippanna, residing at Dosaludiki, Gooty Taluk, on 11th Vysakha Bahula of the year Vishu.

" According to the agreement of compromise filed in Original Suit No. 122 of 1880 on the file of the District Munsif's Court at Gooty, my inam and patta lands cultivated by you should be enjoyed by you this year, and the Government assessment paid by you, and the lands given up to me next year. On these terms we have both compromised this day, and you have given up to me out of these lands the inams in the *Sikayapampu*, the inam and patta lands in the *Peddovodlu*, the *Mittakayilu*, and the *Semkalammachenu*; adjoining the village, and you have retained in your possession only the *Semkalammatala* on which the betel garden is standing. Therefore I shall pay the Government assessment, &c., payable by you for the said lands this year. I shall pay the assessment

* Referred Case 4 of 1883.

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after deducting the assessment for the year Vikrama. The *Semkalammatala* having the betel garden should be given up to me by the 15th Chaitra Sudha of year Chitrabhanu. I shall also get dismissed the decree obtained against you in Court. This is the agreement executed.'

"The decree last referred to is admitted by both parties to be that in Original Suit No. 15 of 1880 on the file of this Court. Ramanna, in whose favour the agreement was executed, is dead, and plaintiff is his widow.

"The plaintiff urges that the defendant Venkappa enjoyed the lands under the agreement, and yet executed the decree in Original Suit No. 15 of 1880 against her (decree execution petition No. 322 of 1882), and recovered Rs. 41-9-0 from her, and therefore seeks to recover Rs. 42, being the loss sustained by her by defendant having wrongfully enjoyed the lands.

"The defendant admits the agreement, and alleges that the lands were not made over to him under it. At the hearing, his vakil further pleaded Section 258 of the Code of Civil Procedure as a bar to plaintiff's suit.

[279] "As to the facts, I am clearly of opinion from the evidence that defendant obtained possession of the lands under the agreement, and that, but for the point of law raised, plaintiff is entitled to recover the damages sued for.

"We next come to the point of law whether Section 258 of the Code of Civil Procedure bars this suit, and entertaining doubts about it, I beg to refer it for the decision of the High Court, at the instance of defendant.

"It is urged by plaintiff's vakil that there was no direct adjustment of the decree under the agreement in question. The case *Kunhi Moidin Katti* v. *Ramen Unni* (1) seems to support him. In my opinion there was only 'a promise' that satisfaction of the decree would be certified at some future date. But there was no payment 'in adjustment of the decree,' nor anything 'carried to the credit of the judgment-debt,' although plaintiff's husband 'may have depended upon the promise' of defendant being performed and upon 'an adjustment being made as the ultimate effect' of agreement. It may also be urged that defendant could not have certified the adjustment till after he cultivated the land and reaped the crop on it unmolested.

"In the case *Davlata* v. *Ganesh Shastri* (2) it was held that suits like the present one, were maintainable under Section 258 of the Code of Civil Procedure as it stood before it was amended by Act XII of 1879, but doubts were expressed whether this would be the case under the amended section.

"The question referred for decision is, 'Is the present suit maintainable?' Contingent upon the opinion of the High Court, I decide it in the affirmative, and decree for plaintiff as sued for with costs."

The case was heard by a Division Bench (KINDERSLEY and HUTCHINS, JJ.) on the 17th July 1883 and was referred for decision to the Full Bench on the 30th July. The following judgments were delivered :—

KINDERSLEY, J.—At the time of the Full Bench decision in *Viraraghava* v. *Subbakka* (3) I had not observed the verbal alteration of the words "such Court" to "any Court." I cannot feel sure that the alteration would make any difference. Having regard **[280]** to

(1) 1 M. 203. (2) 4 M. 295. (3) 5 M. 397.

the importance of the question, and to the existence of a Full Bench decision on the section as it stood before the amendment, I think the case should be referred to the Full Bench.

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HUTCHINS, J.—The plaintiff's husband and the defendant entered into a razinama in Original Suit 122 of 1880, reciting among other terms that the former should give up to the latter at once two out of three plots of land, and that the latter should certify satisfaction of the decree in Original Suit 15 of 1880 which he held against the former. Satisfaction was not certified, but the decree in Original Suit 15 of 1880 was executed. The plaintiff now sues for damages caused by the breach of defendant's promise, equivalent to the profit which she might have made out of the land if it had not been given up in consideration of defendant's promise.

The decision of this Court in *Arunachella Pillai* v. *Appavu Pillai* (1) was under the Code of 1859 and has been practically overruled by *Viraraghava* v. *Subbakka* (2). The latter case, however, was decided under the Code of 1877 before its amendment by Act XII of 1879. A later case to the same effect is reported—*Musutti* v. *Shekaran* (3).

The High Courts of Calcutta and Bombay have also dissented from *Arunachella Pillai* v. *Appavu Pillai* (*Gunamani Dasi* v. *Prankishori Dasi* (4) *Galawad Chanda Bhai* v. *Rahimtulla Jamal Bhai*) (5). In the former case, Couch, C.J., and the majority of the Court held that decree-holder was under a duty to certify a payment even without an express promise, and, if he obliged the debtor to pay a second time, became a trustee for the debtor for the payment which had not been appropriated to the decree. Both these cases were decided upon the Code of 1859.

In a later Bombay case—*Davalata* v. *Ganesh Shastri* (6)—decided under the Code of 1877 before its amendment, the Court held that the view which it had taken under the old Code, *viz.*, that such money might be recovered, had been clearly adopted by the Legislature, but it was intimated that the case might have been differently decided if it had fallen under the amended provision introduced by Act XII of 1879.

[281] Then came the case of *Patankar* v. *Devji* (7), when, with much regret, the same High Court held that suit for the recovery of such money was barred by Section 244 of the Code of 1877 and the last paragraph of Section 258 as amended.

The present case falls under the Code of 1882, in which Section 244 and the amended Section 258 are re-enacted *verbatim*. The former section requires that all questions arising between the parties and relating to the . . . . . discharge or satisfaction of the decree shall be determined by order of the Court executing the decree and not by a separate suit. The latter section, after providing that the decree-holder shall certify all payments under a decree which may be made out of Court, and that the debtor may take out a notice to compel him to make such a certificate, proceeds thus :—" No such payment or adjustment shall be recognised by any Court unless it has been certified as aforesaid." The word *any* has been substituted for *such*, which occurred in the Code of 1877, and the prohibition which formerly applied to the executing Court only has been deliberately extended to other Courts. No Court can now recognize an uncertified payment, and no question relating to such satisfaction can be determined in a separate suit.

I am, therefore, disposed to think that the present suit will not lie.

(1) 3 M.H.C.R. 188. (2) 5 M. 397. (3) 6 M. 41. (4) 5 B.L.R. 223.
(5) 4 B.H.C.R. A.C.J. 76. (6) 4 B. 295. (7) 6 B. 146.

1884 DEC. 20. — FULL BENCH. — 8 M. 277 (F.B.).

The question will be referred to the Full Bench as desired by Mr. Justice Kindersley.

The case was heard by the Full Bench (TURNER, C.J., KERNAN, KINDERSLEY, MUTTUSAMI AYYAR and HUTCHINS, JJ.) on the 12th October 1883.

Mr. *Subramanyan*, for plaintiff.

Sadagopacharyar, for defendant.

JUDGMENT.

On the 20th December 1884 judgment was delivered by

TURNER, C.J.—It may be that the object of the Legislature, in enacting Section 258 of the present Civil Procedure Code, was to give effect to the policy which had been already approved in the enactment of Section 244. It was accepted as desirable that, when proceedings had been instituted, the rights of the parties in reference to the matter in issue should be finally and conclusively [282] determined, and that no occasion should be given in the execution of decrees for the institution of fresh proceedings.

But to deprive a person, aggrieved by what is apparently a fraud, of a right to have recourse to the Court, the intention must be clearly expressed, and we must not carry the prohibition beyond the terms of the law.

The question which we have to consider is, whether, when a payment has been made or a new contract entered into for the purpose of satisfying a decree, and the object has failed by reason that the provisions of the law which are essential to its recognition as a payment or satisfaction of the decree have not been complied with, the person injured is deprived of a remedy by suit.

It appears to us that the grounds on which we held that such a suit would not be precluded by the provisions of Section 244 still obtain. In bringing the suit the plaintiff does not aver that a decree has been satisfied by the payment or contract. His case is that the decree was not legally satisfied. He raises no question as to the execution, discharge or satisfaction of the decree. He alleges only an intention that it should be satisfied—an intention to which the decree-holder might have given, but did not give, effect.

We have then to confine ourselves to the language of the amended provisions of Section 258.

Those provisions are so worded that full effect can be given to them without construing them to debar the institution of a suit for the recovery of money paid or damages for breach of the contract to certify.

The words of Section 258 are as follow:—"If any money payable under a decree is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, or if any payment is made in pursuance of an agreement of the nature mentioned in Section 257-A, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree. No such payment or adjustment shall be recognized by any Court unless it has been certified.

The term "payment" may mean either the act of paying money or the act and its result, the satisfaction of an obligation; the term "adjustment" is susceptible only of one meaning, an act and the result. Reading the terms together and interpreting the one [283] by the other, they would be properly construed as having a like meaning, and thus give

full effect to the word "such," which confines the terms with which it is connected to the sense in which they are used in the preceding paragraph of the section, where the payment is described as a payment of money payable under the decree and paid out of Court, and the word "adjustment" as an adjustment of the decree in part or in whole to the satisfaction of the judgment-debtor.* The words "any Court" substituted for the words "such Court" are not deprived of a sufficient meaning by this construction, for whereas the words "such Court" were held to mean only the Court executing the decree, there are other cases in which it could with equal propriety be held that in the absence of a certificate a decree should be deemed unsatisfied; for instance, if a suit were brought for the administration of the judgment-debtor's estate, it might be incumbent on the Court to determine whether or not a particular decree had been satisfied, and the same question might arise in the winding up of a company. In these cases the Court may be a Court other than the Court executing the decree, or, if it were the same Court, it would not be engaged in executing the decree. The conclusion, then, at which we arrive is that, at least between the parties and their privies, a decree shall be treated by every Court as unsatisfied by a payment or arrangement out of Court, unless its satisfaction is certified. It is not necessary for us at present to determine whether these sections are intended to apply to persons other than parties to the decree or their privies; but if future legislation is resorted to, the effect on the rights of such persons will, we trust, receive consideration. The law remains, for our present purpose, substantially as it was before the substitution of the word "any" for the word "such," and the same reasons influence us in holding the suit maintainable as are expressed in our decision in *Viraraghava* v. *Subbakka* (1). Had the legislature intended to deprive the judgment-debtor altogether of his remedy, we are entitled to expect that plainer language would have been used. It might have been enacted that no separate suit should lie for the recovery of an unsatisfied payment, or words to the like effect might have been employed.

1884 DEC. 20. — FULL BENCH. — 8 M. 277 (F.B.).

The Munsif will be informed that the suit will lie.

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8 M. 284.

[284] APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

NARAYANA (*Defendant No. 1*), *Appellant v.* NARAYANA (*Plaintiff*), *Respondent.*† [12th December, 1884.]

Malabar law—Kanam tenure—Improvements—Trees of spontaneous growth—Redemption suit—Costs of ascertaining value of improvements.

According to Malabar custom, kanams (mortgages) must, on the expiry of the term, either be discharged or renewed.

On redemption of a kanam, the kanam-holder (mortgagee) is not entitled to claim under the head of improvements, the value of trees of spontaneous growth.

In suits to redeem land demised on kanam tenure, on payment of the value of improvements, the costs of the adjudication necessitated by the refusal of either

* ["Judgment-debtor" apparently a mistake for "judgment-creditor."]
† Second Appeals 1095 and 1166 of 1883.

(1) 5 M. 397.

1884 Dec. 12. — Appellate Civil. — 8 M. 284.

party to accept the terms of compensation offered or demanded by his opponent should, when those terms are reasonable, be charged on the party refusing.

[R., 20 M. 435 (440).]

THESE were appeals from the decrees of C. Ramachandra Ayyar, Subordinate Judge of South Malabar, modifying the decree of B. Kamaran Nayar, District Munsif of Temelprom, in suit 811 of 1881.

The plaintiff, Kirangat Manakel Narayanan Nambudripad, sued Ananda Narayana Bhatta and six others to recover certain lands demised on kanam tenure, and Rs. 1,052-9-10, rent in arrears, with interest, and future rent, on payment to defendant No. 1 of the kanam amount, and the value of improvements. Defendant No. 1 pleaded that the plaintiff had been paid renewal fees, and had promised to renew the kanam. The District Munsif held that the document (Exhibit XIII) evidencing the promise to renew was not admissible in evidence, not having been registered. As to improvements, the District Munsif found that defendant No. 1 was entitled to Rs. 4,650-1-0, and decreed redemption accordingly. Both plaintiff and defendant No. 1 appealed against the decree.

The Subordinate Judge held that, although Exhibit XIII did not **[285]** require registration, being merely a receipt coupled with a promise to account for the money at the time of renewal, no promise to renew was proved.

As to improvements, the amount was reduced by about Rs. 2,000.

Both plaintiff and defendant No. 1 appealed to the High Court.

The facts necessary for the purpose of this report appear from the judgment of the Court (TURNER, C.J., and HUTCHINS, J.)

Sankara Menon and *Gopala Nayar*, for appellant.

Mr. *Shephard*, for respondent.

JUDGMENT.

TURNER, C.J.—We propose to dispose of both appeals in one judgment.

Plaintiff brought this suit to redeem 23 items of property originally demised on kanam in 1792. The kanam was from time to time renewed, the last occasion being in 1874. When the kanam was originally granted, the estimated area of culturable land was 102 paras (*a*) which was then expressed to be "land sowing 90 paras." In 1864 the extent was estimated at land "sowing 239 paras," and the extent of culturable land is now land sowing 61 paras, in addition to that which had been brought under the plough at the time of the renewal in 1874. The plaintiff also claims an arrear of rent.

The defendant pleads that there was an agreement to renew the kanam, and that he had paid the sum of Rs. 800 for this and other lands on account of renewal fees. He asserts that he had tendered the rent due, and that the value at which the paddy is estimated by the plaintiff is excessive.

It having become, in the judgment of the Court of First Instance and the Appellate Court, necessary to determine what sum was due to the defendant for improvements, those Courts have arrived at conclusions which are contested by both parties before us and which will be severally dealt with hereafter.

(*a*) (1) A grain measure = 40 lb. avoirdupois.
(2) The amount of seed-corn required to sow 6,400 to 9,600 square feet of land —*Wilson*.

We regret that we are obliged to express the opinion that the principal issues have been too imperfectly investigated by the Lower Appellate Court. 1884 DEC. 12.

[286] First, as to the alleged agreement for renewal. Exhibit XIII, which the Munsif declined to admit in evidence, is, in our judgment, a mere agreement to repay or allow the sum entered in the document, and, being of this nature, it was clearly admissible in evidence. The importance of it in this case is that, in prescribing the time when the sum, of which the receipt is acknowledged, was to be paid or accounted for, reference is made to the time of renewal. APPELLATE CIVIL. 8 M. 284.

If this document stood alone, we are not prepared to say that it would compel us to the conclusion that an agreement for renewal existed, for, according to the custom of the country, kanams must on their expiry be discharged or renewed, and the term might have been used in a vague sense, indicating merely the period when accounts would be taken between the jenmi and the kanamdar. But the document must not be considered alone, but in connection with the surrounding circumstances. In the first place, it was given after the expriy of the last renewed term. That term expired in 1876, and the date of the document is 1879. There was, therefore, no future time at which the kanam would be renewed by reason of its expiry. The parties were, at the time the document was made, standing in the relation of a jenmi who had a right to resume and of a kanamdar who was bound to resign the holding if the jenmi did not renew. The position of the parties has a material bearing in considering how far the mention of the time of renewal in Exhibit XIII is evidence of the subsistence at the time of an agreement to renew.

At the same time it is admitted that the sum of Rs. 800 was not paid as the renewal fee for any particular kanam, but generally on account of the renewal fees to be collected on a number of kanams held by the kanamdar from the same jenmi, and, having regard to this circumstance, possibly all that could be safely inferred from the receipt would be that there was at that time no intention to refuse a renewal. For proof of the alleged agreement to renew, it is then the oral evidence on which the kanamdar must principally rely, and to this the Subordinate Judge has not adverted. This evidence is given by the person who collected the money on behalf of the jenmi, and who was at the time the kariastan of the jenmi. He has distinctly proved, if his testimony is reliable, that an agreement to renew was made. He has asserted that he has [287] entered the sum as received on account of renewal fees in the account books of the jenmi, and those books are not produced to contradict it.

The second witness for the defendant corroborates the evidence of the kariastan that a renewal was promised by the jenmi. It cannot be said that this issue has been satisfactorily tried until due consideration is given to this evidence.

It is further noticeable in determining this issue that no provision was made in Exhibit XIII for payment of interest on the Rs. 800 then taken. If that sum was advanced as a loan to be repaid at a future time, it is inconceivable that there should have been no provision that at least the same interest should have been paid on it as was paid upon the sums which were due on kanam by the jenmi to the kanamdar. If there were no other kanams which had expired or were about to expire when the payment of the Rs. 800 was made, it is permissible to infer that the

1884 DEC. 12. — APPELLATE CIVIL. — 8 M. 284.

promise of repayment or allowance had in view at least the probability that the kanam which had expired would be renewed.

As to the rent, the Subordinate Judge failed to dispose of the fifth issue as to the rate at which the paddy was to be paid for. The Subordinate Judge has assumed the rate was admitted. It may have been so orally, but there is no record of the admission. If it becomes necessary to inquire what sum should be paid by way of compensation for improvements, we desire to point out the following objections which have been successfully maintained to the finding of the Subordinate Judge. The evidence on the record shows that the lands brought under cultivation were of different classes and required a different rate of expenditure, and we cannot say that the action of the Subordinate Judge in allowing a uniform rate all round is less arbitrary than the action of the Commissioners which he has impeached. So for as is possible, some support should have been sought by the Subordinate Judge for the conclusions at which he arrived from the recorded evidence as to the outlay necessary to bring the lands according to their several qualities into their present state of improvement.

A yet more important question is as to the area of land on which the improvement should be allowed. The jenmi complains that the Subordinate Judge has assumed that the whole area of land beyond that included in the original kanam has from time [288] to time been improved without any allowance being made for the value of improvements at the time of renewal.

This Court in *Muppanagari Narayanan Nayar* v. *Virupatchan Nambudripad* (1) laid down what we conceive to be the true principle upon which such a question as this should in the present day be determined.

It was, we believe, the usage in Malabar that account should be taken of the improvements at the end of the term of kanam, and that the value should be added to the kanam if it was not at once discharged by payment. This usage was most convenient, for it enabled the parties, within a reasonable time after they had been made, to determine what amount ought fairly to be allowed to the kanamdar for his labor and expenditure. The usage has, however, in course of time been greatly departed from, and in many instances a renewal has been granted, leaving the account between the parties respecting the value of improvements still undetermined. It may be that the Subordinate Judge has come to a right conclusion in this case in allowing improvements on the whole area claimed by the kanamdar. The circumstance that nothing was paid for improvements in 1864 suggests that those improvements have not yet been taken account of. At the same time it is urged in this Court that those improvements may have dated from even an earlier period of renewal; in regard to some of them it is asserted they have done so. The increase in the porapad (rent) appears to be explained by the circumstance that a larger area of land had been rendered culturable, and it does not necessarily follow that the increased porapad was an admission that the landlord had satisfied the kanamdar's claim in respect of improvements which had increased the area. The Subordinate Judge has not, however, tried this issue, and in the re-trial which we propose to order it will be necessary for him to do so, if his decision on the issue as to the agreement for a renewal is unfavourable to the kanamdar.

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(1) 4 M. 287.

As to the claim for the value of trees of spontaneous growth, we are not aware that the law of Malabar recognizes in a kanamdar any right to compensation on this account, and it has been expressly disallowed in a decision of this Court to which reference [289] is made by the Subordinate Judge. We are not prepared to dissent from that ruling.

We notice that the Subordinate Judge failed to allow the kanamdar any part of the Rs. 800 which unquestionably be paid. If it be found there was no agreement to renew, it should be ascertained whether some portion of the Rs. 800 is not to be allowed in this suit to the tenant before he can be called upon to surrender his land. It is admitted, as we have already mentioned, that the sum was not paid for the renewal of any specific kanam, but generally on account of the kanams which the defendant held, and the Subordinate Judge will have to ascertain whether in whole or in part it has been appropriated to renewal fees due on kanams other than the one now in question.

With these observations we shall set aside the decree and direct a re-hearing of the appeals.

The Court of First Instance awarded costs to the defendant, considering that he had been hardly treated by the jenmi.

The Subordinate Judge directed each party to bear his own costs.

Ordinarily, a mortgagor who comes into Court offering to pay less than is due for the purpose of redemption should bear the cost in the suit for redemption.

In Malabar the extremely difficult question of compensation for improvements necessitates in many cases resort to the Court. We are unwilling to lay down, therefore, any general rule in cases where the question as to liability for costs must depend upon the conclusion at which the Court may arrive on many complicated issues. If the offer of the plaintiff is reasonably approximate, if the defendant's demands are reasonably moderate, the one or other should be charged with the costs of the adjudication necessitated by his refusal to accept the terms offered or demanded by his opponent.

The costs of these appeals will abide and follow the result.

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8 M. 290=9 Ind. Jur. 144.

[290] APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

NARASIMHA (*Plaintiff*), *Appellant v.* VENKATADRI AND ANOTHER (*Defendants*), *Respondents*.* [8th September, 1884 and 14th January, 1885.]

Hindu law—Widow—Alienation—Moveable property.

The restriction placed by the Hindu law on a widow's power of alienation of her husband's estate extends to moveable as well as immoveable property.

[R., 32 B. 59=9 Bom.L.R. 1305 (1319); 31 C. 214 (216); 8 M. 304; 6 N.L.R. 46 (48)= 5 Ind Cas. 752.]

THIS was an appeal from the decree of L. A. Campbell, District Judge of Nellore, in Suit 12 of 1882.

The facts necessary for the purpose of this report appear from the judgment of the Court (TURNER, C. J., and MUTTUSAMI AYYAR, J.)

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* Appeal 44 of 1884.

1885 JAN. 14. — APPELLATE CIVIL. — 8 M. 290 = 9 Ind. Jur. 144.

Visvanatha Ayyar, for appellant.

Gurumurti Ayyar and *Sadasiva Ayyar*, for respondent No. 1.

JUDGMENT.

The appellant, Narasimha, had a sister named Subbamma, who died childless on the 3rd January 1882. About ten days before her death, as alleged by the appellant, she gave away her property to him and placed it in his possession. It consists of moveable property of considerable value and also of some immoveable property, both having devolved on her by right of inheritance upon the death of her husband, Pabbisetti Chinna Subbaiya, about eight years ago. Pabbisetti Venkatadri, respondent No. 1, claimed to be his reversioner, and Pabbisetti Pedda Subbaiya respondent No. 2, to be his adopted son. Both these impugned the gift set up by the appellant as being not true and valid. Respondent No. 1 denied also that a boat, which the appellant claimed as part of Subbamma's property, was in his possession, and contended that no declaratory suit could be maintained. In proof of the alleged gift, the appellant produced five witnesses, three of whom are his relatives, and they deposed to a gift from Subbamma to all her brothers including the appellant. The Judge considered [291] that he was not called upon to determine the preliminary question whether the appellant could maintain a suit for a mere declaration of his title, because his predecessors settled the issues and no issue was framed with reference to the preliminary objection. As to the alleged gift, he observed that the appellant's own witnesses deposed to a gift jointly to him and his brothers, and that a gift by a childless widow, whether of moveable or immoveable property inherited from her husband, was bad in law. As regards the adoption of respondent No. 2, he held in Suit No. 28 of 1882 on his file that it was not proved. He dismissed this suit with costs on the ground that the appellant did not establish his title. It is contended on appeal among other things that, under the Mitakshara law, the gift ought to be upheld, at least so far as it relates to moveable property. We took time to consider what weight was due to this contention, and we are of opinion that it cannot be supported. The rulings of the late Sadr Court of Madras were noticed by the Privy Council in *Bhugwandeen Doobey* v. *Myna Baee* (1), and doubt was thrown on the correctness of the pandits' opinion on which they proceeded. The text of Katyayana, from which a restriction on the widow's power of alienation over the property inherited from her husband is ordinarily deduced, is cited by all the commentaries of authority in this Presidency. It appears in Colebrooke's Digest, Bk. V, Ch. IX, V. 477, and is as follows :—

"What a woman has received as a gift from her husband, she may dispose of at her pleasure after his death, if it be moveable, but so long as he lives, let her preserve it with frugality, or she may commit it to his family.

"2. The childless widow, preserving inviolate the bed of her lord and strictly obedient to her spiritual parents, may frugally enjoy the estate until she die ; after her, the legal heirs shall take it."

The question is whether the second paragraph of this text refers to immoveable property only, or to moveable as well as immoveable property. In Smriti Chandrika, Ch. XI, Section i., Sloka 28, the commentator refers to a text of Brahaspati which says :—"After the death of the husband, the widow preserving the honor of the family shall obtain

(1) 11 M. I. A. 487 (508).

1885 JAN. 14. — APPELLATE CIVIL. — 8 M. 290= 9 Ind. Jur. 144.

the share of her husband so long as she lives, but she [292] has not property therein to the extent of gift, mortgage or sale." This text has evidently reference to moveable property inherited from her husband, for, in the preceding paragraph, Brahaspati is cited as saying that a widow is incompetent to inherit at all immoveable property. After thus denying the widow's power of alienation generally, the commentator proceeds to allude to a text of Prajapati cited in Sloka 20 as authorizing a gift for religious and charitable purposes. The doctrine of Smriti Chandrika then is that a widow is incompetent to inherit immoveable property from her husband, unless she has a daughter, that whatever property she inherits, she is not competent to alienate by gift, mortgage or sale, except for religious or charitable purposes.

The author of the Sarasvati Vilasa cites in Slokas 516 and 521, two texts of Katyayana and treats them in Sloka 532 as forbidding the alienation of both moveable and immoveable property.

(516) When her husband is dead, she who upholds the family shall receive her husband's share; her proprietorship is for her lifetime in gift, mortgage or sale.

(521) The sonless wife who guards her husband's bed and is steadfast in her continence and docile shall have possession until her death; after her, the heirs shall have it.

In Vyavahara Mayukha, Ch. IV, Section viii, Sloka 4, Katyayana's text is expressly stated as applying to moveable and immovable property.

In Madhaviya, Section 43, the commentator refers to the text of Katyayana as warranting the succession of the widow, and in Section 44 he refers to the text of Brahaspati, which prohibits the wife from taking immoveable property, and interprets it, in order that it may not be inconsistent with the text of Katyayana, as prohibitory of the widow selling or making away with immoveable property without the consent of the other heirs. He does not, however, consider whether the text of Katyayana forbids the alienation of moveable property for other than religious or charitable purposes.

Thus, most of the leading commentaries in this Presidency warrant the inference that the restriction, which is placed on the widow's power of alienation over property inherited from her husband, extends to moveable as well as immoveable property.

Both in Dayabhaga, Ch. XI, Section i., Slokas 56, 60, 63, 64, and Dayakrama Sangraha, Ch. I, Section ii, the same view is taken. There is, however, this distinction between the Bengal school and the Mitakshara school; according to the former, a mere use of the husband's property is given to the widow with a special power to [293] mortgage or sell. A passage from the Dhana Dharma of Mahabharata is cited in both the Dayabhaga and Dayakrama Sangraha to the effect that "for women, the heritage of their husbands is applicable to use. Let not women on any account make waste of their husbands' wealth." According to the Mitakshara, the analogy of the law of partition is applied to the widow's estate (Ch. II, Section i), and in Smriti Chandrika, Ch. XI, Section i, Sloka 19, a text of Vridha Manu is cited as showing that, by marriage, the wedded wife acquires ownership, though of a dependent character, over the entire property of her husband, and that, after his demise, she acquires independent power over it. The Mitakshara doctrine seems to be that the widow has a complete vested ownership as contradistinguished from a mere right to use, though her power over it to make a gift or sale at her pleasure is restricted by express texts. Hence those who considered the text of Katyayana to be applicable only to immoveable property doubted whether the widow

1885 JAN. 14. — APPELLATE CIVIL. 8 M. 290= 9 Ind. Jur. 144.

was precluded from alienating moveable property. Having regard, however, to the extent to which the widow's power of disposition is treated, as restricted in the leading commentaries in the South, there appears to be little or no difference in the result. Hence the Judicial Committee observed, in *The Collector of Masulipatam* v. *Kavali Vencata Naranappa* (1), that, the restrictions on the widow's power of alienation are of the very substance of her heritage. Assuming for a moment that she has a larger power over moveable than immoveable property, it can by no means be larger than that possessed by the father of a Hindu family under the text of Yajnyavalkya cited in Mitakshara, Ch. I, Section i, Sloka 27, It is observed by Mr. Mayne in Section 229 that the power must generally be taken to be limited to such necessary or suitable purposes as would come within the ordinary power of the head of a house-hold. We should prefer to say that the nature of moveable property being such that in many cases conversion is essential to its enjoyment, the widow is not precluded from converting it, but must preserve the capital, unless the expenditure of it is necessitated by the insufficiency of the income to provide for her maintenance subject, nevertheless, to a power to dispose of a moderate portion for works of piety. She is not bound to preserve the [294] income, but, owing to her temporary ownership, has a disposing power over it. She may either expend it at her pleasure or may allow it to fall into, and become part of, her husband's estate, and where she has not made any disposition of the savings of income, they will become part of the husband's estate. The allegation that any portion of the property in suit was acquired out of income, was made for the first time in appeal and is inconsistent with the averment in the plaint. We need not, therefore, consider whether, if she makes savings, it is to be presumed, in the absence of proof of a contrary intention, that she has allowed them to fall into, and become part of, the *corpus*. We are, therefore, of opinion that, even if the gift set up by the appellant were proved as alleged, the appeal must fail. The appellant must pay the costs of respondent No. 1.

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8 M. 294=1 Weir 700.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

KONDADU *v.* RAMUDU AND ANOTHER.* [12th February, 1885.]

Act XIII of 1859, *Section* 2—*Advance of grain and money—Order to repay value of work not performed.*

An advance of money and grain having been made to a labourer for work to be done, the labourer failed to complete the work, and an order was passed by a magistrate, under Section 2 of Act XIII of 1859, directing repayment of the balance of the advance not worked off by the labourer:

Held that, as it was not proved that the labourer was offered and accepted the grain in lieu of money to be advanced, the order was illegal.

THIS was a case referred under Section 438 of the Code of Criminal Procedure for the orders of the High Court by J. Grose, District Magistrate of Nellore, on the 21st of October 1884. The facts were as follows :—

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* Criminal Revision Case 655 of 1884.

(1) 8 M. I. A. 529.

1885 FEB. 12. — APPELLATE CRIMINAL. — 8 M. 294 = 1 Weir 700.

Tammisetti Ramudu and Pasupulati Laksminarasu were prosecuted by Vuppu Kondadu, a contractor engaged on the Sungum project, under Act XIII of 1859, for criminal breach of contract.

[295] The Second-class Magistrate at Sungum found that the complainant had advanced Rs. 54-10-2 to the accused for work to be done, and that, after completing a portion of the work valued at Rs. 27-3-11, the accused had deserted the work. The accused were ordered to repay to the complainant Rs. 27-6-3, and Rs. 2 on account of process fees. Against this order an appeal was made to the Special Deputy Magistrate of Nellore. He found that the advance was made partly in grain and partly in cash, Rs. 28-9-6 being the cash payment, and held that although the Act only referred to advances of money, yet that in this case the grain was received as money, the value having been settled at the time the advance was made.

The appeal was dismissed; but at the request of the Deputy Magistrate, the case was referred to the High Court as there were several similar cases pending.

Mr. *Wedderburn*, for the accused, referred to *Reg.* v. *Jethyavalad Vestya*, (1) and contended that Section 2 of Act XIII of 1859 being a penal enactment, must be construed strictly.

The Court (MUTTUSAMI AYYAR and BRANDT, JJ.) delivered the following

JUDGMENT.

There was an advance in money, but the whole of the money agreed to be advanced was not paid in cash, but part in cash and part in grain.

Where an employer of labour offers the advance in money and the person employed asks to have part of the advance in grain as the equivalent of money, we consider that there would be sufficient compliance with the requirements of the Act, seeing that the advance may in such case be treated as an advance in money, part of which was in fact exchanged for grain supplied by the employer at the request of the labourer; but where the facts of the case do not warrant such an inference, we should consider ourselves bound to adhere to a strict interpretation of the Act, which is of a penal character.

As analogous cases, we would refer to rulings of this Court in which it has been held that orders for maintenance in which it is directed that grain be delivered or cloths provided cannot be [296] supported under the provisions of Section 488 of the Code of Criminal Procedure.

In the case before us there is not sufficient evidence to justify us in holding that there was an actual offer by the employer of money equivalent to the grain accepted in advance.

We must therefore quash so much of the order of the Sub-Magistrate as directed the accused to refund the equivalent of the grain advanced.

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(1) 9 B.H.C.R. 171.

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APPELLATE CRIMINAL.

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8 M. 296 = 2 Weir 554 = 9 Ind. Jur. 461.

APPELLATE CRIMINAL.

Before Mr. Justice Brandt.

QUEEN-EMPRESS *v.* ERRAMREDDI AND OTHERS.*
[23rd February 1885.]

Criminal Procedure Code, ss. 403, 437—Different charges arising out of same transaction —Acquittal—Further inquiry—Re-trial.

E being charged with theft and mischief, in respect of certain branches cut from a tree claimed by the complainant, was tried by a Subordinate Magistrate on the charge of mischief and acquitted on the ground that as against the complainant, E had title to the tree. On the application of the complainant, the District Magistrate directed further inquiry into the case under Section 437 of the Code of Criminal Procedure, and on a reference to the Court of Session, the Sessions Judge held that, as no inquiry into the charge of theft had been held, the order was legal:

Held, that the District Magistrate had no power to pass such an order under Section 437, and that a trial on the charge of theft was barred by virtue of Section 403 of the Code of Criminal Procedure.

[F., 24 M.L.J. 463 = 13 M.L T. 360 (363) = 19 Ind. Cas. 310 (313); R., 31 M. 133 = 18 M.L.J. 57 (58) = 3 M.L.T. 230; 32 M. 220 (233) = 9 Cr. L.J. 192 = 19 M.L.J. 157 = 5 M.L.T. 233; 1 Bom. L.R. 15; 12 Cr. L.J. 224 (227) = 10 Ind. Cas. 168 = 5 S.L.R 16 (22); **Commented on**, 10 B. 131 (140).]

THIS was an application to the High Court under Sections 435 and 439 of the Code of Criminal Procedure to set aside an order of the District Magistrate of Cuddapah, directing, under Section 437 of the Code of Criminal Procedure, further evidence to be taken in calender case, No. 168 of 1884, on the file of the Second-class Magistrate of Kamalapur, and to direct stay of proceedings in the said case before the Head Assistant Magistrate of Cuddapah.

The facts appear sufficiently for the purpose of this report, from the judgment of the Court (BRANDT, J.).

Mr. *Powell*, for petitioners.

JUDGMENT.

BRANDT, J.—The petitioners, Dasari Erramreddi and seven [297] others, were charged, in a complaint laid before the Sub-Magistrate of Kamalapur by one Bala Subbareddi, with theft and mischief in respect of the boughs or loppings cut from a tree which the complainant said was his.

The petitioners were, it appears, tried on a charge of mischief only, and were acquitted under Section 245 of the Code of Criminal Procedure, on the ground that the petitioner No. 1 had title to the tree as against the complainant.

The complainant then applied to the District Magistrate to order an appeal to be preferred to the High Court, but the District Magistrate, under Section 437 of the Code of Criminal Procedure, directed further inquiry to be made by the Taluk Magistrate of Cuddapah on the ground that it appeared "this (*i.e.*, the questions, whether the tree belonged to the petitioner No. 1, or to the complainant, or to Government, and whether the accused has acted dishonestly or mischievously?) was a matter which it should not be left to a private individual to prosecute, as the

* Revision Case 52 of 1885.

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question is whether the tree was not in Government porumboke and useful to the public."

From the petition presented by the accused Erramreddi to the Sessions Court, it would seem that, on objection taken by the accused before the Taluk Magistrate that they could not again be tried in respect of a complaint imputing offences of which they had been previously acquitted and that the District Magistrate had no authority to direct "further inquiry" in a case of acquittal, the Taluk Magistrate made a reference to the Deputy Magistrate, who is represented as having directed that the accused should be tried (or re-tried?) for theft only, "as the Sub-Magistrate appeared to have acquitted them of mischief only in the case disposed of by him." This order of the Deputy (Divisional?) Magistrate the petitioners moved the Sessions Judge to refer to this Court as illegal.

The Sessions Judge, however, considered the proceedings of the Deputy Magistrate to be "strictly legal," on the ground that "no charge of theft was inquired into, but one of mischief only;" at the same time the Judge suggested that, on reconsideration, the District Magistrate might see reason to order "further inquiry" to be made by the Head Assistant Magistrate and not by a Second-class Magistrate.

[298] It does not appear what authority the Deputy Magistrate had to explain or to pass orders in respect of the District Magistrate's order. In the next place the District Magistrate's order does not profess to show that any further or other evidence was forthcoming, in addition to that already recorded by the Sub-Magistrate; it does not even profess to show that the evidence recorded had not been fully and fairly considered by the Court of First Instance; and lastly he does not appear to have noticed that power to direct further inquiry under Section 437 is limited to cases in which an accused person has been discharged, and does not apply at all in a case in which an accused person has been acquitted.

It remained for the Deputy Magistrate to put upon the District Magistrate's order the gloss which the Sessions Judge holds to be strictly legal.

It would be almost sufficient to say that the District Magistrate's order was clearly not passed upon the ground on which the Deputy Magistrate suggested that it might be acted on, but on the assumption that it might possibly be proved that the tree belonged to Government, which was not the case for the complainant at all, in the first instance (in his complaint he says it "belonged to him and was in his enjoyment;"), but it may be as well to point out, first, that if the District Magistrate intended to institute wholly new proceedings against the accused on behalf of Government as prosecutor, he could not do this under Section 437 at all events; secondly, that the District Magistrate's order cannot be supported on the ground suggested by the Deputy Magistrate, and approved by the Sessions Judge.

Section 403 of the Criminal Procedure Code provides that a person who has once been tried by a Court of competent jurisdiction for an offence and . . . acquitted of such offence, shall, while such . . . acquittal remains in force, not be liable to be tried again for the same offence *nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section* 236, *or for which he might have been convicted under Section* 237.

It is clear that on the facts, if proved as laid by the complainant, the accused might have been convicted either of theft or of mischief, or of both, if it had been found (1) that the tree belonged **[299]** to the complainant,

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(2) that the accused cut branches off the tree with intent to cause, or knowing that he was likely to cause, wrongful loss or damage to the complainant, or (3) that he cut the tree with intent to cause wrongful loss to the complainant or wrongful gain to himself, or both.

And the charge of theft "might have been made" under Section 236; and why the Sub-Magistrate did not charge the accused with theft or mischief, or both, does not appear, and it does not appear how, if the evidence was not sufficient to prove mischief, it could support a charge of theft; the finding being, as it was, that the accused proved a good title to the tree as against the complainant, they could not "on the same facts" be convicted of theft on the complaint laid by the complainant. Clause 2 of Section 403 does not apply to this case because the imputed offences of mischief and theft were not distinct offences, nor was there a series of acts, but one act or transaction only, the cutting of the tree and removal of the branches cut.

The order of the District Magistrate is quashed.

It is further necessary to point out to the Session Judge and District Magistrate that the suggestion of the former that the "further inquiry" ordered by the District Magistrate should be conducted by a Magistrate, other than the Magistrate who held the original inquiry, as well as the order of the District Magistrate directing the further inquiry to be conducted by the Taluk Magistrate are open to objection in this respect also, that there can be little or no doubt that it was the intention of the legislature that the "further inquiry" allowed under Section 437 should ordinarily be conducted by the Magistrate who first inquired into the case. This is pointed out in an order of this Court which will probably be published shortly, in which, however, it is observed that, in case of the death or removal of such Magistrate, or for other similar cause, it may be that further inquiry might be conducted by another Magistrate, but that the rule is as above stated. The question—What the words "further inquiry" mean in Section 437—is there fully discussed, and need not therefore be gone into further in this case.

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8 M. 300.

[300] APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

ATHIAPPA (*Petitioner*), *Appellant v.* AYANNA (*Petitioner*) *Respondent*.* [20th October, 1884.]

Civil Procedure Code, *Sections* 32, 368 —*Death of respondent in appeal—Rival claims to represent deceased.*

Although a Court is bound by Section 368 of the Code of Civil Procedure to place on the record the name of the person alleged by the appellant to be the legal representative of a deceased respondent, nevertheless, where a person, other than the person alleged by the appellant to be such representative, claims, on good *prima facie* grounds, to be the representative of the deceased respondent, and the interests of the person entitled to the estate of the deceased may be prejudiced, the Court should, under Section 32 of the Code of Civil Procedure, proceed to make such claimant also a party to the appeal.

[Diss., 10 A. 223 (235) (F.B.); 10 A.W.N. (1890) 21; R., 13 B. 22 (24); 26 M. 230 (234) = 12 M.L.J. 368; 2 Ind. Cas. 479 = 19 M.L.J. 33 (34) = 4 M.L.T. 227 (228).]

* Letters Patent Appeal 15 of 1883.

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Oct. 20.
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APPELLATE
CIVIL.
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In a suit filed in the Subordinate Judge's Court, South Tanjore, Lakshmimathi Ammal, the widow of Ramasami Mudali, sued to recover the estate of her husband, valued at Rs. 80,457-1-11, and obtained a decree for the greater portion of her claim.

Against this decree, appeal No. 47 of 1882 was filed by defendants Nos. 1, 2, and 4 who claimed property of the value of Rs. 74,289.

A memorandum of objections under Section 561 of the Code of Civil Procedure was filed by Lakshmimathi Ammal, and also a petition (No. 122 of 1883) to amend the plaint and decree.

On the 27th and 28th August 1883, the appeal was heard and judgment was reserved, and on the 31st August, judgment not having been pronounced, the respondent died.

The appellants having applied to the Court under Section 368 of the Code of Civil Procedure to make one Ayanna Nainar respondent, alleging that he was the legal representative of the deceased, an order was passed by Kernan, J., on the 23rd October 1883, directing that Ayanna Nainar should be entered on the record [301] as respondent. At the same time two applications made by one Athiappa Mudali, who also claimed to be the legal representative of the deceased and to be made respondent in order to support (1) the memorandum of objections and (2) the petition to amend the decree, were rejected by Kernan, J.

Against these orders Athiappa Mudali appealed under Section 15 of the Letters Patent. With this appeal was heard a petition by Ayanna Nainar, in which he objected to the claim of Athiappa Mudali to represent the deceased respondent.

The facts and agruments necessary for the purpose of this report appear from the judgment of the Court (TURNER, C. J., and MUTTUSAMI AYYAR, J.)

Bhashyam Ayyangar, for Athiappa Mudali.

Mr. *Norton*, for Ayanna Nainar.

JUDGMENT.

TURNER, C.J.—The original respondent, Lakshmimathi Ammal, after having presented an objection to the decree of the Court of First Instance, and filed a miscellaneous petition No. 122 of 1883, praying for the correction of the plaint and of the decree, died before judgment was pronounced. One Ayanna Nainar, who claims to be a distant sapinda of the deceased Ramasami Mudali and entitled to succeed to Ramasami's estate as reversioner on the widow's death, was named as her representative for the purpose of this appeal by the appellants, and has himself presented an application to be admitted a party to the record in that character. He does not support either the memorandum of objections or the petition for the amendment of the decree.

A petition, 567 of 1883, was filed on behalf of Athiappa Mudali, a minor, by Janadasa Mudali, in which it was alleged that the minor had been adopted by the deceased respondent who had devised to him a considerable portion of her property, and application was made that the minor's name should be substituted for that of the original respondent and be represented by Janadasa as his guardian *ad litem* to support the memorandum of objections filed in the appeal.

Another petition (566 of 1883) presented by the same person also on behalf of the minor Athiappa Mudali, prayed that the minor's name might be substituted for that of Lakshmimathi Ammal in miscellaneous petition No. 122 of 1883, for the correction of the decree.

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[302] In civil miscellaneous petition No. 568 of 1883, the minor, by his guardian Janadasa Mudali, represented to the Court that a statement made by the appellants in their application for the admission of Ayanna as representative of Lakshmimathi Ammal, to the effect that that lady had died without issue was false, inasmuch as she had adopted the petitioner on 20th August 1883, and appointed Janadasa his guardian.

It was denied that Ayanna was a sapinda of Ramasami Mudali and a reversioner, and it was asserted that the appellants had added him as a party collusively.

It will be seen that the petitions 566 and 567 of 1883, filed on behalf of the minor did not ask simply that he should be made a respondent to the appeal, but that he should take the place of the deceased respondent in order to support the memorandum of objections and the miscellaneous petition filed by her.

This may have been suggested by the ruling of the High Court of Bombay in *Lakshmibai* v. *Balkrishna*, (1) that an appellant is at liberty to bring on the record any party he pleases as representative of a deceased respondent, and that no other person can be brought on the record in that character against his wishes.

The learned Judge to whom the petitions 566 and 567 were presented in the Admission Court rejected them, because Ayanna Nainar had already been made a respondent.

An appeal has been presented against the order of the learned Judge. It is urged that inasmuch as the law allows a cross-appeal to be filed in the form of a memorandum of objections, the rightful representative of a deceased respondent has a right to apply to be made a party in the stead of the respondent deceased, in order to support the objections, although he may not have been the person indicated by the appellant as the representative of the deceased.

While we agree with the learned Judges of the High Court of Bombay that the Court must place on the record the person indicated as the representative of a deceased respondent, we are not prepared to say that in no case can the Court place on the record any other person as filling that character. The Court has the same power to make parties to an appeal as it has to make parties [303] to a suit; and where there appears a substantial doubt whether the person indicated by an appellant is the representative of a deceased respondent or a representative for all purposes connected with the matters in litigation, and a person other than the person indicated by the appellant lays claim to the representative character and on good *prima facie* grounds, and where, if he be not allowed to join, the interests of the person entitled to the estate of the deceased may be prejudiced, we consider the Court ought to proceed under Section 32 to make him a party to the appeal. In this case Ayanna Nainar represents the estate of Ramasami, and the right of suit in respect of certain of the properties may, on the death of Lakshmimathi have survived to him, if he is, as he asserts, the nearest sapinda. On the other hand the appellant Athiappa is recognized by the will of Lakshmimathi as her adopted son; he is also a beneficiary under that instrument and is constituted by it her representative for the purposes of this suit. Assuming that the title of Ayanna Nainar should be established, the representative of Lakshmimathi would still have a claim at least for a part of the mesne profits in suit, and, although he

(1) 4 B. 654.

would not be affected by the decree if he were not made a party to the appeal, he would lose the right of insisting by way of cross-appeal on the objections taken by the deceased Lakshmipathi under Section 561 of the Civil Procedure Code.

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For these reasons, and without deciding on the rival claims of Ayanna and Athiappa as representatives of the deceased in respect of the several causes of action in suit, we consider the Court was at liberty to make Athiappa also a party as claiming to be a representative of the widow. He cannot, however, be made a party merely for the purpose of supporting the memorandum of objections. If he is brought on the record he must be made a party for all purposes, so as to be bound by the decree; and his next friend assenting to this course, we shall reverse the order of the Judge and direct that Athiappa Mudali be made a party to the appeal as respondent, and that he be allowed to appear through Janadasa Mudali as his guardian.

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8 M. 304.

[304] APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Brandt.

BUCHI RAMAYYA (*Plaintiff*), *Appellant v.* JAGAPATHI AND OTHERS (*Defendants*), *Respondents.**
[13th October and 15th December, 1884.]

Hindu Law—Widow's estate—Alienation—Moveables—Release by widow, suit to set aside —Duress—Coercion—Fraud—Grounds on which relief is granted.

B. R., the widow of a zamindar, having for valuable consideration released all her claims on her husband's estate in favour of V. S., her husband's brother, by a deed executed five days after the death of her husband, brought a suit against V.S. to set aside the deed of release on the ground that it was obtained by threats and fraud, and to recover the estate:

Held, that, it was not sufficient to find that the consent given by the plaintiff was not caused by coercion, as defined in the Indian Contract Act, nor by duress as known to the English Law; but that the questions to be decided were (1) whether undue advantage had been taken of the plaintiff's position; (2) whether the plaintiff had been sufficiently informed as to her rights or had proper advisers; (3) whether the contract was an unconscionable or "catching" bargain.

A Hindu widow is not at liberty to defeat the rights of reversioners by alienating or wasting moveable property inherited from her husband.

[R., 32 B 59=9 Bom. L.R. 1305 (1319).]

THIS was an appeal from the decree of K. Krishnasami Rau, Subordinate Judge of Cocanada, dismissing a suit brought by Sri Raja Vatsavayya Buchi Ramayya Garu, widow of the late zamindar of Tuni, against his brother, Sri Raja Vatsavayya Venkata Simhadri Jagapathi Razu Bahadur Garu, zamindar of Tuni, and two others to recover an estate, valued at Rs. 7,36,832.

The facts appear sufficiently, for the purpose of this report, from the judgment of the Court (TURNER, C.J., and BRANDT, J.).

The Advocate-General (Hon. *P. O'Sullivan*) and *Bhashyam Ayyangar*, for appellant.

Mr. *Tarrant* and Hon. *Rama Rau*, for respondents.

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* Appeal 76 of 1883.

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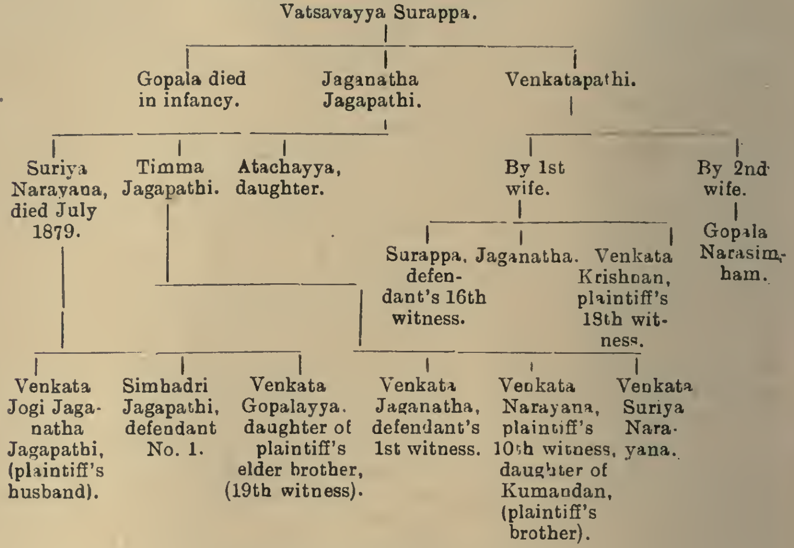
JUDGMENT.

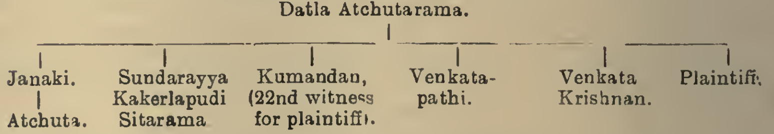
The Kottam estate was created in 1810. A claim had been advanced by the grandfather of defendant No. 1 to the [305] zamindari of Peddapur, and in settlement of that claim, when the suit was under appeal to the Sadr Adalat, the taluk of Kottam was severed from the zamindari and made over to Vatsavayya Surappa Razu.

In order to understand the position and relationship of some of the persons to whom reference will be made in the course of this judgment, it is desirable to set out two pedigrees, which have been furnished to us during the argument.

Pedigree of the Kottam Family.



Pedigree of Plaintiff's Family.



In 1838 Suriya Narayana was recognized as the proprietor of the Kottam mitta on the death of his father, Jagapathi; he soon afterwards succeeded also to the Peddapur zamindari, but the latter estate was held but a short time by him when it was sold for arrears of Government revenue.

The right of Suriya Narayana to succeed to the mitta as impartible was disputed by his uncle, Venkatapathi, who unsuccess-[306]fully attempted to be allowed to sue as a pauper to vindicate his claim.

On the death of Venkatapathi, his sons by his first wife entered into a karar (agreement) with Suriya Narayana (Exhibit XXXIII), by which they admitted the impartibility of the estate and accepted an allotment of land on a fixed rent in satisfaction of all their claims on the Peddapur and Kottam estates. Their half-brother, Gopala Narasimham, instituted a suit,

against Suriya Narayana claiming one-eighth of the estate of Kottam, but on appeal his claim was over-ruled on grounds which are hardly satisfactory (Exhibit XL).

Suriya Narayana had previously made an arrangement with his brother, Timma Jagapathi, for his maintenance and that of his family, and consequently, after the dismissal of Gopala Narasimham's suit, he retained sole and undisputed possession of the mitta. He appears to have been a man of prudence and capacity; he saved money which he invested on loans and other speculations; and kept regular accounts of his transactions. He lived on good terms with his eldest son, plaintiff's late husband, and made a handsome provision for his daughter and her son. During the later years of his life, he was, however, displeased with his second son, defendant No. 1, who consequently left his house and resided elsewhere.

Suriya Narayana died in 1879, and his eldest son entered into possession of the mitta. Defendant No. 1 asserted that the mitta was partible and claimed an equal half share in the moveable as well as the immoveable property of his father. Eventually the brothers went to Cocanada and accepted the mediation of the District Munsif, Ramachendra Rao, who was examined by the Subordinate Judge as a witness in this case. In the course of negotiations, plaintiff's husband advanced a claim to a large sum of money, upwards of three lakhs of rupees, as a gift from his father. Defendant No. 1 disputed the fact that the gift had been made, and asserted that the whole of the money in the palace treasury, amounting to about six lakhs of rupees, was subject to partition. He has deposed, and his evidence on this point is in a measure supported by the Court witness, that he desired to see the accounts but they were not produced.

The Court witness allows that he proposed the settlement, **[307]** which he effected and to which we shall presently allude, not on the basis of any investigation of the assets actually divisible, but rather with reference to the terms which the plaintiff's husband offered as the limit to which he would consent. These terms were somewhat more favourable to defendant No. 1 than the offer made by plaintiff's husband at his residence in Tuni.

The terms recommended by the mediator were embodied in the document, Exhibit A, dated 6th March 1880. This deed commences with the rectial that the mitta is impartible, and records the stipulation that the estate should not be alienated by adoption. There can be no doubt that this stipulation was introduced at the instance of defendant No. 1 and in consideration of his abandoning his claim to a partition of the mitta. As regards this immoveable property then it was the intention that the brothers should remain undivided, and that, on the death of the elder without male issue, possession should pass to defendant No. 1. There is nothing in the instrument to put an end to his co-ownership, and, on his brother's death, his right to possession would defeat the succession of the widow.

As to the ancestral moveable property, it was agreed that, as representing his half share, the defendant No. 1 should receive Rs. 1,75,000 in cash, together with jewels valued at Rs. 20,000; and that out of the utensils, valued at Rs. 2,000, he should receive a fair moiety; that he should be relieved of any responsibility for the liabilities of the family; that the house in which he had been up to that time living, together with the premises and grounds appurtenant thereto, should be put in his permanent possession, together with a sum of Rs. 3,000 to enable him to erect

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other buildings thereon at his pleasure; and that a mango garden in the same village (Viravaram), valued at Rs. 2,000, should also be made over to him.

The sum of Rs. 50,000 was admittedly handed over to one Guruzada Venkata Krishnayya for payment to the defendant No. 1 in accordance with the terms of this agreement, but nothing further was done in pursuance of it; indeed it was conceded at the hearing of this appeal that defendant No. 1 refused to accept any further payment, and had, before his brother, the plaintiff's husband, died, on the 22nd August 1880, intimated his intention of litigating, if necessary, for a fresh partition on the ground that [308] his brother had represented the cash, jewels and other moveables at less than their real value, withholding accounts which would disclose the actual value, and that difficulties had been placed in his way of obtaining possession of the mango garden.

Exhibit XXV is a document, bearing date the 27th August 1880, admittedly executed by the plaintiff in this suit in favour of defendant No. 1. In this it is recited that, in consequence of the death of the plaintiff's husband on the 22nd instant, he having died issueless and being the undivided brother of defendant No. 1, and the registered partition deed, dated 6th March 1880, between the deceased and defendant No. 1 not having been acted upon during the life of plaintiff's husband, defendant No. 1 has become the sole heir to the whole of the immoveable property constituting the Kottam zamindari, and to the whole of the moveable property; that, having regard to these facts, the plaintiff relinquishes all right, title and claim to the aforesaid estate, and, according to the settlement made by mediators, has received from defendant No. 1 on account of her stridhanam, &c., 20,000 rupees' worth of jewels, and 1,75,000 rupees in cash, with power of absolute disposal, together with a house described, and valued at about 1,000 rupees, and a verandah, and fruit garden, the last-mentioned properties to be held and enjoyed without power of disposal by gift, mortgage, sale or otherwise, and that, in consideration of the premises, the plaintiff binds herself not to dispute or question the right of defendant No. 1, or his heirs, to the whole of the estate, moveable and immoveable. This document is signed by the plaintiff and attested by Brahmanna, son of Bavali Luchappa of Tuni, Kamayya, son of M. Subbanna of Tuni; Ramabadra Razu, son of M. Sitarama Razu, then at Tuni; Gopalkrishnama, son of N. Venkatakrishna Razu, then at Tuni, and signed by one Subbarayudu, as writer.

It was registered at Tuni on the 7th September 1880, and bears the Sub-Registrar's endorsement that it was presented for registration by the plaintiff (who again signed this endorsement) at the private dwelling-house of defendant No. 1.

Exhibit LX is a letter from the plaintiff to the Collector of the district, dated the 5th October 1880. This letter was not received in the Collector's office till the 17th idem. Tuni is, we are informed, not more than forty miles distant from Cocanada, and the ordinary post does not take more than three days between the two [309] places. This letter does not, however, appear to have been sent by post. The plaintiff in this communication informs the Collector of the death of her husband as having taken place on the 22nd August 1880, of the disputes between her late husband and his brother, defendant No. 1, and of the settlement of those disputes under the agreement of the 6th March 1880. She then goes on to say that, at the time of her husband's death, she being a female and having no competent male advisers near her, defendant No. 1 having won

over to his side all the officers and servants who had been in her husband's employ, prevented for some hours the removal of her husband's corpse, and while she was overwhelmed with sorrow, frightened her in various ways, and by misrepresentation "as to the past state of things and to her right to the zamindari, hurriedly got certain documents written and signed by her;" that these documents were signed by her from fear of danger to her life, and not of her free will and consent, and that it would be apparent that she could not have voluntarily consented to the agreement evidenced by the document signed by her "when the former document was existing, and while her husband and his brother were divided," and at a time when her loss was so recent, and before the obsequies were over; that she left Tuni and went to her own peoples' house at Chouduvada on the 15th September, lest some injury might be done to her. She prayed, therefore, that the Collector would not register her husband's brother as proprietor of the mitta, but that he would register her name, she being the legal heir. She explained the delay in sending a petition to this effect by saying she had been ill.

On the 14th April 1881, a suit was filed on behalf of the plaintiff against the present defendants, defendant No. 1 being plaintiff's brother-in-law, Vatsavayya Venkata Simhadri Jagapathi Razugaru and the defendants Nos 2 and 3, Ponnada Markonda Razu and Vempati Brahmayya Sastri; the two latter were impleaded as persons to whom her late husband had given powers-of-attorney to manage the whole of his affairs during his intended absence on a pilgrimage, which his death had prevented.

After setting out the agreement of the 6th March 1880, the plaintiff in her plaint alleged that monies given to her, her husband, and late son, from time to time during the lifetime of her father-in-law, were kept in the family chest, and invested without [310] distinction, and shown in the accounts along with the funds taken possession of by her husband on the death of his father, and continued to be in his possession.

The cause of action against the defendants was then stated to be that, immediately on the death of her husband, the defendants Nos. 2 and 3 and others placed all the plaintiff's property in the possession of the defendant No. 1, and that "by threatening the plaintiff in many ways, while she was in deep sorrow" and by practising deceit and by fraudulent means obtained her signature to certain papers against her will, of which papers the agreement, bearing date the 27th August 1880, is the principal one and the basis of the rest; that this document is invalid in law, without consideration, and in contradiction to former facts, and that "according to Hindu law, and under the consent of her husband, she is the rightful owner of the property of all kinds, with the profit thereof." The relief sought was recovery of the Kottam estate, including houses and grounds, and all other immoveable property, with all rights pertaining thereto, together with mesne profits; secondly, cancellation of the "deed of release," dated the 27th August 1880; thirdly, recovery of cash amounting to Rs. 3,02,000, and jewels and other moveables or their value, estimated at Rs. 77,840.

Defendant No. 1 objected that the suit was bad by reason of misjoinder, inasmuch as the plaintiff asserted claims based on different rights. He pleaded that the agreement of the 6th March 1880 did not operate to sever the co-parcenary between himself and his brother; that the impartibility of the zemindari was recognized by the agreement; that, having discovered that he had been deceived by his brother as to the amount and value of the cash, jewels and moveable property,

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he had called upon his brother, if it was his intention to put an end to the co-parcenary, to make a fresh and equitable agreement in supersession of the agreement of the 6th March 1880; and, as his brother died before a new settlement could be made, he claimed that they were undivided as well in respect of the moveable as of the immoveable property of the family. He traversed the allegations of the plaintiff that the agreement of the 27th August 1880 had been procured by undue influence, or intimidation, and asserted that it had been executed by the plaintiff voluntarily, and that she had acted under competent advice, and [311] with full knowledge of the circumstances. He denied that any gifts had been made by his father to the plaintiff's husband, the plaintiff, or her son, and the competency of his father to make such gifts; and he complained that the plaint did not show explicitly how much money was the subject of each of the gifts alleged, nor at what time such gifts were made.

Defendants Nos. 2 and 3 pleaded that the powers-of-attorney, though executed, were not handed over to them; that they did nothing in virtue of such powers; that they did not take possession of any of the plaintiff's husband's property; that they took no part in persuading the plaintiff to execute the documents signed by her at Tuni; and that these were executed by plaintiff of her own free will and consent.

At the first hearing the plaintiff's vakil set up a plea that the Kottam estate was partible; further that the cash and jewels payable and to be delivered under the document of the 27th August 1880, which it was admitted were duly received, were accepted not as a payment under that document, but in part satisfaction of plaintiff's claim. Issues were framed with reference to these as well as the other material averments.

The Subordinate Judge found on the issue as to whether the estate is partible or impartible, that the estate had, all at events ever since it was constituted a separate estate, been treated and regarded by the father of plaintiff's husband, by the plaintiff's husband and his brother as impartible; but that, in any case, the plaintiff is bound by the fact that her late husband in the agreement of the 6th March 1880 treated with his brother and dealt with the estate on the footing that it is impartible.

Upon the sixth issue, whether the release deed, dated 27th August 1880 and the receipt, dated the 7th September 1880, were obtained from the plaintiff by fraud, intimidation, misrepresentation, or undue influence? The Subordinate Judge after going carefully into the allegations and evidence on either side, came to the conclusion that it was not proved that actual force, violence or personal intimidation had been used towards the plaintiff; that it was not proved that by placing additional guards over the rooms in which plaintiff was living, or otherwise, communication between the plaintiff and her relatives was cut off; that there were good reasons why the plaintiff and her advisers should accept the settle-[312]ment made; and that the agreement of the 27th August 1880 was executed by the plaintiff voluntarily and with a full knowledge of the facts.

The plaintiff appeals against the dismissal of her suit.

We consider that it is not material for the purposes of this suit to determine whether the Kottam mitta is partible or impartible; whether partible or impartible, the brothers being undivided in interest in respect of it, the defendant No. 1 would and did take the estate by survivorship.

The agreement of the 6th March 1880 purports to operate as a partition between the brothers only in respect of the assets of the estate other than the mitta, and if that deed is binding upon the defendant No. 1 the plaintiff would be entitled to succeed to such portion of the property dealt with under that instrument as remained to her husband as his separate share of the ancestral estate other than the mitta, and to the wealth, if any, which he had obtained by gift, unless, by acceptance of the agreement evidenced by the instrument of the 27th August 1880, she has precluded herself from insisting on her rights of succession.

We propose then to consider in the first place whether that instrument is binding on the widow.

Execution of the instrument as well as of others, which we shall shortly notice, and acceptance of the full amount of cash and jewels payable thereunder is admitted by the plaintiff. We shall in the proper place consider whether the plaintiff's explanation of such acceptance is reasonable and credible. It is necessary to look not only at the circumstances under which the documents were actually signed and registered, and under which negotiations for the agreement were commenced and concluded, but to consider the position of affairs [for some little time before the date of the plaintiff's husband's death.

The existence of a dispute between defendant No. 1 and his brother touching the succession to the mitta and the moveables of the family is clearly shown. It is also shown that the agreement of the 6th March 1880 was not arrived at after a satisfactory ascertainment of the family property, and whether defendant No. 1 would have been held bound by it or not, there existed grounds on which he conceived himself at liberty to repudiate it, and he did repudiate it, and it was not completely executed when his brother died. Defendant No. 1 was examined as the plaintiff's seventh witness. [313] He deposes that he saw his brother, plaintiff's husband, who appears to have been seriously unwell for some twenty days before he died, at Tuni, whither he went from Cocanada on hearing of his brother's illness; and if this witness be believed, plaintiff's husband, a day or two before he died, questioned his brother as to his intention to bring a suit, and promised as soon as he got well "to look into the accounts and settle anything that might be found wrong with reference to the difference in respect of the moveable property." Now this difference defendant No. 1 explains as follows: In settling the amount to be given to defendant No. 1 under exhibit XXV, the absence of all accounts showing the value of the moveables to be divided had been commented on and plaintiff's husband promised to produce the accounts when they got to Tuni. However this may be, it may be taken that, on some ground or other, defendant No. 1 thought he had reason to believe that property had been concealed, and it is a fact, deposed to by defendant No. 1 and not disproved or contradicted, that he was prevented by persons who had been connected with the plaintiff's husband from taking possession of the mango garden awarded to him under exhibit XXV. This prevention was, it seems, the result of some dispute as to the produce of the season.

At any rate the plaintiff's husband must be taken to have been aware that defendant No. 1 challenged the finality and validity of the deed of partition of the 6th March 1880; indeed, as the Subordinate Judge points out in para. 47 of his judgment, there is evidence that plaintiff's husband had reason to believe that defendant No. 1 was on the point of filing a suit for this purpose and that he deferred his pilgrimage to

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Benares on that account. The intention of the plaintiff * to dispute the agreement must have been known and discussed in the family, and it is not likely that the plaintiff's husband would have concealed from the plaintiff the action which his brother contemplated.

The plaintiff's brother, Kumandan (twenty-second witness), had been summoned to Tuni, when the plaintiff's husband entertained the intention of going to Benares in order that he might take care of his sister during her husband's absence. He was in the palace for some days—a fortnight, he says—before his brother-in-law fell sick, and it is impossible that he should not have been made aware of the position of affairs between defendant No. 1 and his brother. [314] He admits that, during his brother-in-law's illness, he was present at a conversation between the plaintiff and her husband respecting the management of his estate; he asserts indeed that the plaintiff's husband had directed that an adoption should be made, and that the estate should be managed, and that the money due to defendant No. 1 under the deed of division should be paid to him whenever demanded.

Although we are unable to believe that the plaintiff's husband directed an adoption unconditionally and contemplated the possession of the estate by his widow at the very time he was insisting that the deed was binding on his brother, for that deed provided for the succession of the brother to the mitta and prohibited an adoption, it is in accordance with probability that the prospects of the widow should have been considered when it became apparent that her husband's illness was serious, and it is even more probable that the plaintiff's husband, whether he conceived himself seriously ill or not, should have discussed with his wife, and in the presence of her brother, his intention to insist on, or waive the agreement.

The plaintiff herself refers to the same conversation, but whether or not the plaintiff or her brother knew before her husband's death that defendant No. 1 intended to call in question the agreement of the 6th March 1880, the whole of the circumstances relating to the agreement and the intention to dispute it were known to Datla Sitarama Razu, the Dewan. He had, before the death of plaintiff's husband, been to Madras and taken legal advice on the question whether the agreement of the 6th March 1880 was binding upon the plaintiff's husband, and had arranged for securing professional assistance to restrain defendant No. 1 "if he raised difficulties and brought a suit, instead of accepting the settlement;" and he informed Kumandan of these facts when the negotiations were on foot which resulted in the agreement of the 27th August 1880. It appears from his own statement that this witness Sitarama Razu was regarded with distrust by the defendant No. 1 from the time of his brother's death, and that he acted as the partizan or at least as the adviser of the plaintiff.

There being no reasonable doubt that full knowledge of the facts was possessed by the plaintiff and her brother, and that they were aware of the legal advice which had been procured for her [315] husband as to the efficacy of the agreement of March 1880, before the agreement of the 27th August 1880 was made, we proceed to consider the other grounds on which the plaintiff now seeks to repudiate that agreement.

It was conceded at the hearing of the appeal that the plea of coercion could hardly be maintained, and it is not, therefore, necessary for us to go into this part of the case at great length.

* [" plaintiff " is apparently a mistake for " defendant No. 1."]

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With reference, however, to the evidence adduced to show that the plaintiff's brother and others were prevented by violence and threats from taking the body of plaintiff's husband to the burning ground, with a view to putting pressure on the plaintiff and so compel her to come to terms, we must observe that, according to the statements of all the witnesses who depose to the facts alleged in this respect, the Sub-Magistrate of Tuni and the Inspector of Police were on the spot, and the witnesses were admittedly in communication with them, but neither of those officers is called as a witness to show that any complaints were made to them as to violence having been used or threatened We note that Sitarama Razu, who in his examination-in-chief asserted that when he was taking steps for the performance of the funeral rites the defendant No. 1 came up and threatened he would cut and stab any one who interfered with the burning of the corpse, admitted in his cross-examination that he did not personally hear words to that effect used, and in his examination-in-chief that he did not personally see whether any guards were placed near the place where the plaintiff was. We do not then believe the evidence as to additional guards having been placed about the palace in order to prevent free communication between the plaintiff and the ladies who were with her, or with her male relatives and others who would be her natural friends and advisers on the occasion, though it is quite possible that guards were placed over the moveable property after the death of the zamindar, as is to be inferred from Sitarama Razu's evidence. Nor do we believe the evidence intended to show that she and her brother and others were in actual fear of bodily injury. The witness who speaks in the strongest terms of the violence and threats said to have been used by defendant No. 1 and his people, and of the pressure put upon the plaintiff and all connected with her, is her brother Kumandan, the twenty-second witness. Plaintiff herself does not go nearly so far, **[316]** while the third witness, the Dewan Sitarama Razu, is also more guarded, and, while he states that he was informed by Kumandan, within a few days after the death of plaintiff's husband, that plaintiff had been induced to sign the agreement under threats that if this were not done the defendant No. 1 would bring a criminal charge against the plaintiff and himself of having poisoned the plaintiff's husband, he, according to his own account, did nothing and said nothing, except to advise that "they should keep quiet, and he would see what could be done when they got back to Chouduvada."

The evidence of these witnesses, as well as that of the tenth witness, Vatsavayya Venkata Narayana (a son of Timma Jagapathi, son-in-law to plaintiff's brother Kumandan) and that of the nineteenth witness, Datla Chinna Venkata Krishnam Razu, who is doubly connected with the family of plaintiff's husband by marriage, and also related to plaintiff—some of the most important witnesses both in respect of the statements made by them, as well as by reason of their position and relationship—is open to not a few of the unfavourable comments made upon it by the Subordinate Judge. We shall, however, have to consider this evidence further in connection with other circumstances.

It is not sufficient to find, as we do, that the consent given by the plaintiff was not caused by coercion as defined in the Indian Contract Act, nor by duress as known to the English Law; we have further to determine whether undue advantage was taken of the circumstances in which the plaintiff, a native lady of rank, was placed at the time when her consent was given to the agreement which she now seeks to set

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aside, or of the position in which her late husband's brother, defendant No. 1, then stood in relation to her; whether that agreement was concluded by the plaintiff without sufficient information as to her rights, or without proper advice; whether it was an unconscionable or "catching" bargain; and whether, for all or any of these reasons, it ought to be relieved against.

It was upon considerations of this nature that the learned Counsel for the plaintiff principally insisted. One of the cases cited, *Tacoordeen Tewarry* v. *Nawab Syed Ali Hossain Khan* (1) **[317]** contains a statement "of the principles which have always guided the Courts in dealing with sales or gifts made by ladies" in the position which the plaintiff occupies, and though this is not a case of a sale or gift, but of a family arrangement or settlement, to which favour is shown by the Courts, and in respect of which ignorance of rights on either side is not so minutely scrutinized, we have no hesitation in holding that, in the present case, it must be shown that the transaction was sufficiently understood by the plaintiff; that she herself was, or her competent advisers were, acquainted with her rights. Whether these requirements are fulfilled in the present case depends upon a consideration of all the facts. The Courts have, probably intentionally, refrained from defining in express terms what an unconscionable or catching bargain is; but surprise, improvidence, undue haste in carrying into execution the terms agreed upon, inadequacy of consideration, are all matters to be taken into account in determining whether an agreement of this sort ought to be set aside or upheld. It is no doubt true that this agreement was concluded very shortly after the death of the plaintiff's husband, and it may well be assumed that the plaintiff was in great grief. Negotiations were commenced within a very few days at latest after her husband had breathed his last. The arrival of Kakerlapudi Sitarama, the husband of the plaintiff's elder sister, Sundarayya, who is frequently referred to as the influential brother-in-law, was not awaited.

On the other hand, we cannot say that the plaintiff had not with her competent advisers. The third witness, Datla Sitarama who, as we have observed, as Dewan under her husband and his father, must have been, and is shown by his own account to have been, very intimately acquainted with all the affairs of the family, was there, and his own evidence shows that he was consulted frequently by plaintiff's brother, Kumandan; he was present on two occasions when the inventory of the jewels was being made and gave information respecting them. Plaintiff's brother, Kumandan, admits that the plaintiff had a good opinion of Sitarama, who in this case has been interesting himself strongly on the plaintiff's behalf, and is admittedly adverse to defendant No. 1. Kumandan, the twenty-second witness, is certainly a man of affairs, and interested in his sister's welfare; and the tenth witness, Venkata **[318]** Narayana, who is now evidently hostile to defendant No. 1, was, in our opinion, beyond doubt consulted with reference to the negotiations throughout, and what he thought of the settlement proposed appears very clearly from the letter, exhibit XXX (a) written by him, as he admits, on the 24th August 1880, only two days after the death of the plaintiff's husband. In this after informing the correspondent to whom he wrote of the terms proposed, he says "it will be the best thing that can happen if matters can be settled in this way."

The nineteenth witness for plaintiff, Datala Chinna Venkatakrishnan,

(1) 1 I. A. 206.

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a relative of the plaintiff, as well as of the plaintiff's husband, was also there; and he was, as he admits, consulted by Kumandan, though, he says, he declined to interfere; he was present when the jewels were counted and valued, and says that Kumandan may have come twice or thrice while this was going on. This witness's evidence is important as showing that he had a conversation with the defendant No. 3, as to the probability of success or failure of an attempt to contest the division-deed between plaintiff's husband and defendant No. 1. He says that, for the reasons given to him by the defendant No. 3, he came to think that the deed of division, which before then he had thought to be a valid document, might be shown to be not so, by reason of the money agreed therein to be paid not having been paid; whatever his views on this subject, his evidence is of some weight as showing that the legal validity of the partition-deed was in fact discussed. His reasons for refusing to interfere we cannot believe, as it is clear he was taking part with Kumandan.

The plaintiff and her advisers had not, it is true, the advantage of professional advice, and our attention has been called to the case of *Prem Narain Singh* v. *Parasram Singh* (1), which, among other reasons for setting aside an "ikrarnamah," this circumstance was given weight. But this was only one of several considerations which influenced their Lordships in deciding that the deed executed should not be upheld, and in other respects that case differs very materially from this. The deed was found to have been executed without any consideration whatever, in a state of things "likely to overawe" the parties," and materially to affect the free exercise of their will."

[319] It may and probably does frequently happen in this country that it would be difficult to obtain in time such professional advice as would be worth having, for the settlement of family disputes: relatives and members of the family are capable advisers in such cases, and we are not prepared to hold, and think it would be a matter for regret if it were held, that on this account alone a family settlement of doubtful claims should be set aside.

As to undue haste, there is evidence given by defendants 2 and 3 examined as plaintiff's fourth and fifth witnesses, as well as by witnesses on the side of defendant No. 1 that proposals for a settlement emanated from plaintiff herself, or her advisers, and whether this evidence be strictly true or not, we may observe that it is not unusual in this country to take advantage of the presence of relatives and friends on the occasion of the funeral, to have matters settled with regard to the claim of a widow on the estate of her husband. Moreover, though negotiations commenced, as we find, on the second or third day after the plaintiff's husband died and a draft of the agreement was written very soon after this, the fair copy of the agreement was not signed until the 27th August, that is the fifth day after the death, and the instrument itself was not registered until the 7th September; and in the meantime the additional agreement had been made as to a money maintenance to be paid to the plaintiff, and alterations introduced into the principal agreement (exhibit XXV) as to defendant No. 1 alone being liable for his mother's maintenance and as to additional house accommodation for plaintiff.

The plaintiff's evidence as to the instruments not having been shown to her before the 7th September, we cannot accept as true. It is opposed

(1) 4 I. A. 101.

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to the oral and documentary evidence, and in contradiction to the allegations made in her petition to the Collector, exhibit LX. It is, indeed, almost incredible that the plaintiff and her advisers should have deliberately and for so long acted their parts, taking all the property given, and executing all the documents, and should not even before the Registrar have thrown out a hint that all that was done was not voluntarily done, or have even attempted to communicate with other friends or relatives, or with any official; and though we would not make too much of this fact, it is to be noted that, while the plaintiff left Tuni on the 15th September, her petition in which she first speaks of her having [320] been compelled against her will to execute the agreement of the 27th August, is only dated the 5th October and did not reach the Collector till the 17th. No doubt there is some evidence that she was unwell, but even if she was this is hardly a satisfactory explanation of the delay, when her brother and other influential relations were present to act for her.

The fact that the deed of agreement, exhibit XXV, and subsidiary documents were not attested by plaintiff's brother, Kumandan, or other relatives, has been commented on as a circumstance tending to throw suspicion on the transaction.

If those concerned had determined to make it appear, as far as possible, that the arrangement which they professed to accept was agreed to, it does not appear why they should have drawn the line at attesting the documents which the plaintiff feigned (as they say) to execute, and the evidence given by Sitarama Razu that Kumandan insisted on concluding the arrangement, notwithstanding his advice to the contrary, is inconsistent with any unwillingness on Kumandan's part to conclude it. The reasons given by the nineteenth witness, Datla Chinna Venkatakrishnan, for refusal to attest, namely, that he was not willing to act against the wishes of his sister-in-law and that he refused because Kumandan refused, and Kumandan's explanation of his refusal, do not appear to us at all satisfactory or worthy of credit. We think it not improbable that these and other members of the family, who were present and who could apparently have had no other reasons for refusing to attest, may have declined to affix their signatures as witnesses, as the Subordinate Judge finds they did, because they had not before been in the habit of doing so, because to do so is considered by persons of their position unbecoming their dignity and for fear that they might be called to give evidence in Courts or elsewhere, as to the execution of the documents attested by them.

We now pass on to consideration of the question whether from the amount accepted by plaintiff, under the agreement (exhibit XXV) as compared with what the plaintiff would have been entitled to as the widow of the brother of defendant No. 1, it is to be inferred that the bargain was manifestly unfair to the plaintiff.

The provision made for her was a very handsome provision in itself. It was almost the same as that defendant No. 1 had been content to accept as the equivalent of his share in the moveable [321] property and the consideration for waiving his asserted right to partition of the Kottam estate. The widow has at her absolute disposal 1,75,000 rupees.

In what position would she have stood if the settlement had not been made?

Defendant No. 1 was, as we have seen, prepared to contest the division of moveables effected between him and the plaintiff's brother, on

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the ground that, as alleged by him, some 3,00,000 rupees had been concealed under the pretence that cash to this amount was the subject of gifts to the plaintiff's husband, to her, and to her son. Whether a claim to have that division set aside on this ground would have been successful, it is not necessary to decide; nor again whether, the division being maintained, a claim to a further share in the amount alleged to have been concealed might have been successful. But we are bound to say that the evidence adduced to prove the alleged gift of three lakhs to the plaintiff's son is, for reasons sufficiently explained by the Subordinate Judge, to say the least of it, open to grave suspicion.

The plaintiff's allegation was to the effect that a lakh of rupees was given by her father-in-law to her husband in 1861 or thereabouts, and a further gift of two lakhs to her husband, herself and her son, jointly, in 1870.

* * * *

The conclusion at which we arrive on this part of the case is that it is not satisfactorily proved that there was a gift of three lakhs of rupees to the plaintiff's husband and plaintiff.

Another question for consideration is whether the share in moveables retained by her husband, if taken by the widow, would have been at her absolute disposal. If the answer to this were in the affirmative, the present bargain would not be, on the face of it, so clearly to her advantage as giving her absolute disposal over a very considerable amount of moveable property, which she would not otherwise have had.

The question whether a widow has an absolute right to dispose of the *corpus* of moveable estate, inherited from her husband, has been much discussed and the early decisions have been at first doubted and now over-ruled.

The principal cases on this point decided by the late Sadr Court of Madras were referred to by the Privy Council in *Bhugwan* [322] *Deen Doobey* v. *Myna Baee* (1), and it was remarked that in only one of these, *Gopaula Putter* v. *Narraina Putter*, (2) were the authorities relied on by the pundits, on whose "Bywastas" the Courts acted, quoted, those authorities being the Madhaviya and Sarasvati Vilasa commentaries. On looking into these, we find passages in the latter work which apparently go rather to bear out the contrary view, while we have been unable to find any that support the *dicta* of the pundits.

We refer to Sections 516, 521, and 532 in the Sarasvati Vilasa, Foulkes' transalation (Trubner & Co., 1881).

(516) When the husband is dead, she who upholds his family shall receive her husband's share; her proprietorship is for her life, in gift, mortgage and sale.

(521) The sonless wife who guards her husband's bed and is steadfast in her continence and docile, shall have possession until her death, after her the heirs shall have it.

(532) Regarding the two texts, *i.e.*, the first given above (516) and the second given in 521, but at greater length as follows: "when her husband is dead, she who upholds the family shall receive her husband's share in the immoveable as well as the moveable, the grosser metals, the grains, the fluids, and the clothes; but her proprietorship is for her lifetime, in gift, mortgage, and sale"—they are to be expounded as applying to the wife who has no daughter, on the strength of these two passages

(1) 11 M.I.A. 487 (503). (2) M.S.D. (1850) 77.

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"after her the heirs shall have it," and, "but her proprietorship is for her lifetime."

We can see here no distinction drawn between moveables and immoveables.

In the Madhaviya, Section 35, page 25 (Dr. Burnell, Higginbotham, Madras, 1868), on the text of Vriddha Manu, "the wife (*i.e.*, widow) who has no son, who preserves inviolate the bed of her husband, and is steadfast in her duty, should offer the pinda for him, and take the whole share," the commentator remarks "the whole share" consisting of moveable and immoveable property, and he quotes the text of Prajapati; "Taking his property, moveable and immoveable, the silver and base metal, grain, liquids and clothes."

And in Section 44, in explaining the Vedic text "women are powerless and cannot succeed to the heritage," the same commentator **[323]** quotes the text of Brahaspati, which prohibits a wife from taking immoveable property, with the following comment, *viz.*, "Let the wife, whose husband is dead and who is divided, leave the immoveable property and take some pledge, &c.," and observes that it is only prohibitory of the widow selling or making away with immoveable property without the consent of the other heirs; else it would be inconsistent with the text, "Let the widow take the immoveable and moveable property, the gold, base metal, grain, liquids and clothes; let her cause the sraddhas to be offered in each month, the sixth month, &c.; let her honor with offerings to the gods and pitrs, paternal uncles, gurus, daughter's sons, the children of her husband's sisters, his maternal uncles, also old persons and guests."

The first passage merely concedes to the widow equal rights in moveable and immoveable property; the second, while it expressly denies the widow power to alien immoveable property without the consent of the other heirs, does not expressly concede to her an unqualified power to deal with other property, but concludes with a text declaring for what purposes the widow is allowed to inherit.

Having regard to the absence of express authority in Madhaviya's commentary to the agreement with other authoritative commentaries, the texts of the Sarasvati Vilasa, as well as to the observations of their Lordships of the Privy Council in the case above quoted, it has recently been held by this Court in *Narasimha* v. *Venkatadri*, (1) that the restriction which is placed on the widow's power of alienation over property inherited from her husband extends to moveable as well as immoveable property.

Convenience suggests that a widow should have power to make such dispositions of moveables as are consistent with their nature and requisite for their enjoyment, *e.g.*, grain must be sold or consumed, the increase of cattle must be disposed of when not required for the purposes of the estate; but it is one thing to hold that a widow has a disposing power for the purposes of enjoying moveable property, and quite another to hold that she is at liberty to waste it, or alien it as she pleases, so as to defeat the interests of the reversionary heirs. It cannot be said that, at the time when the agreement of the 27th August 1880 was made, the enjoyment **[324]** by a widow of an unqualified power to dispose of the *corpus* of moveable property inherited from her husband did not admit of question.

The conclusions then at which we arrive are that the deed of the 27th August 1880 was executed by the plaintiff deliberately, and on the advice

(1) 8 M. 290.

of her relations, she and they being sufficiently acquainted with all material facts; that it was a settlement of the claim of defendant No. 1 to set aside the agreement of the 6th March 1880, and of the claim of the widow to property alleged to have been separate property acquired by her and her husband by gift; that although she had no professional assistance with respect to the arrangement which she accepted, it was known to her advisers what professional advice had been given respecting the obligatory force of the agreement of the 6th March 1880 on defendant No. 1; that the plaintiff was fully aware of the claims she was renouncing; and that her advisers regarded the arrangement as a just and equitable one; and that it is not proved to have been otherwise.

In this view, we consider that the plaintiff is not at liberty to repudiate the agreement of the 27th March* 1880, and inasmuch as that agreement operated as a satisfaction of the other claims she asserts in this case, her suit was properly dismissed.

No cause of action appears as against defendants Nos. 2 and 3.

As regards the defendant No. 1 we should have hesitated to confirm the order of the Lower Court in respect of his costs in that Court, had it not been that, instead of confining herself to questioning the legal validity of the agreement of March, 1880, the plaintiff allowed gross mis-statements of fact and exaggerations to be introduced into the plaint filed on her behalf, in support of which evidence has been given at great length, which we are altogether unable to believe.

The appeal then is dismissed with costs in favour of all the defendants.

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[325] APPELLATE CIVIL.

Before Sir Charles A. Turner Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

KUPPA (*Defendant*) *Appellant* *v.* SINGARAVELU (*Plaintiff*) *Respondent.*† [5th January and 24th February, 1885.]

Hindu Law—Sudra—Illegitimate son—Issue of adulterous intercourse—Maintenance.

A Sudra having kept the wife of another man in his house for many years as a concubine, had a son by her, whom he recognized as his own.

In a suit brought by the son, who was of age, to recover maintenance from his putative father:

Held, that he was entitled to recover.

[F., 34 M. 68 (70) = 5 Ind. Cas. 919 = 20 M.L.J. 350 = 7 M.L.T. 161 = (1910) M.W.N. 138; R., 32 B. 562 = 10 Bom. L.R. 736 (739).]

THIS was a suit, *in forma pauperis*, brought by Singaravelu in 1883 against Kuppa Pillai to recover maintenance at the rate of Rs. 600 a year, together with three years' arrears at the same rate and interest thereon, and Rs. 2,000 for marriage expenses to be incurred. Plaintiff alleged that his mother was kept by defendant who had three children, including himself, by her; that he came of age in 1881, from which time he had not been maintained by defendant, but had maintained himself by contracting debts. The family property, he alleged, yielded Rs. 8,000 a year.

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* "March" is a mistake for "August."
† Appeal 71 of 1884.

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Defendant pleaded, *inter alia*, that the mother of plaintiff was a married woman who had committed adultery with several persons besides himself, and that plaintiff's paternity was, therefore, doubtful, and that, as plaintiff's mother was of a low caste (Kullar), plaintiff, who was of age, was bound to maintain himself by labour.

The Subordinate Judge at Negapatam, R. Vasudeva Rau, found that plaintiff's mother had been kept by defendant in his house for 25 years, that there was no doubt as to plaintiff's paternity, and that defendant had treated plaintiff as his son, and held that under Hindu Law plaintiff was entitled to maintenance. *Muttu-*[326] *samy Jagavira Yettappa Naikar* v. *Venkatasubha Yettia*(1), confirmed on appeal by the Privy Council (2), *Vencatachella Chetty* v. *Parvatham*(3), *Chuoturya Run Murdun Syn* v. *Sahub Purhulad Syn* (4).

The decision in *Nilmoney Singh Deo* v. *Baneshur* (5) relied on by the defendant was held not to be applicable to the Madras Presidency.

The plaintiff obtained a decree for maintenance at Rs. 140 a year and arrears of maintenance, and for Rs. 200 for marriage expenses.

The defendant appealed to the High Court.

Gurumurti Ayyar, for appellant contended that plaintiff being of age was not entitled to be maintained by the defendant.

Gopalacharya, contra, referred to *Viraramuthi Udayan* v. *Singarvelu* (6) *Rahi* v. *Govinda Valad Tejer* (7) *Hargobind Kuari* v. *Dharam Singh* (8).

The Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.) delivered the following

JUDGMENT.

This appeal arises in a suit which the respondent brought to recover maintenance from the appellant, his putative father. The appellant resisted the claim, 1st, on the ground that the respondent was not his son; 2ndly, on the ground that his connection with the respondent's mother was adulterous; and 3rdly, on the ground that the claim is not valid under Hindu Law. As to the first contention, we concur in the opinion of the Subordinate Judge that respondent is appellant's son, and the evidence, oral and documentary, bearing on the question is almost conclusive. The main contention on appeal was that the respondent's mother was a married woman living in adultery when he was born.

On this point, the Subordinate Judge has recorded no distinct finding, probably under the impression that the contention is immaterial in regard to a claim for maintenance as contra-distinguished from a claim to inheritance. That an illegitimate son is not entitled to inherit to a Sudra under the Mitakshara Law, if he is the offspring of incestuous or adulterous intercourse, [327] has already been recognized by this Court —*Venkatachella Chetty* v. *Parvatham.* (3) In *Muttusamy Jagavira Yettappa Naicker* v. *Venkataswara Yettaya,* (2) the Judicial Committee have, however, held, confirming a decision of this Court, that the natural son of a Hindu father, recognized by him as such is entitled to maintenance, although he may not have been born in the house of his father or of a concubine possessing such a status as is necessary to entitle her son to inherit to his father. The appeal must therefore fail, and we dismiss it with costs.

(1) 2 M.H.C.R. 293. (2) 12 M.I.A. 203 (3) 8 M.H.C.R. 134.
(4) 7 M.I.A. 18. (5) 4 C. 91. (6) 1 M. 306.
(7) 1 B. 97. (8) 6 A. 329.

8 M. 327.

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APPELLATE CRIMINAL.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Hutchins and Mr. Justice Brandt.

MUNICIPAL COMMISSIONERS OF MANNARGUDI v. NALLAPA.*
[23rd January and 24th February, 1885.]

Towns' Improvement Act, 1871, *Sections* 64, 72—*Tax on animals—License, Extent and limit of.*

N having taken out a license under the provisions of the Towns Improvements Act, 1871, for a bullock, the bullock died and N bought another bullock, but did not take out a second license. N was convicted for keeping this bullock without a license:

Held, (by Turner, C.J., and Hutchins, J., Brandt, J. dissenting) that the conviction was right.

THIS was a case referred for the orders of the High Court by J. B. Pennington, District Magistrate of Tanjore, under Section 438 of the Code of Criminal Procedure. The case was stated as follows:—

"The defendant in the case has been convicted by the Bench under Section 67 of Act III of 1871, of omitting to get a license for a bullock, and sentenced to pay a fine of four annas, in addition to the fee for the license, annas eight. He had apparently taken a license for a bullock which died in the course of the half-year, whereupon he bought a fresh bullock (the bullock in question) to replace the one that died. It appears to me unnecessary to get a [328] fresh license for the new bullock, as I think the license obtained for the dead bullock will hold good for the new bullock for the same half-year. But Section 65 of the Municipal Act is not quite clear, and I submit the case in order to obtain an authoritative ruling from the High Court. The fee and fine in the present case have been collected."

Counsel were not instructed.

The Court (TURNER, C.J., HUTCHINS and BRANDT, JJ.) delivered the following

JUDGMENTS.

TURNER, C.J.—The language of Act III of 1871, Sections 63—72 is, so far as it is material, as follows:—

"Section 63. If it shall be determined by the Commissioners............ to levy, for the purposes of this Act, taxes on carriages, horses, and other animals, such taxes shall be levied as provided in Sections 64 to 72 of this Act.

"Section 64. A tax at a rate not exceeding the rates specified in Schedule C......shall be imposed upon every carriage, horse, ass, dog, bull, bullock... ...kept within the town and shall be payable in advance. Provided that this section shall not apply to.........carriages or animals, the property of the Municipal Corporation, or vehicles kept for sale and not used for any other purpose, if the property of, and kept by, *bona fide* dealers.

"Section 65. The owner or person having the charge of every carriage, horse, ass, dog, bull, bullock . . . . . shall . . . . . send . . . . . a statement in writing signed by him containing a description of the vehicles and animals liable to the tax, for which he desires to take out a license.

* Criminal Revision Case 787 of 1884.

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"The owner shall, at the same time, pay to the Commissioners the half-yearly taxes payable by him. . . . . according to the rates given in Schedule C.

"Any person becoming possessed, between the first day of the official year and the first day of the next succeeding half-year, or between such last-mentioned day and the first day of the next official year, of a carrige or animal so kept, shall, within thirty days of becoming so possessed, send . . . . . a similar statement, together with the full amount payable for the then current half-year. . . . . Provided always that no person shall be liable to be taxed under this section for any carriage or animal which shall have been in his possession for any less period in any half-year.

[329] "Section 66. On receiving the amount of the taxes as aforesaid, the Commissioners shall give to the person paying the same a license for each of the vehicles and animals for the period in respect of which the money is received. The owner of every carriage and animal aforesaid, who shall have received a license for the same, shall, at all reasonable times, during the said period, be bound . . . . . to produce such license when called upon to do so by any person duly authorized to demand its production.

"Section 67. If the owner or any person having the charge of any carriage or animal so kept as aforesaid shall not have taken out a license under the last preceding section, he shall, on conviction before a Magistrate, be fined the full amount payable by him in respect of such carriage or animal . . . . and the Commissioners shall thereupon give him a license for the vehicles and animals in respect of which he has been fined as aforesaid."

Then follow sections relating to carriages and animals kept for hire. Section 68 requires that each such carriage shall bear a registration number.

Section 69 empowers the Commissioners to compound with livery stable-keepers, &c., for a certain sum to be paid for all the carriages or animals so kept in lieu of the taxes specified.

Section 70 is as follows:—"Whenever the owner of a carriage or animal, as aforesaid, kept for the time being in premises situated within the town, shall not reside in the town, the tax due for such carriage or animal shall be recoverable from the person in whose premises it is for the time being kept."

Section 71 requires the Commissioners to keep a register "of the persons, who, during the then current six months, shall have received a license under Section 66 of this Act, and of the vehicles and animals in respect of which they may have paid."

Section 72 empowers the Commissioners, &c., to enter and inspect any place wherein they may have reason to believe there is any vehicle or animal liable to taxation under Section 64 of the Act for which a license has not been duly taken out; and it also empowers the Commissioners to "summon any person whom they may have reason to believe to be liable to the payment of any tax under the last mentioned section" . . . . "and to examine such person as to the number and description of the carriages, horses [330] or other animals, in respect of which such person is liable to be taxed."

It will be seen that the Commissioners are authorized by Section 63 to levy taxes not on any person in respect of the number and description of carriages and animals kept by him, but on carriages, horses and animals; and although I should not insist on the terms of this section, because there may be a want of precision in its language, and a tax assessed

on a person in respect of the carriages or animals kept by him might be described as a tax on carriages or animals, Section 64, which follows, does not admit of such an explanation. That section distinctly states that a tax shall be imposed on every carriage, horse, ass, dog, bull, bullock, &c., kept within the town, and the proviso does not exclude the corporation, but vechicles and animals, the property of the corporation; nor does it exclude *bona fide* dealers in vehicles, but vehicles kept by them for sale and for no other purpose and, moreover, which are their own property. So that, if a vehicle, belonging to a person who is not resident in the town is sent for sale to a dealer and is not kept for any other purpose, it is liable to the tax. Again Section 70 sanctions the collection of the tax on carriages or animals of non-resident owners and whether or not they are used.

The 65th section requires the owner or person, having charge of a carriage or animal kept within the town, to send not a mere list but a description of the vehicles and animals *liable to the tax*, and although, in practice, the only description given is of the class so as to ascertain the amount of tax prescribed in the schedule, I think it clear the Commissioners might insist on a description which would identify the vehicle or animal and that this was intended.

Again, on receiving the amount of the tax, the Commissioners are required to give a license for *each* vehicle and animal. If it had been the intention that the tax should be assessed on a person in respect of the number of vehicles or animals kept by him, it would have been enacted that a license should be given to the person assessed for so many vehicles or so many animals of the class for which he had been assessed and had paid the tax.

In Section 66 we find that "the owner of every carriage and animal aforesaid who shall have received a license for the same" is required to produce such license. If the tax had been assessed on [331] the person, he would receive one license in respect of so many carriages or so many animals of a certain description. Again, carriages let out for hire are to bear a registration number, Section 68; and by Section 72 the inspection is allowed of any premises wherein the Commissioners have reason to believe there is "any vehicle or animal liable to taxation."

The second clause of this section, it is true, authorizes the Commissioners to examine any person as to the *number* of any carriages kept by him, but this may have had in view the provisions of Section 69 enabling livery stable-keepers to compound.

The only passage which can be referred to, to support a contrary construction, is the proviso to Section 65: "no person shall be liable to be taxed under this section" for any carriage or animal which shall have been in his possession for any less period not exceeding thirty days in any half-year; but the law must declare the owner liable for the tax imposed on the carriage or animal. If then a person loses or parts with a carriage or animal in respect of which he has taken out a license and acquires another for which a license has not been taken out, he is liable to pay the tax for such other. It might indeed be contended that, under the third paragraph of Section 65, a person acquiring within the half-year a carriage or animal for which a license had been taken out, is required to take out a second license, but I do not think that this is the true construction of the paragraph. The section is obviously dealing with carriages and animals for which no license has been taken out, and the license which the Commissioners are required by Section 66 to give on payment of the tax is

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expressly declared to be "for the period in respect of which the money is received," that is to say, the whole period.

In the 77th section of Madras Act IV of 1884 there is a distinct provision that no person by reason of transfer of ownership shall be liable in respect of any vehicle or animal for which a license relating to the half-year in which ownership was transferred has already been given—and indeed the Act adds "in any municipality :" so that under the amended Act if the tax has been paid on any carriage or vehicle and a license obtained in any municipality for a particular half-year, the payment of the tax cannot be enforced by any other municipality for that half-year, although there may have been a change of ownership.

[332] The amended Act may fairly be referred to as indicating the intention of the Legislature as to the nature of the tax.

It is thus shown to be a tax on any vehicle or animal described in the Act kept in any municipality above a certain period.

It is only in cases in which the owner loses a vehicle by destruction or an animal by death that this construction will work any hardship.

On the other hand the construction prevents the payment of tax twice or more frequently in the same half-year in respect of the same animal or vehicle. Practically it is probable that the latter construction will not yield so much to the municipality as the former.

In the case before the Court it was not pleaded that the tax had already been paid for the half-year on the animal purchased by the accused ; if it had been paid by the former owner, this should have been pleaded and proved. The conviction must be affirmed.

BRANDT, J.—No doubt Section 64 requires payment of a tax at the rate prescribed on *every* carriage, horse, &c., kept within the town: but if a carriage is destroyed by fire or an animal dies for which a license for the half-year has been taken out, such tax may, I think, be taken to cover a carriage bought from a maker or a horse brought in from outside municipal limits to replace the lost vehicle or animal.

Again Section 65 requires the owner to send in a statement containing a *description* of the vehicles and animals liable to the tax for which he requires a license, but looking at the practice, *viz*., the sending out of a printed form showing only so many vehicles on four wheels, or two wheels, and so many horses only, and so many ponies, without any requirement of description by colour, marks, &c., and looking also at the not very precise wording of the Act in several instances, and at the meaning which may not unfairly be placed on the word *description*, 'an account,' 'recital', 'writing down,' it seems to me that the word does not necessarily imply more than such a description as will truly show whether a vehicle is a four-wheeled vehicle on springs, or a horse over a certain height and so on. The tax is, to a great extent at all events, levied with reference to, and for the use and wear of, municipal roads, and it does not appear to me what difference it can make to the municipality whether they are used by one **[333]** animal or another, or by one carriage or another, provided that a tax is paid on 'every' carriage or animal using the roads, according to its size and 'description,' or class as defined for the purposes of the Act.

It may no doubt be that it is so much the better for the municipality if an owner loses a horse during the half-year and has to take out a fresh license for a horse bought to replace the other, but I cannot suppose that the Act was framed with this object in view.

Take the case of an exchange by two persons in the municipality of two carriages for each of which a license has been taken out. If the owner of carriage A chooses to transfer with it his license for that carriage and the owner of carriage B to transfer with his carriage his license for that carriage, no doubt the conclusion arrived at by the learned Chief Justice would cover the case, but what difference could it make if each owner retained his original license? It is not required that each license shall be pasted into, or affixed to, the carriage for which it is originally given. And so in the case of horse purchased to replace one which has died.

It appears to me only reasonable to suppose that it was not intended that a municipality should make profit out of a taxpayer's misfortune, and that it is not absolutely necessary to place on the wording of the Act a construction leading to the results which the judgment of the learned Chief Justice establishes.

Municipal bodies have ample means at their disposal to ensure that no fraud is committed.

[In consequence of the difference of opinion between their Lordships, the case was referred to Hutchins, J., who delivered the following judgment :—]

HUTCHINS, J.—This case first came before me in the Admission Court. I then stated that I was disposed to think, *prima facie*, that a license runs with the animal, but that the point was one which ought to go before a Bench of two Judges.

The question seems to turn on whether the license is for a particular vehicle or animal, or for any vehicle or animal which the licensee may possess provided the whole number for which he takes out licenses is not exceeded.

[334] Section 64 of the Act comtemplates a tax "upon every carriage, horse, ass, dog, bullock, &c.," kept within the town—*i.e.*, *prima facie*, a tax on the particular vehicle or animal.

Section 65 requires the owner or person having the charge of every carriage, horse, ass, &c., to send to the Commissioners a description of the vehicles and animals liable to the tax, and to pay the tax. Then follows a clause regarding the construction of which I was overruled in *Snaith* v. *McQuhae* (1), but which I still think must be interpreted by the analogy of Section 75. I do not understand the learned Judges who decided that case to have overruled me in that respect or to have held that a transferee of a licensed vehicle or animal is bound to take out a fresh license. I prefer not laying any stress on the word 'description' for I do not see how it can be extended beyond such description as may be necessary with reference to Schedule C to show the class within which the vehicle or animal falls and the rate of tax to which it is liable.

Under Section 66 the Commissioners are to give, not a single license for the specified number of each class of vehicles and animals, but "a license for each of the vehicles and animals," and as such license is to be for the whole half-year, it would probably cover the vehicle or animal even in the hands of a transferee. I do not understand that Mr. Justice Brandt doubts the power of the licensed owner to transfer the vehicle or animal with its license, if he so pleases.

So far no difference is made between hackney-carriages and other vehicles or animals, but Section 68 makes a provision with regard to

(1) 7 M.H.C.R. 332

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vehicles kept for hire which seems to show that the license for such vehicle is for that vehicle only and no other—all such carriages shall bear a registration number, and the number assigned to it has to be affixed to the carriage.

The effect of Section 69 is to enable livery stable-keepers and other persons keeping many carriages or animals for hire to compound for the tax, unlike other persons who, as before provided, have to take out a license for each.

Upon the face of the Act then what is contemplated in the case of ordinary owners is a license for, and appropriated to, each [335] vehicle or animal. To see whether this is likely to have been the intention of the Legislature we may fairly refer to the new Act designed to replace Act III of 1871. Section 77 of that Act enunciates the very same principles—(2) the amount payable for each half-year shall be payable by any person in whose possession . . . . any vehicle or animal may be found, so soon as *it* has been for 30 days in such half-year kept . . within the municipality ; (3) no person by reason of transfer of ownership shall be liable in respect of any vehicle or animal for which a license . . . , . has already been given. Sections 80, 81 require every person to give "such information respecting the vehicles and animals kept by him as the Chairman considers necessary for the assessment of the tax," and these words certainly go some way to support the inference which the learned Chief Justice has drawn from the word description, but on which I have thought it better not to lay stress.

It must, I suppose, be conceded that the Legislature either had the particular vehicle or animal in contemplation throughout, or else it all along had in view a vehicle of such and such a general description, a horse of so many hands, and so forth. The question may then be tested by taking the exact converse of the present case. Suppose the accused, instead of being prosecuted for having the new bullock unlicensed, had kept the old bullock 30 days, had then replaced it by this one, and had then been prosecuted for not taking out a license at all—it would have been a complete answer to the charge that he had not kept any particular bullock in the town for more than 30 days. For the proviso to Section 65 runs thus—"No person shall be liable . . for any carriage or animal which shall have been in his possession for 30 days only." It seems to me that any carriage or animal must there mean any particular carriage or animal, and if so, surely it follows that the tax imposed upon every carriage or animal is imposed on that particular carriage or animal. I therefore remain of the opinion, which I formed *prima facie* in the first instance, that the Act requires every particular vehicle or animal, used or kept for more than 30 days in the half-year, to be paid for; and that a person becoming possessed of an unlicensed horse within the half-year is not at liberty to transfer to it a license taken out for another which has died or been sold. In the case of the exchange referred [336] to by Mr. Justice Brandt, it will of course make no difference whether the particular bits of paper are exchanged or not, for, as at present issued, they are in every respect identical, but I do not see what there is to prevent the Commissioners from inserting in the license any description of the vehicles or animals that they deem necessary for the security of their income.

I am not therefore prepared to hold that the conviction in this case was illegal. The accused person has never alleged that the tax on the bullock had already been paid by its former owner. That was a poin

which he ought to have pleaded and proved, if he relied on it, and it is probable that the bullock was brought outside Municipal limits. Anyhow, the tax and the fine together amounting to but 12 annas, I do not see sufficient ground for ordering an inquiry in the absence of a complaint.

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8 M. 336=2 Weir 557.

APPELLATE CRIMINAL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Brandt.

QUEEN-EMPRESS *v.* AMIR KHAN AND ANOTHER.*
[23rd January & 24th February, 1885.]

riminal Procedure Code, Section 437—*Further inquiry—Re-trial—District Magistrate, Powers of.*

Where an accused person has been discharged by a Magistrate, further inquiry cannot be directed under Section 437 of the Code of Criminal Procedure on the ground that the Magistrate has not rightly appreciated the credit due to the witnesses.

Further inquiry should only be directed when other witnesses might have been examined, or when the witnesses have not been properly examined; and inasmuch as Section 437 does not direct that the evidence already taken should be taken again, the further inquiry should ordinarily be made by the Magistrate who made the original inquiry.

Where a District Magistrate being of opinion that a Subordinate Magistrate had, without just cause, refused credit to the witnesses in a certain case and had **[337]** improperly discharged an accused person, directed a further inquiry by another Magistrate, and the accused was on the same evidence re-tried and convicted:

Held, that the conviction must be quashed.

[Overruled, 14 M. 334 (336)=2 Weir 557; **Diss.**, 9 A. 52 (**F.B.**)=6 A.W.N. (1886) 281; **F.**, 12 C. 522; 31 M. 133=18 M.L.J. 57=3 M.L.T. 230 (234); **R.**, 10 B. 131 (140); 32 M. 214=10 Cr. L.J. 299 (301)=3 Ind. Cas. 488 (489)=5 M.L.T. 356; 32 M. 220 (239)=9 Cr. L.J. 192=19 M.L.J. 157=5 M.L.T. 233; 5 C.P.L.R. 20 (23); 1 L B.R. 311 (312); 4 L.B.R. 233.**]**

THIS was a petition to the High Court under Sections 435 and 439 of the Code of Criminal Procedure, praying that the proceedings of J.W. Reid, Sessions Judge of Coimbatore, dated 11th November 1884, confirming on appeal the sentence of the Temporary Deputy Magistrate of Coimbatore in calendar case No. 23 of 1884, might be revised.

The facts of the case appear sufficiently for the purpose of this report from the judgment of the Court (TURNER, C.J., and BRANDT, J.).

Counsel were not instructed.

JUDGMENT.

TURNER, C.J.—According to the evidence of the complainant, the petitioners came to his shop, and the petitioner, Amir Khan, handed to him a currency note for Rs. 10 and asked him to change it. The complainant expressed his willingness to do so subject to a deduction of 4 annas for commission, to which Amir Khan agreed. By Amir Khan's direction, the complainant handed 9 rupees to the petitioner Yakub Khan, who at once went away. The complainant asked Amir Khan to sign the note, which he did. The complainant then tendered him the balance of the

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* Criminal Revision Case 737 of 1884.

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change, 12 annas. Amir Khan then asserted he had not received the 9 rupees and protested he had no knowledge of Yakub Khan, and, throwing down the 12 annas, he snatched the note from the hand of the complainant and walked away with it. The complainant, taking with him a cartman and some other persons he met in the street, went in search of the petitioners and found them together and gave them in charge of a constable, informing him of what had occurred. The petitioners were taken to the house of the Inspector of Police, where Amir Khan produced two currency notes and Rs. 7, and the complainant identified one of the notes as it bore on its back the signature written in his presence.

Kasturi, the complainant's gumasta, who came into the shop as Yakub Khan was leaving it, identified him and corroborated the complainant's evidence as to what occurred subsequently up to the time when Amir Khan left the shop.

Papanna, the cartman, deposed that the first witness came to him and told him that a Mussulman had come to him and asked **[338]** to change a note and had taken away forcibly the note and the change, and that he accompanied him to search for the man. He corroborated the complainant's evidence as to the discovery of the petitioners and their arrest.

The petitioners were charged with cheating or theft.

The petitioner, Amir Khan, stated that he went to the shop of the complainant to change a note, and that, when the complainant handed him Rs. 9-12-0 only, he demurred to the amount deducted on the ground that it was excessive; that after a wrangle he returned the money and went away: and that afterwards the complainant came with a constable and arrested him and Yakub Khan; and he attributed the arrest to malice on the part of the police. Yakub Khan admitted he had gone to the complainant's shop to get some cotton seed, as he said, but failed to get any. He denied that he had seen Amir Khan there, and asserted that he had returned to a chatram and laid down there, to which place a number of people brought Amir Khan, and he accompanied them to "see the fun," when he was arrested.

The second-class Magistrate who tried the petitioners took the evidence of the complainant, his gumasta, and the cartman, and discharge the accused.

On perusing the records the District Magistrate recorded the following order:—"In this case two persons, Amir Khan and Yakub Khan, were accused of stealing a currency note of Rs. 10 from the complainant Sellan Chetti. The Sub-Magistrate dismissed the case because he considered the complainant's statement was unsupported, and because he seems to have believed a story told by the first accused, but not supported by evidence. I see no reason to think that the statement of the complainant is not entitled to credit, and I therefore direct that further inquiry be made in the case, for which purpose it is transferred to the Temporary Deputy Magistrate."

The officer indicated held a fresh trial. He examined the complainant, his gumasta, and the Inspector of Police, and also several witnesses produced by the petitioner Amir Khan to support his statements. In the result he convicted the petitioner Amir Khan of cheating and theft, and the petitioner Yakub Khan of cheating and abetment of theft.

On appeal, the Sessions Judge overruled an objection taken to **[339]** the order of the District Magistrate on the ground that it was passed without notice to the petitioners. He also overruled the further objection

that the Magistrate had in fact ordered a new trial and not "further inquiry," and on the merits he supported the conviction. 1885 FEB. 24.

On revision, it is urged that the order of the Magistrate in directing further inquiry where no further evidence was forthcoming against the accused, was *ultra vires*; and that "further inquiry" necessarily means an inquiry upon fresh evidence corroborative of, or in addition to, the evidence already adduced before the Court; and that a mere rehearing upon the same evidence is illegal. The Sessions Judge had overruled this objection when taken in appeal on the ground that further inquiry means inquiry into the matter alleged by the examination of witnesses, *de novo*. APPELLATE CRIMINAL. 8 M. 336 = 2 Weir 557.

The Judge apparently regards the term "further inquiry" as identical in meaning with the terms "fresh inquiry" or "re-trial." This is not its obvious meaning, and involves the conclusion that the Legislature intended to overrule the series of decisions quoted by Prinsep under Section 253 of the Code of Criminal Procedure, in which it has been held that, except in Sessions cases, after an order of discharge, no Magistrate could re-open the proceedings and commence a new trial unless evidence be forthcoming which was not before the Magistrate in the first proceedings.

It has been already observed by this Court that the true construction of the 435th—439th sections of the Code of Criminal Procedure is to be ascertained by reading them together, and by so doing the question now under consideration, *viz.*, the meaning of the term "further inquiry," appears to us to become apparent.

Section 436 enacts that the Court of Session or District Magistrate, if it appears to them that a case is triable exclusively by a Court of Session, and that an accused person has been improperly discharged, may, instead of directing a fresh inquiry, order him to be committed for trial; or if such Court or Magistrate thinks that the evidence shows some other offence has been committed—which must mean some offence other than the offence inquired into—such Court or Magistrate may direct the inferior Court to inquire into such offence.

Section 439 confers on the High Court, as a Court of Revision, the powers of a Court of Appeal, including, among others, a power **[340]** to reverse a finding and sentence, and to acquit or discharge an accused person, or to order him to be "re-tried," or to order that additional evidence be taken.

The term "further inquiry" means, in its primary signification, an inquiry in addition to that which has already been held—not the re-taking of the same evidence, which would be a fresh inquiry or re-trial, but the taking of additional evidence; and, while there is nothing in the context of Section 437 which suggests an intention to use the term in any other meaning, the sections which precede and follow Section 437 show that the term was intended to bear its ordinary meaning. A District Magistrate, then, has no power under Section 437 to direct the re-opening of proceedings merely because, in his judgment, a Subordinate Magistrate has not rightly appreciated the credit due to the witnesses.

He should direct a "further inquiry" only where he is satisfied that such an inquiry is possible, that is to say, that further evidence is forthcoming either because the witnesses already examined have not been fully examined, or because there are other witnesses who might have been examined.

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The High Court itself, which has a power that the Magistrate does not possess, namely, to order a "re-trial," is not warranted in so doing merely because the Magistrate who has discharged an accused person in a case he was competent to try and finally determine, arrived at a conclusion different from that at which the High Court would have arrived as to the credit due to the witnesses.

If in cases not falling under Section 436, a District Magistrate sees reason to think that the Subordinate Magistrate has improperly discharged an accused person by reason of his having misapprehended the law or committed a material error in procedure, the District Magistrate should, under Section 438, report the case for the opinion and orders of the High Court.

The conclusion at which we arrive as to the meaning of "further inquiry" is in accordance with the decisions of the Calcutta High Court in *in re Chundi Churn Bhuttacharjea* (1), *Jeebunkristo Roy* v. *Shib Chunder Das* (2), and of the Allahabad High Court in *Queen Empress* v. *Hasna* (3); and it is not in-**[341]** consistent with the decision of this Court in *Queen Empress* v. *Papadu* (4), which has been misapprehended by the Judge. That case merely determined that the effect of an order for "further inquiry" was to re-open the trial and to permit the Magistrate to convict for an offence included in the offence originally inquired into if he considered it established by the evidence.

The District Magistrate in the case before the Court did not satisfy himself that any further evidence would be forthcoming. His reason for directing further inquiry was that the Subordinate Magistrate had improperly refused credit to the witnesses for the prosecution. The case was not one in which any further direct evidence was procurable. The complainant alone could speak to the payment of the nine rupees to Yakub Khan. The gumasta could alone confirm the statement of the complainant as to the presence of Yakub Khan at the time when Amir Khan was at the shop, and what occurred at the shop after he left it. The cartman corroborated the evidence of the complainant by proving immediate complaint and the arrest of the petitioners at the same place. The production by Amir Khan of the note endorsed, at the house of the Inspector, was not denied and was consistent with the case of both parties.

The constable who made the arrest was not examined at either trial, but he could have given no other evidence than had been given by the cartman.

But, as we have observed, the District Magistrate did not consider whether any additional evidence was procurable nor indicate on what points "further inquiry" should be made. Moreover he transferred the case to another Magistrate, and, while we are not prepared to say that in no case it is competent to him to do so when he acts under Section 437, we consider that it was intended that the "further inquiry" should ordinarily be held by the Magistrate who made the original inquiry inasmuch as the section does not contemplate that the evidence already taken should be re-taken.

It remains to be considered whether, although the Magistrate in directing a "further inquiry" may have acted under a misconception as to the nature of the inquiry which should be held, and **[342]** may not have satisfied himself that "further inquiry" was possible, his order should be quashed.

(1) 10 C. 207. (2) 10 C. 1027. (3) 6 A. 367. (4) 7 M. 454.

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If, although the order was issued on insufficient grounds, it had been duly carried out and further evidence had been forthcoming, we conceive that it would have been our duty to uphold the proceedings, including the order; but inasmuch as no further evidence was procured and the petitioners have been convicted on substantially the same evidence as that which the Subordinate Magistrate who held the first trial refused to act upon, we consider the petitioners should have been again discharged, and setting aside the convictions, we direct that the fines, if levied, be refunded.

8 M 342.

APPELLATE CRIMINAL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Brandt.

QUEEN-EMPRESS v. PODIATHAL.*

[23rd January and 26th February, 1885.]

Salt Laws Amendment Act, 1882, *Section* 26, *cl.* 3; *Section* 27 (*e*)—*Salt imported from foreign state, contraband.*

Section 26 of the Salt Laws Amendment Act (Madras Act I of 1882) makes it penal to import salt by any route not legally sanctioned for that purpose, and also to possess salt known to have been imported in contravention of the Salt Laws, and Section 27 of the said Act authorises, *inter alia*, the Governor in Council to make rules for regulating the import of salt by land.

No such rules having been passed in 1884, P was convicted of being in possession of salt known to have been manufactured in, and imported from, the native state of Pudukottai:

Held, that the conviction was right

THIS was a case referred for the orders of the High Court under Section 438 of the Code of Criminal Procedure by J. B. Pennington, District Magistrate of Tanjore, on the 8th December 1884.

The letter of reference was as follows:—

"The accused in this case has, on her own confession, been convicted by the Sub-Magistrate under Section 26 of Madras Act I of 1882 [343] of being in possession of Pudukottai salt in British territory, and the fine has been levied from her.

"As I doubt if the possession of Pudukottai salt in British territory is an offence under the section, I refer the case for the orders of the High Court. I exhibit below in the form of a tabular statement the arguments that may be urged on both sides.

"The arguments that may be urged on the one side are—

"Under Section 27, clause (*e*), Government have power of making rules for regulating the import and export of salt by sea and land. Under Section 12 of Act VI of 1844, they have the power to prescribe by what routes goods shall be allowed to pass into British territory. They have not prescribed any such routes for the importation of goods from

"The arguments that may be urged on the other side are—

"Government have the power of making rules for *regulating* the import of salt, not of prohibiting it *under the clause in question*. Whether they have the power or not, they have not yet prohibited the import of Pudukottai salt *under that clause*. Nay, the prohibition imposed by Section 9 of Regulation I of 1805, upon the import of foreign

* Criminal Revision Case 758 of 1884.

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Pudukottai territory. Nor have they made rules for the import of salt by land from that territory. There is, therefore, no legally sanctioned route for the importation of salt therefrom. Moreover, the import of salt by land is expressly forbidden by Section 3 of Madras Regulation I of 1805, so that any person who imports salt from Pudukottai would be punishable under Section 26 of (Madras) Act I of 1882. Salt so imported is dealt with in contravention of the Act and rules. It is, therefore, 'contraband' and the possessor is punishable if he knows or has reason to believe it to 'contraband.' If it is earth [344] salt he has reason to believe it to be contraband, as it is a well-known fact that earth-salt is not manufactured in British territory on behalf of Government, or under license, and that no route has been legally sanctioned for the importation of Pudukottai salt. A person that possesses Pudukottai salt would, therefore, be punishable under Section 26 of Madras Act I of 1882."

salt; *i.e.*, salt manufactured out of the limits of the territory of Fort St. George (including Pudukottai salt), has been removed by Madras Act I of 1882 (*vide* schedule to the Act by which the said Section 9 is repealed). The prohibition has been removed and no fresh prohibition has been imposed. Presumably, then, Government have sanctioned the indiscriminate import of Pudukottai salt. Section 12 of Act VI of 1844 applies only to frontiers guarded by chaukies, which the Pudukottai frontier is not. No routes have been sanctioned for the importation from Pudukottai territory of articles, other than salt, but, of course, [344] the importation of those articles is not illegal. Section 26, clause 3, presupposes the existence of sanctioned routes and imposes a penalty only if the salt is imported by any other route. It cannot be held to apply to a case in which no route at all has been sanctioned. Therefore salt imported from Pudukottai territory, no matter by what route, cannot be held to be 'contraband.' Section 26, clause 3, only imposes a penalty on one who imports salt by a route not legally sanctioned; but it is very doubtful whether it can be held to amount to an absolute prohibition of import in all cases, where no routes have been prescribed at all. There is no section in this Act nor is there any in any other Act in force at present, to the effect that no person shall import salt (foreign) by any route not legally sanctioned. Section 9 of Regulation I of 1805 contained such an express prohibition and Section 3 contains a similar prohibition of the import of salt *in* the Presidency of Fort St. George. Section 3 of Regulation I of 1805 applies to cases of import and export, from one port into another, *in* the territories subject to the Presidency of Fort St. George, and not *into* such territories. The intention appears to have been to extend the Rawana system which was established by the Regulation to all salt moved within the Presidency (excluding the Pudukottai territory, &c.), whether by sea or land. This view is supported by the fact that a separate section (Section 9) existed for prohibiting the import and export of foreign salt, which means salt manufactured out of the limits of the territories subject to the Presidency of Fort St. George. This Section 9 has now been repealed. In the view thus taken, the note made in the margin of Section 3 of Regulation I of 1805 in the editions of certain compilers of Acts, that it (the section) is repealed, as regards the importation by sea of foreign salt by Section 2 of Regulation II of 1818 is evidently misplaced, while the same note made in the margin of Section 9 appears to be correct. Regulation II of 1818 merely says: 'The provisions of Regulation I of 1805,

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[345] so far as they may affect the importation by sea of *foreign* salt, are rescinded.' It does not say expressly that Section 3 or Section 9 is repealed. But as Section 9 refers to foreign salt and not Section 3, the note ought to have been made by the compilers only under Section 9 and not under Section 3. Possession of Pudukottai salt in British territory is not, therefore, contraband."

"For my own part, I am inclined to think that Section 26, Clause 3, cannot be easily got over by those who urge that the possession of Pudukottai salt in British territory is not an offence. It says: 'Any person who imports salt by a route not legally sanctioned for that purpose shall on conviction be punishable.'

"The salt imported is liable to confiscation together with the vessels, vehicles, materials, implements, and animals employed in its conveyance or in otherwise dealing with it. But it is still not quite clear whether the salt so imported is 'contraband,' *i.e.*, whether it is dealt with in *contravention* of any provision of law, there being no provision expressly prohibiting the import of salt from Pudukottai territory, *i.e.*, if a section, similar to Section 9 of Regulation I of 1805, should come into existence.

"I beg the High Court to refer to their proceedings, No. 1955, dated 29th May 1883, in disposing of this reference.

"It may not be out of place for me to state here that in Government Order, dated 22nd October 1884, No. 1173, Revenue, the Collector of Madura was requested to refer a case of conviction for possession of Pudukottai salt to the High Court in order to obtain a ruling on the question whether the possession of Pudukottai salt in British territory is an offence or not, and copy of the Government Order was sent to the Collector of Tanjore."

The Government Pleader (Mr. *H. H. Shephard*) appeared on behalf of the Crown.

JUDGMENT.

The judgment of the Court (TURNER, C.J., and BRANDT, J.) was delivered by

TURNER, C.J.—The accused, a woman, on her admission that she was caught by a petty officer in the Salt Department while carrying (in the Tanjore district) 15 seers and 60 tolas of "Pudukottai," earth-salt, was convicted under Section 26 of the Madras Salt Act I of 1882.

The conviction was summary, and it does not appear whether it was under clause 3 of Section 26, for "importing" salt by a route not legally sanctioned for that purpose, or under clause 5, for being in [346] possession of salt knowing, or having reason to believe, it to be "contraband."

The conviction, if under clause 3, could not be upheld: it was on the admissions of the accused that she was convicted, and she said that some one had given the salt to her to carry for him; she did not admit that she imported it, and it cannot be assumed that she did: it must be taken that it came into her possession after it had crossed the frontier.

Practically, the only question then is whether the salt was "contraband" under the Salt Act, for, in the absence of any explanation on the part of the accused as to why she took it, as she said, from another person, not at a price nor as a gift, seeing that she did not pretend to be able to identify such person, and that it appears to have been alleged in the charge that the salt was "Pudukottai" salt, it must be taken that she knew, or had reason to believe, the salt to be "contraband" if it was such.

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The law relating to salt in this Presidency has been so often altered by repeal that it is somewhat difficult to ascertain what portions of the earlier Regulation and Acts on the subject are still extant, or to put on what remains of the Regulation of 1805 and of the Acts prior to 1882, a satisfactory construction when read with the last Act.

This reference is made by the District Magistrate of Tanjore, at the suggestion of Government, with a view to obtain an authoritative decision as to whether, as the law now stands, salt imported from the Pudukottai State into this Presidency, without the express permission of Government is "contraband" or not.

Mr. Pennington points out that the Regulation of 1805 commences with a prohibition against the manufacture or sale, and transit, and importation of "salt" "in the territories subject to this Presidency, and also contains a special provision (Section 9) prohibiting the importation of "foreign salt"—"under which denomination is to be deemed to be included salt of every description made or produced without the limits of the territories subject to the Presidency of Fort St. George"—"into any part of the said territories" except on account of Government or with their special sanction, or in virtue of a Regulation duly enacted and promulgated for that purpose; and the District Magistrate has, we think rightly, apprehended that, while the later section applied to all salt made outside the territories subjected to the Government of this [347] Presidency, and imported into those territories, the third section applies to salt exported and imported within, that is, from one part of those territories to another. Section 9 was repealed by Regulation II of 1818 as regards import of foreign salt by sea only, and this fact lends support to the construction adopted by the District Magistrate, inasmuch as the provisions of the Regulation of 1805 were left standing as regards foreign salt imported by land. Again, Act VI of 1844 dealt, *inter alia*, with foreign salt imported by land from the territories of native chiefs not subject to the jurisdiction of the Courts and Civil authorities of this Presidency. Section 12 of this Act authorized the Governor in Council to prescribe by what routes salt, *inter alia*, should be allowed to pass out of any such foreign territories as was described in Section 7 of the Act. The effect of the repeal of Sections 6 and 7 of the Act may be either to leave foreign territory undefined or to leave the definitions untouched for the purposes of Section 12, but this is immaterial, for full power is given by Act I of 1882.

Section 9 of Regulation I of 1805 was eventually repealed by Madras Act I of 1882.

We may then, so far as the present case is concerned, confine our attention to the latter Act.

It is noticeable that this Act does not in express terms prohibit the importation of salt by land from native States by any other than a prescribed route, but it declares it to be an offence (Section 26, clause 3) "to import salt by any route . . . . . not legally sanctioned for that purpose," and so implies a prohibition against such importation generally.

The Act, moreover, as we have before observed, empowers the Government, *inter alia*, to frame rules "for regulating the export and import of salt by sea and land," Section 27 (*e*), and so impliedly gives to the Government power to prescribe rules for the import of salt by land from foreign territories.

It was assumed that such rules would have been framed prescribing, *inter alia*, routes for the importation of salt from any place outside the

Presidency from which it is or might be imported. But, in the absence of such rules, the implied prohibition contained in Section 27 (e) of Madras Act I of 1882 nevertheless takes effect.

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8 M. 342.

The conviction in the case referred to us is then, in our opinion, good in law.

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8 M. 348.

[348] APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Brandt.

ARUNACHALA (*Plaintiff*), *Appellant v.* PANCHANADAM AND OTHERS (*Defendants*), *Respondents.** [13th February, 1885.]

*Civil Procedure Code, Section 13—Hindu Law—*Res judicata*—Representation of estate by Hindu widow—Decree in favor of widow—Suit by reversioner—Admission by widow subsequent to decree not binding on reversioner.*

In 1877, S claiming to be the adopted son of M, sued A, the widow of M, to recover his estate. A denied the adoption. S failing to adduce any evidence, the suit was dismissed under Section 158 of the Code of Civil Procedure, 1877. In 1882 by an agreement made between A and S, A acknowledged the title of S as adopted son of M. A having died, a suit was brought against S by a reversioner of M. to recover the estate of M:

Held, that S was estopped by the decree in the former suit from setting up his claim as adopted son against the plaintiff, and that the subsequent agreement between A and S did not affect plaintiff's right.

[R., 9 C.P.L.R. 59 (61).]

THIS was an appeal from the decree of W. F. Grahame, District Judge of South Tanjore, dated 18th July 1884, confirming the decree of K. Krishna Ayyangar, District Munsif of Tiruvadi, in suit 195 of 1883.

The plaintiff, Arunachala Pillai, sued to recover from the defendants, Panchanadam Pillai and four others, the estate of Muttu Pillai with mesne profits. Muttu Pillai died in 1874 without issue, and was succeeded by his widow, Alamelu, who died in 1882. Plaintiff alleged that, on the death of Alamelu, Kottai Ammai, the adoptive mother of Muttu Pillai, was entitled to succeed to the estate for life, and that she, by a registered deed, dated 13th December 1882 (exhibit A), conveyed to plaintiff, who was the divided paternal uncle's son and next heir of Muttu Pillai, her life interest. The defendants were alleged to be in possession of the estate. The defendants pleaded that Shunmugam Pillai, defendant No. 3, was adopted by Muttu Pillai, and was in sole [349] possession of the estate. In suit No. 389 of 1877, Shunmugam Pillai sued Alamelu to recover the estate of Muttu Pillai, claiming as adopted son. Alamelu denied the adoption. That suit was dismissed under Section 158 of the Code of Civil Procedure, 1877, because the plaintiff's pleader was not ready to proceed and adduced no evidence.

On the 28th of July 1881, by a written agreement made between Alamelu and Shunmugam, Alamelu admitted that her previous denial of the adoption was not true and that Shunmugam was the adopted son of Muttu Pillai.

The second issue was whether the alleged adoption of Shunmugam was true and valid as against plaintiff. The Munsif found that the

* Second Appeal 927 of 1884.

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adoption was clearly proved and held that the decree in suit 389 of 1877 was no bar to Shunmugam's plea, because plaintiff did not claim through Alamelu, but as a reversioner of Muttu Pillai. The suit was dismissed.

On appeal the District Judge confirmed the Munsif's finding as to the fact of adoption, and remarked that there was no proof of any consideration for exhibit A.

Gopalacharyar, for appellant.

Mr. *Wedderburn*, for respondents.

For the appellant it was contended that the decree in the former suit estopped the respondent from setting up his adoption.

For the respondent it was argued (1) that the appellant did not claim "under" Alamelu within the meaning of Section 13 of the Code of Civil Procedure, but "under" Muttu Pillai. (2) That the question of adoption had not been heard and finally decided in the former suit. (3) That if appellant claimed "under" Alamelu and was entitled to rely on the decree in her favor, he was equally bound by her subsequent admission in favor of respondent's title, and that, if necessary, the case should be remanded to try that and other questions raised in the suit.

JUDGMENT.

The judgment of the Court (TURNER, C J., and BRANDT, J.) was delivered by

TURNER, C. J.—Shunmugam Pillai sued to establish his right as adopted son of Muttu Pillai, and to recover the estate from the widow, Alamelu. He failed to adduce evidence to prove his title, and the suit was dismissed.

The widow represented the estate, and if she defended the suit **[350]** *bona fide*, the decision whether allowing or disallowing the right claimed would have bound all persons claiming in succession to the widow—*Krishna Behari Roy* v. *Brojeswari Chowdranee* (1).

The circumstance that the widow afterwards recognized the claim cannot affect persons having rights in succession to her. The appellant is the next reversioner in succession to the mother of Muttu Pillai, and it is immaterial whether or not consideration was given for exhibit A. He is entitled to succeed. The decrees of the Court of First Instance and appeal are reversed and the claim decreed with costs in all Courts. The amount of mesne profits will be ascertained in execution of decree.

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8 M. 350.

APPELLATE CRIMINAL.

Before Mr. Justice Brandt.

QUEEN-EMPRESS *v.* GOUNDADU.* [23rd February, 1885.]

Act I of 1866 (*Madras*), *Section* 22—*General Clauses Act*, 1868, *Section* 5.

Section 5 of the General Clauses Act, 1868, does not authorize a Cantonment Magistrate to award rigorous imprisonment in default of payment of a fine imposed under Act I of 1866 (Madras).

ON the 3rd of February 1885, Lieutenant-Colonel G. H. Oakes, Cantonment Magistrate at St. Thomas' Mount, sentenced Goundadu to rigorous

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* Criminal Revision Case 92 of 1885.

(1) 2 I.A. 283.

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imprisonment for eight days for failing to pay a fine of Rs. 6, imposed upon him for keeping swine within the cantonment without permission, contrary to the provisions of Section 14, Sch. III of the Cantonment Rules passed under Section 17 of Act I of 1866 (Madras).

This order, it was stated, was passed under Section 5 of the General Clauses Act, 1868. A warrant of distress had been issued and return made that Goundadu had no property from which the fine could be levied.

The case was referred for the orders of the High Court by J. F. Price, District Magistrate of Chingleput, on the 13th February 1885, on the ground that the order was contrary to the **[351]** provisions of Section 22 of Act I of 1866 (Madras), which provides imprisonment without labour as the penalty for non-payment of a fine.

Counsel were not instructed.

The Court (BRANDT, J.) delivered the following

JUDGMENT.

The sentence is illegal. Section 22 of Act I of 1866 provides that in default of realization of a fine imposed for breach of any rule or regulation made under the provisions of Section 17 of the said Act, by reason of no moveable property belonging to the offender being found, the offender shall be liable "to be imprisoned without labour" for any term not exceeding one month.

Section 5 of the General Clauses Act extends the provisions of certain sections in the Penal Code and Criminal Procedure Code "to all fines imposed under the authority of any Act hereafter to be passed," unless such Act contains express provision to the contrary.

Seeing that the Cantonment Act was passed two years prior to the General Clauses Act, the provisions of Section 5 of the latter Act do not apply to the former, and the fact that rules and regulations framed under clauses 4 to 11 of the Cantonment Act did not receive the force of law until after 1868 (if this is so), can make no difference. So much of the Cantonment Magistrate's order as imposed rigorous imprisonment is set aside.

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8 M. 351.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Brandt.

SUBBU (*Defendant*), *Appellant* v. VASANTHAPPAN (*Plaintiff*), *Respondent*.* [13th February, 1885.]

Rent Recovery Act, Section I—Inamdar—Regulation XXV of 1802.

Section 1 of Madras Act VIII of 1865 does not confine the term "inamdar" to such inamdars as are registered:—*Held*, therefore, that the purchaser of an inam village, who had not got his name registered as inamdar, was not thereby debarred from enforcing the provisions of the Act against a tenant for arrears of rent.

Valamarama v. Virappa (I.L.R., 5 Mad., 145) observed upon.

[Appr., 26 M. 589 (591) (F.B.); R., 15 M. 484 (485).]

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* Second Appeal 833 of 1884.

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[352] THIS was a summary suit brought, under Section 40 of the Rent Recovery Act, to prevent the defendant, who had purchased an inam village, from selling the plaintiff's interest in certain land for arrears of rent claimed by the defendant. The plaintiff urged that the defendant could not enforce the provisions of the Rent Recovery Act, inasmuch as he was not registered as inamdar of the village.

The Sub-Collector of Salem held that, as plaintiff had accepted a patta from defendant, he could not resist the defendant's claim for rent, and dismissed the suit.

On appeal, the Acting District Judge (C. W. W. Martin) reversed this decree on the ground that defendant had no right to proceed under the Rent Recovery Act, until he was registered as inamdar of the village, citing *Valamarama* v. *Virappa*.(1)

The defendant appealed to the High Court.

Ramasami Mudaliar, for appellant.

Respondent was not represented.

The Court (TURNER, C.J., and BRANDT, J.) delivered the following

JUDGMENT.

The appellant, according to the statement of his vakil in this Court, purchased seven-eighths and his younger brother purchased one-eighth of the inam for their joint benefit as members of an undivided family. By their purchases, they became inamdars, and Section 1 of the Rent Recovery Act relating to inamdars does not confine the term "landholders" to such inamdars as are registered. Since the date of the decision in *Valamarama* v. *Virappa*, (1) it has been held that the provisions of Regulation XXV of 1802, Section 8, were intended only for the protection of Government revenue and authorize only the Government to question the validity of an unregistered alienation of a part of a zamindari in so far as it prejudices the claim for revenue. The respondent did not, it appears, take exception to the patta on the ground that only one brother was represented as lessor, but this defect should be corrected. The decree of the Appellate Court is set aside and a re-hearing of the appeal ordered. The appellant's costs of this second appeal will abide and follow the result.

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8 M. 353.

[353] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

DEVU (*Defendant* No. 1), *Appellant v.* DEYI AND ANOTHER (*Plaintiffs*), *Respondents.** [5th and 7th March, 1885.]

Aliyasantana law—Yajaman—Family compact.

The question, whether, according to the Aliyasantana usage obtaining in South Canara, the senior member, male or female, or only the senior female, is the *de jure* yajaman (manager) of the family is not concluded by authority and cannot be determined without evidence of usage.

By a family compact between all the members of an Aliyasantana family in settlement of disputes in the family, it was agreed that the senior male for his life should enjoy the possession of the family land and protect the females:

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* Second Appeal 322 of 1884.

(1) 5 M. 145.

Held, that the senior female, assuming that she was *de jure* yajaman, could not arbitrarily revoke this arrangement.

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APPELLATE CIVIL.

8 M. 353.

[F., 12 M. 462 (464).]

THIS was an appeal from the decree of J. W. Best, District Judge of South Canara, dated 26th November 1883, confirming the decree of the District Munsif of Mulki (Babu Rau) in suit No. 38 of 1880.

The facts necessary for the purpose of this report appear from the judgment of the Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.)

Srinivasa Rau, for appellant.

Ramachandra Rau Saheb, for respondents.

JUDGMENT.

The suit which has given occasion to this second appeal was brought by the respondents, Deyi and Ammu, two females of an Aliyasantana family in South Canara, against the appellant, Devu Shetti, the senior male member, and two others, his wife and son, to remove Devu Shetti from his position as yajaman and to recover the property belonging to the family.

Of the averments contained in the plaint, whereby fraud and misconduct were imputed to the appellant, several may be dismissed from our consideration.

As against defendant No. 2, the appellant's son, it was alleged that property belonging to the family had been alienated to him **[354]** without just cause. This allegation, it is found, has not been proved, and the respondents have not objected to the finding on second appeal.

With reference to items of land II, IV, V and VI and the well, VII, which are now in the possession of the appellant's wife, defendant No. 3, it was asserted that they formed part of the property belonging to the respondents' family alienated by the appellant in fraud of its right. The Judge has found that the respondents have failed to prove this imputation, and this finding also they have not impugned. With reference to this part of the respondents' claim, however, the Judge observes that it is impossible to say with confidence that the respondents' contention that the appellant maliciously acknowledged the title of defendant No. 3 is false. If the appellant is the lawful yajaman, a vague suspicion, such as the above, founded on a fact which is of itself equivocal, cannot be accepted either as proof of dishonesty or as a sufficient ground for removing him from a position to which he is entitled by virtue of his birth.

Again, the Judge observes that the appellant has not acted *bona fide* in repudiating his liability to maintain the respondents on the ground that the karar (A) proved division between them, whilst that document proved nothing more than a provisional arrangement, which had been made, as a matter of convenience, for the separate enjoyment of family property. Although it does not prove partition, it may well be that the appellant was mistaken as to its legal effect or as to the interpretation which ought to be put upon it.

Dismissing then the imputation of fraud and malversation as not proved, the substantial questions for decision are—(1) whether, according to the Aliyasantana usage obtaining in South Canara, and by which the parties to this appeal are governed, it is the senior male, or female, or only the senior female that is entitled to be the yajaman of the family, and (2) whether, assuming that the eldest female is the yajaman *de jure*, the karar (A) is one which she is entitled to countermand at her pleasure.

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As to the first question the Judge has decided it in favour of the senior female, but it is argued before us that this view is not in accordance with the usage prevailing among the people, who follow this special law of inheritance. It becomes, therefore, neces-[355]sary to see whether the question has been set at rest by decided cases and the authorities which are mentioned by the Judge, and to examine into the history of the usage in so far as it can be ascertained from judicial decisions and from the writings of those, qualified by special experience in, and knowledge of, the district, to express an opinion on the subject.

The first account of the usage to be found among the papers in this Court is that of Mr. F. M. Lewin, written in 1830 and forwarded by Dr. Burnell to this Court with his letter, dated the 2nd April 1873. Mr. Lewin observes : " The elder sister or brother manages the affairs of the Aliyasantana family. If the rest do not choose to live with them, they obtain separate establishments and set up housekeeping for themselves." Adverting to the course of judicial decisions in the district, Dr. Burnell observes that " until 1842, those decisions gave the actual management to males and allowed partitions, though not recognizing them as legal. In 1843 in the case of *Dera Pujari* v. *Ackoo*, the so-called Bhutala Pandiya was first produced and division allowed. This continued till 1863 when the people considered that the decision in *Munda Chetti* v. *Timmaju Hensu* (1) settled the custom . . . . It is only since that decision that there have been claims to management by Aliyasantana females ; from all previous decisions it would appear that the males alone were in actual management."

Referring to Bhutala Pandiya, Dr. Burnell remarks that : " It is avowedly a missionary tract and printed without the consideration which a genuine edition requires." The passage which is to be found in this treatise pertinent to the question before us and to the question of partibility is thus rendered in *Timmappa Hegade* v. *Mahalinga Hegade* (2)— " The children of the senior or junior maternal aunts, the eldest female, the eldest male, shall alone stand (entitled) to Ali Uli, but the children of the elder and younger can have no reason to enter into a division." Ali means death, Uli survivorship, and the meaning of the compound is the inheritance or property arising from death and survivorship. " The other living persons shall act in union (with them). Should a misunderstanding arise between the elder and younger sisters, the elder shall provide the younger with a house and with household [356] articles and have the management herself, having a right to Uri Siri." Uri means fire and Siri means prosperity, and the compound means a right to what is good and bad, or the assets and liabilities of the family. " Thus," the text goes on to say, " Bhutala Pandiya made a rule and prohibited division of property. Bhutala Pandiya wrote and added the rule that to the pattapatti (dignity or pattam) wherever it exists, the Ali Uli man (the surviving heir mentioned above) shall alone be entitled and not the other santana (offspring), who will be entitled where the Uli (heir) is dead."

It will be seen that the senior female is mentioned in the text first in connection with yajamanship, and that in connection with pattam or dignity, a female is excluded from succession by reason of her sex. We do not think it safe to hold that the order in which the eldest female and the eldest male are named is conclusive. It is also necessary to add that

(1) 1 M.H.C.R. 380. (2) 4 M.H.C.R. 28 (30).

this version differs from that accepted by Mr. Anderson, and mentioned in a note to *Munda Chetti* v. *Timmaju Hensu* (1). According to the last-mentioned version: "It is the eldest child of the eldest sister, be it male or female, that is the yajaman and entitled to hold the family property which is indivisible, the other members of the family being subject to the authority of such female or male manager." It is scarcely necessary to remark that this version is clearly in favour of the senior male, and the exact meaning of this part of the passage was not decided in *Timmappa Hegade* v. *Mahalinga Hegade* (2).

The next writing to which we may refer is Strange's Manual published in 1856, Section 392. It is stated that in its details the law of Aliyasantana corresponds with that of Marumakatayam, save that the principle that inheritance vests in females in preference to males is better carried out in Canara, where the right of management vests ordinarily in females, whilst in Malabar males commonly possess it. This passage no doubt supports the Judge's view, but, as an authority, it is a mere opinion expressed in a general way in contrasting two special systems of inheritance obtaining on the Western Coast.

As to *Munda Chetti* v. *Timmaju Hensu* (1), it decided that, under the Aliyasantana law, no compulsory partition of family property [357] could be permitted. To this extent it is binding authority. It was also pointed out in this case that the decisions of the local tribunals in original suit 376 of 1833 and appeal suit 82 of 1843 rested either on the express agreements of the parties or on notions of expediency. It is, therefore, also an authority for the position that, where a partition is made with the consent of all the members of the family, it is valid, but that notions of expediency cannot be accepted as the basis of judicial decisions. It must, however, be observed that the question of title to yajamanship was neither raised nor decided in this case. In so far as the version of Bhutala Pandiya to which the Court then referred is concerned, it is the version suggested by Mr. Anderson, which is in favour of the eldest child, be it male or female. We are aware that the Court then observed that in Canara females alone are "recognized as the proprietors of the family property," and that Mr. Justice Holloway referred also to the authority of Mr. Strange and quoted with approval his statement that the doctrine that all rights to property are derived through females is more consistently carried out in Canara than in Malabar. But it must be borne in mind that these general observations were made without especial reference to the question now at issue, but with reference to the question of partition among males and females, which cannot certainly be reconciled with the principle that all rights to property are derived from, and transmitted through, females. It may well be that a male may be yajaman, though he may not be permitted to insist on partition lest the family property may in part become his separate property liable to be diverted from the family by alienation, and even the proposition that females are the sole proprietors of family property can hardly be considered strictly accurate. How are we then to account for the right to maintenance vesting in males? It seems to us that it would be more correct to say that the property vests in the whole family, consisting of males as well as females, though, from the fact that marriage is not a legal institution, influencing the devolution of property, all rights are derived from, and transmitted through, females.

(1) 1 M.H.C.R. 380. (2) 4 M.H.C.R. 28.

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The next case to which the Judge has drawn attention is that of *Timmappa Hegade* v. *Mahalinga Hegade* (1) already referred to. The point decided in this case was that a pattam or dignity devolves **[358]** on the eldest male in the family, and that, in selecting the successor, we are to look to seniority by birth and not to seniority of stock. The contest was between two male members and not between male and female members. The ground of decision is that the version of Bhutala Pandiya accepted by Mr. Anderson is not correct and that the distinction between one branch and another in regard to an individual right is hardly reconcilable with the continuing *status* of non-division and the equal community of interest of all the branches. This case is no authority on the question before us, save to the extent that it is not safe to rely on the version of Bhutala Pandiya's text accepted by Mr. Anderson.

Another case on which the Judge relies is *Tirumlai* v. *Dhurma Pujari and others* (second appeal 484 of 1870). In that case the plaintiff was the senior female and the defendants were the senior males, and the ground of action was that, as senior female, the plaintiff was entitled to the management of family property. The District Munsif held that the senior female and the senior male were entitled together to be yajamans. The Principal Sadr Amin, however, observed on appeal that the rule "that the eldest surviving member, whether male or female, was entitled to be the yajaman was too well established to require to be discussed." On special appeal the High Court remitted an issue whether, according to the true understanding of the Aliyasantana law, the right of actual management and dealing with property is resident in, and exercised by, the women in Canara, and directed the Principal Sadr Amin to take evidence as to the general rule of law and as to any modification of that rule, which may have taken place by custom. At the same time the District Judge was called upon to forward, for the consideration of the High Court, copies of judgments passed in the District in regard to the matter then in contest.

The District Judge forwarded the judgments in appeal suit 221 of 1830, 82 of 1843, original suit 204 of 1865 on the file of the Udipi Munsif, original suit 65 of 1864 on the file of the Mulki Munsif, appeal suits 711, 764 and 768 of 1866, original suit 66 of 1864 and appeal suit 259 of 1865, but he also stated that the question then under discussion was directly dealt with in none of them. He went on to state, however, in the letter from which we have already quoted that "at present there can be no **[359]** doubt that people of all the castes that follow the custom have entirely accepted the rule laid down in *Munda Chetti* v. *Timmaju Hensu*; that, since receiving the order of the High Court, he asked a large number of persons as to their practice, and that the answer in every case was that it was in accordance with the rule mentioned in the judgment." He added that the decision in *Munda Chetti* v. *Timmaju Hensu* practically settled the custom and that, accordingly, the eldest member of the family, whether male or female, claimed the management, and that the rule would not have found so ready an acceptance had it not agreed with the custom of the people. Thus, the observation of the highest local tribunal was in favour of the rule, that the eldest member, whether male or female, was the yajaman. But to the issue referred by the High Court, the Principal Sadr Amin returned a finding to the effect that the right of actual management was resident in, and exercised by, the women in Canara. With

(1) 4 M.H.C R. 28.

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these materials before it, the High Court observed that they were still dissatisfied, that the question was whether, in practice, the written text of the law had been so modified as to be adequate proof of abolition by derogation, but that the finding of the Principal Sadr Amin was based mainly upon that very text: "The Civil Judge, however," they continued, "goes further and declares that the doctrine must be right because it has received a ready acceptance among the people. It seems useless to dispute the matter further, and for the present case, at all events, we must accept the finding." The reservation shows that the decision was not intended to conclude the question finally. It must also be noted that the doctrine which found ready acceptance among the people according to the Civil Judge was not that found by the Subordinate Judge in direct opposition to his own previous unhesitating statement of the well-understood usage, *viz.*, that the actual right of management was in the women, but that it was the eldest member, whether male or female, who was entitled to be yajaman.

We are, therefore, unable to concur in the opinion of the District Judge that the question before us, viewing it as a matter of usage, is concluded by authority. The Judge observes that management by males is detrimental to the interest of the family and that their natural instincts are in conflict with the duty which they owe to the family. The question is not merely one of expediency. **[360]** In the neighbouring District of Malabar, the general rule is in favour of management by males. In this connection there are two other matters which will require to be considered when evidence is taken as to actual usage.

The first is the observation made both by the Judge and the District Munsif that, from the accession of the British rule in Canara down to a recent date, not a single varg (holding) was registered in the name of a female. The other is the argument urged at the bar that Aliyasantana females recognize marriage as a binding contract for certain purposes, though it has no influence on the law of inheritance, and that, unlike the women in Malabar, they often leave their family houses and reside with their husbands. If this is a fact, it may possibly have some weight in connection with the question of usage, or at all events of expediency.

Our conclusion on the principal question is that it is still *res integra*, and that it is impossible to come to a satisfactory conclusion regarding it without evidence of usage.

The other question for decision is whether, assuming that the respondents are entitled as the eldest females to actual management, they are at liberty to set aside the muktiyar karar (A) and to recover the land mentioned therein on the ground that they are the lawful yajamans. This document recites that there was a controversy between the appellant and Kalappa Shetti on the one side and the respondents on the other as to the right of the former to give away land No. 17 of Nandikur village to one Charappa Shetti, and a compromise was effected on the suggestion of mediators, and it purports to have been executed pursuant to that compromise by Devu Shetti, the appellant, and Kalappa Shetti to Deyi and Ammu, the respondents. It then goes on to state that, with the respondents' consent, this appellant and his brother are to enjoy the land in equal shares during their lifetime, to pay the Government assessment and protect the respondents, but that they are to have no right to sell, mortgage or lease it out on mulgaini without the respondents' consent. The Judge observes that the document evidences only a temporary arrangement made for separate enjoyment of family property and that the mere fact of its having been in

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force for a period exceeding twelve years is no bar to the respondents resuming possession if they are otherwise lawfully entitled. We are unable to concur in this opinion. All the members of [361] the family for the time being appear to have been parties to the arrangement, which purports to have been made in adjustment of a dispute among them for preserving the family peace and protecting the interests of all the parties concerned and intended to be in force during the appellant's lifetime. The arrangement is, in our opinion, a family arrangement made by all its members and intended to be in force during the appellant's life, and even assuming that the senior respondent is the lawful yajaman, we do not think that the karar can be arbitrarily set aside by her. We are informed by the vakils on both sides that the kararnama includes all the property in dispute in this appeal, and the finding that the respondents are not at liberty to revoke it renders it unnecessary to determine the more important and more difficult question, whether, if the karar did not stand in their way, the respondents are entitled to assume the management at their pleasure. No issue, therefore, need be remitted as to usage. The appeal must be allowed and the decree of the District Court reversed so far as it decrees any lands to the plaintiffs, and the plaintiffs' suit dismissed.

In the circumstances we think it will be sufficient to require the plaintiffs to pay the appellant's costs of this appeal.

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8 M. 361=9 Ind. Jur. 264.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

RAMANUJA AND OTHERS (*Plaintiffs*), *Appellants v.* DEVANAYAKA AND OTHERS (*Defendants*), *Respondents.**
[30th January and 24th February, 1885.]

Civil Procedure Code, Section 26—Misjoinder—Amendment of plaint—Specific Relief Act, Section 42—Declaratory suit.

Suit by six plaintiffs praying for a declaration that certain proceedings of a District Temple Committee removing them from office as trustees of a temple were illegal.

Defendants pleaded that the suit would not lie because of misjoinder and also because further relief might have been sought:

[362] *Held*, that under Section 26 of the Code of Civil Procedure the plaintiffs could not sue jointly and that the plaint should be returned for amendment, one of the plaintiffs to be allowed to use it as his own.

Held, also, that unless there had been an actual ouster from office, a declaratory suit would lie.

[R., 18 A. 131 (138); 27 M. 80 (85); 6 Ind. Cas. 15=8 M.L T. 6.]

THIS was an appeal from the decree of J. Hope, District Judge of South Arcot, reversing the decree of Athiappa Chettyar, Subordinate Judge at Cuddalore, in suit No. 5 of 1883.

The plaintiffs, Ramanuja Charyar and five others, sued Devanayaka Mudaliar, the President of the District Devasthanam Committee, and 26 others, for a declaration that certain proceedings passed on the 23rd December 1882 by the defendants 1—15 removing the plaintiffs from the

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* Second Appeal 768 of 1884.

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office of dharmakartas or trustees of the pagoda of Trivindipuram were invalid. Defendant No. 1 and others pleaded, *inter alia*, that there was a misjoinder of causes of action and that a declaratory suit would not lie.

The Subordinate Judge held that as the plaintiffs sought to cancel one and the same order, there was no misjoinder and that a declaratory suit would lie and, on the merits, decreed for the plaintiffs.

On appeal the District Judge held that the order dismissing the plaintiffs must be held to be valid until set aside and therefore that the plaintiffs being no longer joint trustees could not sue jointly on the ground of having a common cause of action.

The District Judge also held, for the same reason, that plaintiffs could not consider themselves to have been in office when the suit was filed and that they were therefore bound to sue for further relief and could not ask for a declaration merely under Section 42 of the Specific Relief Act. On these grounds the suit was dismissed.

The plaintiffs appealed to the High Court on the following grounds:—

1. The District Judge was wrong in holding that the plaintiffs could not have sued jointly. They were joint trustees appointed by a single order, and the order now sought to be set aside was passed as against them all, and was based on grounds that applied equally to all and no one trustee has suffered an injury which is not common to all the others.

[363] 2. The District Judge was also wrong in holding that plaintiffs' suit for a declaration will not lie. Plaintiffs do not seek to get an office or property for the first time in their own right from strangers. They were in office and are still in possession of the properties connected with the temple, and if the order which they assert to be invalid and which is the only impediment to their discharging their duties be set aside, they are in a position at once to resume their office. They are therefore not in a position to seek for further relief.

The Advocate-General (Hon. *P. O'Sullivan*) and *Gopalacharyar*, for appellants.

Mr. *Shephard* and *Chellaya Pillai*, for respondents.

Counsel for appellants referred to Section 26 of the Code of Civil Procedure, *Booth* v. *Briscoe* (1) and to *Chinna Rangaiyangar* v. *Subbraya Mudali.* (2)

Counsel for respondents argued that Section 26 of the Code of Civil Procedure differed from the English rule and that plaintiffs if dismissed could only sue for damages and not for re-instatement.

On the 24th February, the Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.) delivered judgment as follows:—

JUDGMENT.

The appellants are the dharmakartas of a Vishnu Temple in the District of South Arcot and the respondents are the members of the Committee appointed for the District under Act XX of 1863 having jurisdiction over the appellants. On the 22nd December 1883, respondents 1 to 11, 13 to 15 and the second defendant removed the appellants from the office, as is alleged, of Trustees. The suit from which this appeal arises was brought jointly by all the appellants to have it declared

(1) 2 Q.B.D. 496. (2) 3 M.H.C.R. 338.

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that their removal from office was without just cause and null and void. The Judge considered that the removal of each appellant, if illegal, was a distinct wrong and that the appellants were bound to have asked to be re-instated in their office, and upon these grounds he dismissed the suit with costs, observing that the appellants were entitled neither to sue jointly nor to ask for merely a declaratory decree. We agree with the Judge that the appellants are not at liberty to sue together, for the wrongful dismissal of each of them is a [364] distinct wrong forming a separate cause of action whilst the persons entitled to join in one suit as plaintiffs under Section 26 of the Code of Civil Procedure are persons in whom the right to the relief claimed is alleged to exist, whether jointly or severally or in the alternative, in respect of *the same cause of action.* The learned Advocate-General who appeared for the appellants quoted *Booth* v. *Briscoe*, (1) and referred to the rule framed under the Judicature Act, Order XVI, Rule I. The words of limitation, *viz.*, in respect of the same cause of action, which are found in Section 26 of the Code of Civil Procedure are not to be found in the rule cited, and the absence of such words of limitation is noticed as an argument in favour of the plaintiffs in the case on which reliance is placed. We do not, however, think that the Judge was right in saying that the appellants were bound to have asked to be re-instated in their office and that a declaratory suit could not be maintained under the proviso of Section 42 of the Specific Relief Act. This provision of law no doubt directs that the Court shall not make a declaration of title when the plaintiff, being able to seek further relief than a mere declaration, omits to do so. But, if A is in possession of certain property and B denies his title and requires A to deliver it to him, A may claim a declaration of his right to hold the property—(Illustration G). It follows that if A is in possession of a certain office and B requires him to surrender it, A may sue for a declaration of his right to continue in it, unless he has actually been ejected from the performance of its duties, or the enjoyment of its emoluments. Possession, whether it is of property or of an office may be regarded either as a physical fact, or in contemplation of the legal right to it, and it is in the former sense it should be understood in coming to a finding under Section 42 as to whether the plaintiff is, or is not, able to seek further relief. It may be observed that the term relief presupposes the actual withholding of the fruit of the right of which a declaration is sought, and not its mere denial. A declaratory decree is all that a plaintiff requires when he has no need of the assistance of the Court to replace him in possession. The Judge is in error in failing to make a distinction between offices from which the office-bearer for the time being may be lawfully ejected directly he is dismissed, and the offices which the office-bearer may persist in [365] holding, until he is ejected by a Court of Justice though at his own risk and subject to the legal consequences of such conduct.

The result is that the objection to the misjoinder of the plaintiffs ought to prevail and the objection to the suit being for a mere declaration of right ought to be overruled. As the misjoinder of plaintiffs is only a plea in abatement and rather to the form than the substance of the action, it ought not if possible to defeat the action, altogether, unless the defendant has been prejudiced in this case. The plaint may be amended as if it were brought by some one of the plaintiffs in respect of his removal only, and we see no objection to the amendment. It is provided by Section 26 of

(1) 2 Q. B. D. 496.

Act XIV of 1882, that "judgment may be given for such one or more of the plaintiffs as may be *found to be entitled* to relief, for such relief as he or they may be entitled to, without any amendment." This provision is obviously based on the principle that the misjoinder of a party as plaintiff to whom the relief claimed could not be awarded whilst there are others to whom it might be awarded, is a mere defect of form which is not fatal to the action. The contention of the appellants' Counsel that the plaint ought to be treated as that of the first plaintiff or any one of the other plaintiffs is, we think, entitled to weight. We would remit the suit for disposal on the merits and direct the Judge to return the plaint for amendment allowing one of the plaintiffs to use it as his own and requiring the others to put in separate plaints. The costs incurred hitherto will abide and follow the result.

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8 M. 365=1 Weir. 667.

APPELLATE CRIMINAL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

NATHUD BI (*Complainant*) *v.* JAFAR HUSAIN (*Defendant*).*
[11th December, 1884 and 16th March, 1885.]

Army Act, 1881 (44 *and* 45 *Vict., c.* 58) *Section* 145.

Section 145 of the Army Act, 1881, is not applicable to soldiers of Her Majesty's Indian forces.

[R., 10 M. 108 (110) = 1 Weir. 668.]

[366] THIS was a case referred to the High Court, under Section 432 of the Code of Criminal Procedure, by Colonel T. Weldon, Chief Presidency Magistrate of Madras.

The case was stated as follows:—Complainant holds an order duly granted by a Magistrate under Section 488 of the Code of Criminal Procedure directing defendant to pay her a monthly sum of rupee one and annas eight for the maintenance of defendant's illegitimate child. The order not having been complied with, complainant has taken proceedings in the Presidency Magistrates' Court to enforce it.

The case was posted for hearing on the 2nd May 1884, and the following order was then passed:—

Complainant on 3rd March 1884 obtained an order from a Presidency Magistrate (Mr. Mir Ansar-ud-din) directing defendant, who is a sepoy of the 22nd Regiment, Madras Native Infantry, to pay her one rupee and eight annas monthly for the maintenance of defendant's illegitimate child, named Hamida Bi.

The order not having been complied with, complainant now seeks to enforce it by process of this Court.

Defendant being a soldier of the regular forces, a copy of the order in question should, when passed, have been submitted through the Local Government for the orders of a Secretary of State in accordance with Section 145 of the Army Act. That course will now be adopted, and it is ordered accordingly.

(Signed) T. WELDON, Colonel.
Chief Presidency Magistrate.

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* Criminal Revision Case 485 of 1884.

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As appears from the proceedings of Government, dated 10th July 1884, No. 3312, Military, the Local Government referred the matter to the Military authorities who, acting on the opinion of the Judge Advocate-General of the Bengal and Madras Army, state that "the whole tenor of Section 145, Army Act, shows that it has no relation to Native soldiers." In this opinion the learned Advocate-General of Madras "concurs."

Broadly stated Section 145, Army Act, provides (1) that a soldier of the regular forces shall be liable for the maintenance of his wife and of his children, legitimate and illegitimate, to the same extent as though he were not a soldier, but imposes conditions to prevent this purely civil liability being enforced in such a manner [367] as would weaken the defensive power of the State by withdrawing a fighting man from the ranks, or by depriving him of the means of discharging his duty efficiently. At the same time provision is made that just claims against a soldier shall be satisfied in a manner consistent with the exigencies of military service, so in this view (2) it shall be the duty of the Secretary of State, on being furnished with a copy of any decree or order passed against a soldier for the maintenance of such soldier's wife or children, to arrange that a certain portion of the soldier's pay shall be appropriated to the satisfaction of the decree, and (3) where a proceeding is instituted against a soldier to enforce his liability, if the soldier be serving out of the jurisdiction of the Court having cognizance of the complaint, a sufficient sum must be lodged with the process to pay the expenses of his attendance before the Court; and in no case can any process be effective if the soldier is under orders for foreign service.

The Magistrates have already been instructed (G.O., dated 28th September 1881, No. 5149, Military, and 8th October 1881, No. 2070, Judicial,) that Natives of India are "Soldiers of the Regular Forces" within the meaning of the Army Act.

This ruling was passed on a reference made by the Government of Bombay to the Government of India in respect to the illegal purchase of a medal from a sepoy of the 24th Regiment (Bombay) Native Infantry, the Magistrate before whom the charge was laid stating that he was not aware of any provision of law enabling him to deal with persons who buy necessaries from the Native soldiery. The Judge Advocate-General of the Army in Bengal thus reviewed that case:—

"Upon a proposal being made for the passing of a special enactment to suit such a case, the Government of India consulted the Legislative Department respecting the necessity for this measure, with the result that the Legislative Department expressed the opinion that Section 85 of the Mutiny Act (38 Vict., c. 7) is applicable to a case of purchasing necessaries &c., from Native soldiers of Her Majesty's Indian Army, for reasons that were given. The Government of India, adopting this opinion, communicated the decision, by letter from the Military Department, No. 276 S, of the 8th June 1878, to the address of the Adjutant-General. The decision was further communicated by the Government to the [368] Secretary of State for India in two separate despatches (No. 211, of 15th July 1878, and No. 256, of 27th July 1879), and in both cases the Secretary of State, upon the advice of the legal adviser of the India Office and with the concurrence of the Secretary of State for War, replied in substance (No. 355, of 5th December 1878, and No. 339, of 20th November 1879) that the word Soldier in the 85th section of the Mutiny Act must be held to include soldiers who are Natives of India. This decision applies to the 149th section (Section 156, Army Act, 1881) of

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the Army Discipline and Regulation Act, which contains the provisions corresponding to the foregoing section.

"But the application of the 149th section of the Army Discipline and Regulation Act to Native soldiers rests upon a yet stronger basis. Section 169 of the Act makes all soldiers of the regular forces subject to the Act, and by Section 181, Her Majesty's Indian forces are included among Her Majesty's regular forces; again (Section 172 Section 180 (2), Army Act, 1881) makes special provision for the application of the Act to those officers, soldiers, or followers who may be Natives of India. Every person, therefore, who purchases, receives, or otherwise disposes of the necessaries, clothing equipment, &c., of a Native soldier, is liable upon summary conviction (for which see Army Discipline and Regulation Act, Section 181, page 112) (Section 190, pages 163-184, Army Act, 1881) to the penalties set out in the 149th section of the Act as modified by Act VII, 1867, in accordance with the power conveyed by the same section."

A circular in accordance with the above opinion was issued by His Excellency the Commander-in-Chief of India, copy being sent by the Government of India to this Government and by the latter communicated (G.O., dated 8th October 1881, No. 2070, Judicial) to all District and Presidency Magistrates for guidance.

In November 1881, a claim was made in the Madras Presidency Magistrates' Court for enforcement of a maintenance order against a member of the Carnatic Artificer Company—a purely local corps composed of Eurasians, but the members of which are, it seems, attested under the English Army Act.

In that case I expressed an opinion that the provisions of Section 139 of the Army Discipline Act, 1879 (Section 145, Army Act, **[369]** 1881) applied, but that I had not been able to ascertain what authority, if any, in this country represents the Secretary of State for the purposes of Section 139, Army Discipline and Regulation Act, 1879; or what procedure should be adopted in India in cases such as are referred to in that section. I therefore requested instruction as to what course should be followed in India by Civil Courts when decrees or orders are passed by such Courts under Section 139 of the Army Discipline and Regulation Act, 1879 (Section 145, Army Act, 1881).

My letter to Government was submitted to the Advocate-General who advised Government thus:—"With reference to the order of Government, No. 1858, dated the 17th November 1881, upon the letter of the Chief Presidency Magistrate, Madras, to the Chief Secretary, dated the 14th November 1881, No. 288, I think the course prescribed in Section 139 of the Army Discipline and Regulation Act must be followed when decrees or orders are passed by the Civil Courts in India to which the Section applies. The corresponding section in the present Act (44 & 45 Vict., c. 58) is section 145. A somewhat similar provision was contained in the Mutiny Act, Section 106, but the power given in the Army Discipline and Regulation Act to a Secretary of State to make stoppages was, by the Mutiny Act, given to the Secretary of State for War. I think a copy of the order or decree should still be sent to the Secretary of State for War."

In the present case (*Nathud Bi* v. *Jafar Husain*) the opinion of the Judge Advocate-General of the Army in Bengal was, it appears, communicated by telegraph, and no reasons are stated for the conclusion arrived at by that officer beyond a general allusion to the "tenor" of Section 145, Army Act.

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The "tenor" of Section 145, Army Act, 1881, is, I respectfully submit, that which I have set forth above. There may be some minor details which would be difficult of application to the circumstances of service in this country, but these difficulties are not confined to the Native soldiery, and they are none of them impossible if the section be used so far as applicable. Even the allusion to a daily rate of pay is mere matter of account, and the conversion of British into local currency is provided for by Section 169. Perhaps it may be contended that, if strictly construed, the word **[370]** "Serjeant" does not include the corresponding rank in the Native Army, but it cannot be disputed that the words "any other soldier" include a Native soldier, and even the reference to the rank of serjeant is for purposes of comparison. As regards the Civil Tribunal, Section 190, Army Act, 1881, defines the meaning of Civil Court" and the "Court of Summary Jurisdiction" as applied to India.

The view I took was, that defendant being undoubtedly a "Soldier of the Regular Forces" within the meaning of the Army Act, 1881, the provisions of that Act are applicable to him, subject only to the modifications specified in Section 180. I could see nothing in the tenor of Section 145, Army Act, 1881, which renders it impossible of application to Native soldiers equally with European soldiers of Her Majesty's Indian forces, and the policy of the law is referable to the whole army without distinction of race.

In the circumstances noted above, I think it better, before passing a final order for the levy of the amount due, by direct action under Section 488 of the Code of Criminal Procedure, which might result in the imprisonment of the soldier, to state the case under Section 432 of the Code of Criminal Procedure for the opinion of the Honorable Judges of the High Court on the question whether or not the provisions of Section 145 of the Army Act, 1881, apply to Natives serving in Her Majesty's Indian forces?

Further proceedings in this matter have been stayed pending the decision of their Lordships on the question now respectfully submitted to them.

The Advocate-General (Hon. *P. O'Sullivan*) and the Government Pleader (Mr. *Shephard*) appeared on behalf of Government.

JUDGMENT.

The judgment of the Court (TURNER, C.J., and HUTCHINS, J.) was delivered by

TURNER, C.J.—The 190th section of the Army Act, 1881, prescribes that in that Act, if not inconsistent with the context, the expressions "regular forces" and "Her Majesty's regular forces" shall include Her Majesty's Indian forces subject to the modifications in the Act contained. Those modifications are declared in the 180th section of the Act. There is nothing in that section which prohibits the application to soldiers of Her **[371]** Majesty's Indian forces of section 145.* It remains to be

* 44 & 45 Vict., c. 58, section 145—

(1) A soldier of the regular forces shall be liable to contribute to the maintenance of his wife and of his children, and also to the maintenance of any bastard child of which he may be proved to be the father, to the same extent as if he were not a soldier; but execution in respect of any such liability or of any order or decree in respect of such maintenance shall not issue against his person, pay, arms, ammunition, equipments, instruments, regimental necessaries or clothing; nor shall he be liable to be punished for the offence of deserting or neglecting to maintain his wife or family, or any member thereof, or of leaving her or them chargeable to any union, parish or place.

(2) When any order or decree is made under any Act or at common law for pay-

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considered whether it is inconsistent with the context to place on the term "regular forces" in Section 145 the interpretation prescribed by Section 190. It is clear that not only is there nothing in the first clause of the section inconsistent with such an interpretation, but the reason for the provisions of that clause, prohibiting the issue of execution in respect of an order for maintenance against the person, pay, arms, &c., of a soldier, obtains more strongly in this country than in the United Kingdom, inasmuch as there is [372] greater probability that the services of the soldier may be required on active duty.

If, as we think cannot be questioned, the provisions of clause 1 of the section are not inconsistent with the prescribed interpretation, clause 2, so far as regards the Court making the order, is imperative—and there is nothing obviously inconsistent with the interpretation in that part of the clause; indeed it may be argued that the term "a Secretary of State" was used so as to include the Secretary of State for India, to whom a Court of British India would directly report. The provisions of this clause, conferring a discretionary power on the Secretary of State, are also not inconsistent with the interpretation prescribed; the term "daily pay" might be interpreted to mean the quota of the monthly pay due for each day, and the term "Serjeant" as implying in the case of Her Majesty's forces in India the corresponding rank; but it would clearly be most inconvenient that a reference in every case in which an order is passed against a sepoy be made to the Secretary of State in England, and it is more probable that, had there been an intention that the section should apply to a soldier of the Indian forces, some authority in British India would have been substituted.

In the third clause there are expressions, which are inconsistent with the prescribed interpretation of the term 'regular forces.' Although the Court of the Presidency Magistrate is a Court of Summary Jurisdiction within the meaning of the Act, Section 190, it is not situated in any

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ment by a soldier of the regular forces either of the cost of the maintenance of his wife or child, or of any bastard child of whom he is the putative father, or of the cost of any relief given to his wife or child by way of loan, a copy of such order or decree shall be sent to a Secretary of State and in the case—

(a) Of such order or decree being so sent; or

(b) Of it appearing to the satisfaction of a Secretary of State that a soldier of the regular forces has deserted or left in destitute circumstances, without reasonable cause, his wife, or any of his legitimate children under fourteen years of age, the Secretary of State may order a portion not exceeding six pence of the daily pay of a non-commissioned officer who is not below the rank of sergeant, and not exceeding three pence of the daily pay of any other soldier, to be deducted from such daily pay, and to be appropriated, in the first case, in liquidation of the sum adjudged to be paid by such order or decree, and in the second case, towards the maintenance of such wife or children, in such manner as the Secretary of State thinks fit.

(3) Where a proceeding is instituted against a soldier of the regular forces under any Act, or at common law, for the purpose of enforcing against him any such liability as above in this section mentioned, and such soldier is quartered out of the jurisdiction of the Court, or, if the proceeding is before a Court of Summary Jurisdiction, out of the petty sessional division in which the proceeding is instituted, the process shall be served on the Commanding Officer of such soldier, and such service shall not be valid unless there be left therewith in the hands of the Commanding Officer a sum of money (to be adjudged as costs incurred in obtaining the order or decree, if made against the soldier) sufficient to enable him to attend the hearing of the case and return to his quarters, and such sum may be expended by the Commanding Officer for that purpose; and no process whatever under any Act or at common law in any proceeding in this section mentioned shall be valid against a soldier of the regular forces, if served after such soldier is under orders for service beyond sea.

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"Petty Sessional Division." The final provision declaring any process mentioned in the section invalid, if served after the soldier is under orders for service beyond the seas, *i.e.*, out of the United Kingdom, the Channel Islands and the Isle of Man, is inconsistent with the interpretation of the term "regular forces" as including Her Majesty's Indian forces, who are enlisted in places beyond the seas and ordinarily serve there.

Looking to the context, we hold that the section as a whole does not apply to soldiers of Her Majesty's Indian forces, and the Chief Magistrate will be informed accordingly.

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8 M. 373.

[373] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

MINAKSHI (*Plaintiff*), *Appellant* v. VELU AND ANOTHER (*Defendants, Nos.* 1 *and* 2), *Respondents.**
[5th and 9th March, 1885.]

Civil Procedure Code, Sections 59, 63, 138, 139—*Appeal—Rejection of documents admitted by Lower Court.*

Certain documents having been allowed by the District Munsif to be filed by the plaintiff during the trial of a suit, the District Judge, on appeal, held that he was bound to strike them off the file on the ground that they were not filed with the plaint nor entered in any list annexed to the plaint, and because the Munsif had not recorded any reason for admitting them :

Held, that, as the documents had been admitted in evidence by the Lower Court, the Appellate Court was bound to consider them.

[F., 22 B. 173 (175); 8 C.L.J. 147 (152)=12 C.W.N. 312 ; R., 6 C.L.J. 621 (634) ; 10 C.L.J. 33=13 C.W.N. 797 (800)=2 Ind. Cas. 946 (948).]

THIS was an appeal from the decree of J. H. Nelson, District Judge of Chingleput, reversing the decree of T. Chellappa Nayakar, District Munsif of Punamalai, in suit 529 of 1883.

The plaintiff Minakshi sued the defendants, Velu Pillai and two others, to recover Rs. 1,380-7-3, balance due on a promissory note executed by Annasami, deceased father of defendants, Nos. 1 and 2, and elder brother of defendant No. 3.

The Munsif decreed for plaintiff.

The defendants appealed, *inter alia*, on the ground that the Munsif had improperly admitted certain documents in evidence in support of plaintiff's claim.

The District Judge reversed the decree of the Munsif, remarking in his judgment—

"Exhibits C to J and L to N were improperly received by the Lower Court. No list of documents was put in with the plaint, though apparently there was nothing to prevent the plaintiff from obeying the law ; and no reason for the Lower Court overlooking [374] this omission appears on the record. I am bound to strike all these documents off the record."

The plaintiff appealed to the High Court.

Bhashyam Ayyangar and *Kaliana Rama Ayyar*, for appellant.

Mr. *Tarrant*, *Gurumurti Ayyar* and *Sadasiva Ayyar*, for respondents.

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* Second Appeal 862 of 1884.

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The facts necessary for the purpose of this report appear from the judgment of the Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.).

JUDGMENT.

This suit was brought by the appellant on the documents A and B which were duly filed with the plaint. At the hearing the appellant's fourth witness produced on summons exhibits C to G, her fifth witness H and J, and her sixth witness K to N.

The whole of these exhibits C to N, with the single exception of K, have been "struck off the record," by the District Judge, as not having been entered in any list attached to the plaint and on the ground that the Munsif had recorded no reason for allowing their admission. Now the majority of these exhibits, including K, were simply put in evidence for the comparison of Annasami's signature thereto, with his alleged writing in A and B. C, however, is stated to contain an admission of the debt by the deceased Annasami, while D and E contain a similar admission by the respondent No. 1 and F, which the respondent No. 1 admits, has been filed to support D and E, by comparison of the handwriting.

The District Judge has not stated under what section of the Code he considered that these exhibits could be absolutely ignored. Section 59 certainly does require a plaintiff to file with his plaint a list of all the documents on which he *relies*, *i.e.*, which he is then in a position to know to be essential to his case, whether in his possession or power or not; but this cannot apply to documents tendered merely for comparison of handwriting. Section 63 states the penalty for omitting to file such a list. No document which ought to have been entered in such a list shall be received in evidence at the hearing without the leave of the Court. With regard to that it is enough to say that the Munsif did allow the documents to be filed. Either there was an objection raised which was overruled, or they were not objected to: and in either case we do not think it open to the Appellate Court to refuse to consider **[375]** their value. *Goshain Tota Ram* v. *Raja Rickmunee Bullub* (1), *Hanooman Singh* v. *Fell* (2).

Reference has been made to Sections 138 and 139, but with regard to these it is sufficient to say, first, that it is very doubtful whether any of these documents can be said to have been in the possession or power of the plaintiff herself, and, secondly, that there is nothing to show that the plaintiff was called upon to produce her documents at the first hearing. It is only documents which ought to have been produced at the first hearing that can be absolutely excluded under Section 139 and documents need not be produced at the first hearing unless "called for by the Court."

We consider that the District Judge is bound to consider the documentary evidence and to give it such weight as it deserves. With regard to K, it has been pointed out that the witness who produced it did so under a summons, but it is not likely that this will materially affect the view which the Judge has taken of it.

We refer to the Judge, on the whole evidence, the issue, Whether the documents sued on are genuine, and, if so, what is the amount due to the plaintiff? With regard to the ninth ground of appeal and C.M.P. 687 of 1884, the application for the admission of the documents should be made

(1) 13 M.I.A. 77. (2) N.W.P. (1868) 148.

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to the District Judge. We will only say that, if the allegations made in the ground of appeal are correct, the documents ought to be admitted.

The District Judge is requested to submit his finding on the above issues to this Court within six weeks from the date of receiving this order when 10 days will be allowed for filing objections.

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8 M. 376=9 Ind. Jur. 265.

[376] APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Brandt.

UMAMAHESWARA (*Plaintiff*), *Appellant v* SINGAPERUMAL AND OTHERS (*Defendants*), *Respondents.**
[20th February and 9th March, 1885.]

Hindu law—Money decree against father —Attachment of sons' shares.

In a suit brought against the father of a Hindu family and his eldest son, on a bond executed by the former, by which family property was hypothecated as security for the repayment of the debt, decree was passed against the father only and his share of the property was declared liable to be sold. In execution of this decree, family property was attached, but, on the intervention of the younger sons, the attachment was set aside as to their shares. In a suit brought by the decree-holder to establish his right to sell the younger sons' shares in satisfaction of the decree against their father:

Held, that so far as the younger sons were concerned the decree must be treated as a decree for money against the father and that all that could be sold in execution of the decree against the father was the share of the father.

[**R.**, 7 M.L.T. 373 (375)=1910 M.W.N. 35=5 Ind. Cas. 735 ; **D.**, 10 M. 316 (317).]

THIS was an appeal from the decree of G. D. Irvine, Acting District Judge of Trichinopoly, dated 17th July 1884, confirming the decree of T. M. Rangacharyar, District Munsif of Aryalur, in suit 29 of 1882.

The plaintiff, Umamaheswara Ayyan, brought suit No. 595 of 1880 against the father of the three minor defendants in this suit and their elder brother to recover Rs. 792-2-0, due under a bond, hypothecating certain land as security for the debt, dated 5th April 1875, executed by the father in satisfaction of a decree obtained against him in 1871, which decree was obtained on a bond of 1868 for money borrowed, it was alleged, for family purposes by the father.

The plaintiff obtained a decree against the father only, and his share in the family property was declared by the decree to be liable to be sold in default of payment.

In execution of this decree, plaintiff attached certain family property, upon which the present defendants, by their next friend, **[377]** intervened, claiming that their shares in this property were not liable to be sold and on the 16th September 1881 their claim was allowed.

This suit was accordingly brought to establish the liability of the defendants' shares in the property attached to be sold in satisfaction of the decree obtained by the plaintiff against their father.

It was alleged in the plaint that the defendants were not born in 1868 when the original bond was executed by their father, and therefore, their right to object to the sale of the property hypothecated was denied.

The defendants pleaded, *inter alia*, that, as plaintiff had failed in suit 595 of 1880, to prove that the debt was binding on the family (this

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* Second Appeal 796 of 1884.

issue having been raised), he was debarred by Sections 13 and 43 of the Code of Civil Procedure from bringing this suit.

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The District Munsif overruled these pleas, but held that, under the decree in suit 595 of 1880, the defendants' shares could not be sold, and, therefore, he declined to admit evidence tendered to show that the judgment-debt in that suit was binding on the defendants—*Chockalinga* v. *Subbaraya* (1).

On appeal, the District Judge referred to *Ramakrishna* v. *Namasivaya* (2) overruling the case cited by the Munsif, but confirmed the decree on the ground that the plaintiff was really bringing a fresh suit on the same cause of action against other members of the family, whom he ought to have included in the former suit.

The plaintiff appealed to the High Court.

Mr. *Shephard* and *Ramachandra Rau Saheb*, for appellant.

Balaji Rau, for respondents.

The Court (HUTCHINS and BRANDT, JJ.) delivered the following

JUDGMENT.

The judgment of the District Court cannot be supported on the ground on which it has been put. The appellant having obtained a hypothecation-bond from a Hindu father, sued the debtor and the debtor's eldest son and obtained a decree against the father and the father's share in the property, the eldest son's share being exonerated on the ground that appellant had failed to prove that the debt was a family debt. But the fact of the eldest son having been sued cannot affect the creditor's position as against the younger sons. So far as they, the present **[378]** respondents, are concerned, the appellant holds a money-decree against their father with an express charge on a certain share of the property, which does not include respondents' shares. We agree with the appellant's counsel that the creditor cannot be put in a worse position by the fact of his judgment-debt being expressly charged on the father's share. As between him and the respondents he is the holder of a money-decree against their father—neither more, nor less. Section 43 of the Code applies only where part of a claim has been relinquished, not where the plaintiff has omitted to join some of those liable for his claim. When a plaintiff omits to join some of those liable, he is estopped from bringing a fresh suit, not by Section 43, but by the doctrine of *King* v. *Hoare* (3) that no man may bring two suits on the same obligation. But it has been held by a Full Bench in the case mentioned by the District Judge, *Ramakrishna* v. *Namasivaya* (2), that this principle does not apply where the second suit is brought, not on the original obligation, but simply for the purpose of establishing that the interest of the sons in the joint family property may be sold under the decree against the father.

The question, however, arises, and it is this which induced us to reserve judgment in the case, whether under any circumstances the effect of a mere money-decree against a father can be extended so as to bind the sons' interests. This point was not considered in *Ramakrishna* v. *Namasivaya* (2). The statement of the facts seems to indicate that the judgment-debt was charged on the property, and we have inspected the original decree and find that it was so charged. And in *Sitanath Koer* v. *Land Mortgage Bank of India* (4) also there was a mortgage-decree. It is now settled law that a decree against a Hindu father

(1) 5 M. 133. (2) 7 M. 295. (3) 13 M. & W. 494. (4) 9 C. 888.

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and the family property in his hands binds the property, and that the whole property can be sold under such decree, subject to the right of the sons in certain cases to come in and show that the debt was incurred for an immoral or illegal purpose. Where, therefore, the sons come in before the sale and claim the exemption of their shares, a question between them and the decree-holder is properly raised in execution, and the party against whom the order is made is entitled, under Section 283, to insitute a suit to establish the right which he claims, which in the case of the decree-holder is the right to bring the whole [379] property to sale. But where the decree is a simple money-decree against the father, all that can be sold is the father's interest and the right to have such interest ascertained and partitioned off—*Hardi Narain Sahu* v. *Ruder Perkash Misser* (1). Where the decree-holder attaches more than the father's interest, the sons have a right to come in and object in the same way as any stranger interested in the property, but neither the fact of their claim being allowed nor the circumstance that the judgment-debtor happens to be a Hindu father can in any way give the decree-holder a right to extend the operation of the decree or proceed against more than his debtor's right, title and interest.

Upon this ground, the appellant's suit fails and his second appeal must be dismissed with costs.

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8 M. 379=1 Weir 679.

APPELLATE CRIMINAL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Brandt.

RAMASAMI *v.* KANDASAMI.* [19th January, 1885.]

Act XIII of 1859—*Contract to supply labourers.*

A contract, in consideration of an advance of money, to supply labourers to do certain work on an estate, falls within the scope of Act XIII of 1859, and the fact that such contract contains covenants to pay penalties in default of supplying the labourers, and to repay the advance, if necessary, by personal labour for five years, does not take the contract out of the operation of the Act, so as to make illegal an order, directing the contractor to be imprisoned for failure to comply with an order to repay the advance.

[R., 3 L.B.R. 33 (35); 1 Weir 686 (687).]

THIS was a reference to the High Court, under Section 438 of the Code of Criminal Procedure, by C. Kough, Acting Joint Magistrate in charge of the Office of the District Magistrate of Madura.

The facts appear sufficiently, for the purpose of this report, from the judgment of the Court (TURNER, C.J., and BRANDT, J.)

Counsel were not instructed.

JUDGMENT.

The accused received an advance of Rs. 54 and agreed to collect within one week 20 coolies and within another [380] week 15 more coolies, to take them to the complainant's coffee-estate, to get work done by them on the estate for one month, and to get their accounts settled so as to leave no arrear outstanding against him. He further

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* Criminal Revision Case 19 of 1885.

(1) 10 C. 626.

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agreed to pay a penalty of Rs. 1 and 2 per diem in case of delay on his part in supplying the two sets of labourers, respectively. He also engaged, in case he failed to fulfil the contract, to make compensation for any loss which the complainant may sustain, to undergo the punishment prescribed by Act XIII of 1859, and that, in repayment of the said advance, he would himself repair to the coffee-estate and work on it as a cooly for five years, and that at the end of the fifth year he would get his accounts settled and take back the agreement. The accused failed to supply coolies according to this contract, and, on the 14th August 1883, the Sheristadar Magistrate of Dindigul found that the contract was broken and directed the accused, under Act XIII of 1859, to repay the advance of Rs. 54 within fifteen days from that date as offered by the accused and agreed to by the complainant. The accused having failed to comply with this order, the Sheristadar Magistrate sentenced him to undergo rigorous imprisonment for one month. The Joint Magistrate in charge of the District Magistrate's Office observes that the advance was made to the accused for the purpose of collecting coolies to work on a coffee-estate, that the penalty prescribed being personal service, the case does not fall within the scope of Act XIII of 1859, that the order for the repayment of the advance was one which it was not competent for the Sheristadar Magistrate to pass, and that the sentence of rigorous imprisonment must be set aside as illegal.

The accused agreed to collect coolies and to get work done by them on the coffee-estate for one month and the agreement is within the scope of Act XIII of 1859. How far the agreement to pay a penalty for every day's delay in supplying labourers and to serve as a cooly for five years, in the event of the contract not being fulfilled, is valid, it is not necessary to decide for the purpose of this reference, but it would suffice to observe that even if it is valid, the complainant is still entitled to claim the performance of the substantive agreement if still capable of performance, or the repayment of the advance.

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8 M. 381.

[381] APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Brandt.

KANNA PISHARODI (*Defendant No. 1*), *Appellant v.* KOMBI ACHEN AND ANOTHER (*Plaintiffs*), *Respondents.**

[14th January and 1st April, 1885.]

Malabar law—Karnavan—Powers restricted by family arrangement—Redemption of kanam—Repayment of renewal fee, improperly re-received by karnavan—Amount to be ascertained before decree—Value of improvements to be ascertained before decree—Jenmi—Right to deduct arrears of rent due from sum payable.

The ordinary powers of the karnavan of a Malabar tarwad can be restricted by a family agreement to which he is a party, and if in breach of such agreement, the karnavan makes an alienation to a stranger who has notice of the agreement, the tarwad is not bound by the alienation.

When a decree is passed for recovery of land demised on kanam on payment of the amount received as renewal fee, the amount must be ascertained at the trial and inserted in the decree.

On taking an account between the jenmi (mortgagor) and kanam-holder mortgagee), the former, on redemption, has by custom a right to deduct all

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* Second Appeal 9 of 1884.

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arrears of rent due to him from the sum which he has to pay to the latter before recovering possession of the land.

[Appr., 8 M. 415 (418); R., 28 M. 182 (193) (F.B.)=14 M.L.J. 415; D., 17 M. 271 (273).]

THIS was an appeal from the decree of F. H. Wilkinson, District Judge of South Malabar, reversing the decree of B. Kamaran Nayar, District Munsif of Temelprom, in suit 538 of 1882.

The facts, so far as they are necessary for the purpose of this report, appear from the judgment of the Court (TURNER, C.J., and BRANDT, J.).

Gopalan Nayar, for appellant.

Sankaran Nayar, for respondents.

JUDGMENT.

The respondents brought this suit to recover two items of property, which, they alleged, had been demised on kanam by their ancestor to defendant No. 1 in 1034 (1858).

So far as is necessary to consider the pleas for the purposes of this appeal, the defendants pleaded that the demise of 1034 was renewed by the karnavan, Pangi Achen, in 1053 (1878), that rent **[382]** had been duly paid, and that, if they were ousted, they were entitled to the value of improvements.

The Judge has found that defendant No. 1, the kanam-holder, was aware that the karnavan, Pangi Achen, had no right to grant a renewal by reason of an agreement made by the family restricting his powers. He, therefore, set aside the renewal and decreed the return of the property. But he directed that the amount received for the renewal fee should be ascertained in execution of decree and should be repaid by the respondents. He also held that the rent which was in arrear should be deducted from the kanam-amount, but he omitted to decide whether the holder of the kanam or persons in possession were entitled to any sum for improvements.

In second appeal, it is contended that a karnavan is competent to grant a renewal of a kanam and that the District Court erred in holding that a renewed kanam was not valid; that having paid the renewal fee the kanam-holder is entitled to the further term of twelve years; that the claim to set aside the renewed kanam is barred by limitation; that no more than three years' rent can be set off against the kanam-amount; and that the value of improvements should have been awarded.

Ordinarily, it is of course true that the karnavan of a Malabar tarwad is entitled to grant a renewal of a kanam, but it is in the power of the family, with the assent of the karnavan, to place a restriction on his ordinary powers, and in this case it is found by the Judge that the family had done so and that the fact was known to the kanam-holder; consequently, although the kanam-holder had paid the renewal fee, the tarwad is entitled to contend that the renewal was improperly granted, and on returning the renewal fee. it may claim to recover possession of the property, inasmuch as the original kanam has expired.

The District Court should not have postponed the inquiry as to the amount paid for renewal to the execution of the decree. It should have ascertained what was the sum which was paid, and in its decree should have directed the restoration of the property conditionally on the repayment of that sum. It was also the duty of the Court to have ascertained whether the kanam-holder was entitled to any sum for improvements, and if so, what was the sum to which he was so entitled.

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[383] With regard to the claim to set off arrears of rent for more than three years against the kanam-amount, we observe that, in the Sadr Court's proceedings of 5th August 1856, this right was distinctly recognized. Those proceedings are in accordance with the customary law recorded in "Vyavahara Samudram," a work to which an antiquity of over two hundred years is attributed.

It is no doubt true that, where a "set-off" is pleaded, only so much of it can be allowed as falls within the period of limitation, if the set-off consists of a debt resulting from an independent transaction. But the claim that a deduction should be made from the kanam-amount on account of arrears of rent is not properly described as a "set-off."

By the custom of the country the kanam-amount is looked upon as a security for the rent; and on the expiry of the term, an account is taken between the jenmi and the kanam-holder, and while there is allowed to the kanam-holder interest on the sum paid by him as kanam and the value of improvements, there is allowed to the jenmi whatever rent may be in arrear, with interest on the arrears. In taking this account, allowance is made to the landlord of all the rent in arrear, and not only of so much as could have been recovered by the jenmi if he had brought a suit for the rent.

This is in accordance with the general law that, where parties reserve the settlement of the items of cross and connected accounts to a particular period, the several items will then be admitted or disallowed independently of any question, whether suit could be brought to recover them separately. The jenmi has the right either to sue for the rent as it accrues due, or to claim the enforcement of the security afforded by the kanam amount when the account between the parties is adjusted.

We must set aside the decree and direct the Judge to ascertain what is the amount of the renewal fee, if any, that was paid and what is the value of improvements to which the kanamdar is entitled, if any, in respect of improvements.

Having tried these issues, we direct him to pass a fresh decree. The costs of this appeal will abide and follow the result.

NOTE.—See 7 M. 545.

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8 M. 384.

[384] APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Brandt.

KRISHNAN (*Plaintiff*), *Petitioner v.* REVI VARMA (*Defendant*), *Respondent.** [13*th* and 14th March, 1885.]

Court Fees Act, Section 7, clauses ii, iv – Claim for future emoluments attached to an office – Jurisdiction – Valuation—Madras Civil Courts Act, 1873, *Section* 12—*Portion of claim struck out and plaint returned for presentation to inferior Court.*

In a suit filed in the Court of a Subordinate Judge, the plaintiff prayed, *inter alia*, for a decree for the payment, annually, of the emoluments attached to a certain office, or their value at a rate stated in the plaint. This portion of the claim he valued, under clause ii of Section 7 of the Court Fees Act, at ten times the amount of the value claimed for one year. The value of the claim thus stated exceeded the pecuniary limit of the jurisdiction of the District Munsif. The Subordinate Judge held that this portion of the claim was not actionable, inasmuch as the right to the emoluments was conditional upon services to be rendered,

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* Civil Revision Petition 412 of 1884.

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and did not fall under clause ii of Section 7 of the Court Fees Act, not being a fixed sum payable periodically, and therefore he held that the plaint was improperly valued, that the suit was not within his jurisdiction, and that the plaint should be returned to be presented to the proper Court.

Held, that this order was right.

IN suit No. 43 of 1882 in the Court of the Subordinate Judge of North Malabar, Thekkampaten Puthen Vittil Krishnan sued Revi Varma Valia Raja of Cherakal Kovilagom for a decree, (1) declaring that the plaintiff's tarwad possessed the hereditary right to an office and other rights in a certain temple, of which the defendant was the manager; (2) declaring that certain emoluments were annually due to plaintiff's tarwad and should be paid in future; (3) directing payment of the value of emoluments already due to plaintiff but withheld by the defendant; and (4) perpetually restraining defendant from obstructing the plaintiff in the performance of the duties of his office.

[385] The suit was valued as follows :—

	Rs.	A.	P.
Ten times Rs. 214-13-11, emoluments due for a year	2,148	11	2
Arrears of emoluments	437	1	1
Interest on arrears	33	4	5
Total ...	2,619	0	8

Court Fee stamps for Rs. 160 were affixed to the plaint and subsequently an additional stamp of Rs. 10 was added for the injunction, and the plaint was declared to be properly stamped by the Subordinate Judge (V. P. deRozario) on the 16th December 1882. On the 22nd of January 1884, the case was tried by C. Ramachandra Ayyar, who delivered the following judgment :—

"The plaintiff, calling himself Karayma Kalagom and hereditary Karyam Parayunnavar, sues to have declared as against the defendant his right to both the offices and to the future emoluments throughout the existence of his tarwad, and also to recover arrears of wages or emoluments for twenty-nine months from 30th Minam 1055 (10th April 1880) and for a perpetual injunction restraining the defendant from interfering with the performance of the duties.

"Both the offices claimed are alleged to yield an annual income of Rs. 214-13-11, and the 123 items of income consist of boiled-rice, oil, raw-rice, sugar, burnt-sticks, and milk-conjee, said to be annually given to the plaintiff's tarwad for services rendered: no fixed money allowance appertains to the office, and the value of the 123 items is not fixed. However it may be, the emoluments claimed are purely wages to be earned by rendering services which may be dispensed with by person having authority for proved misconduct. The yearly income, therefore, can be called neither maintenance nor annuity within the meaning of clause ii, Section 7 of the Court Fees Act. Maintenance, annuity, and other sums payable periodically should be fixed, and this is distinguishable from arrears of maintenance for which clause i specially provides. Under this clause, suit for arrears of sums periodically payable is valued according to the amount claimed.

"The plaintiff, seeking for a declaration of his right to both the offices and for recovery of twenty-nine months' arrears of his emoluments, had to value his suit under clause iv ; for he prays for a declaratory decree with consequential relief, which is the recovery [386] of the arrears of

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wages. The arrears of emoluments claimed were Rs. 470-5-6, and this was the value of the suit. But the plaintiff asks for a declaration entitling him to payment of future wages, or emoluments, as he calls it, throughout the existence of his tarwad. This becomes due to him only when the service for which it may be due is performed. I do not see any legal cause of action for this claim. The claim has been made apparently to evade the District Munsif's jurisdiction over the suit. It is true that a plaintiff might ask for several reliefs in one suit, but the Court has power to strike out any one relief for which it may appear that no cause of action had accrued on the date of the plaint. In my opinion, the plaintiff had no cause of action to sue for his future wages or emoluments for an indefinite period, and this prayer the Court is not bound to allow. The valuation set upon this right was Rs. 2,148-11-2. This being struck off the plaint, the value of the other reliefs asked for is Rs. 470-5-6 and the suit is cognizable by the District Munsif. Directing the defendant to continue payment to the plaintiff's tarwad of future wages for an indefinite period would imply a direction of the Court to the plaintiff to continue performance of his duties for an indefinite period, and this would be absurd. If the plaintiff refuse to perform his duty, the defendant might engage another. It is argued that even if the plaintiff was entitled to claim future wages, valuing one year's wages at ten times, the value for the purpose of jurisdiction is one year's wages only; for the subject-matter of the suit is one year's wages only. There is much force in this argument, and the plaintiff's vakil does not show me any precedent to the contrary. This view of the question also reduces the valuation within the pecuniary jurisdiction of a District Munsif.

"I am of opinion that the suit has been improperly valued and so the Court is not bound to try the suit when the proper value is within the District Munsif's jurisdiction. I find that the value of the suit is Rs. 684, and direct that the plaint be returned to the plaintiff to be presented to the proper Court. The plaintiff will bear all costs."

Against this order the plaintiff appealed to the District Court.

The District Judge, T. vonD. Hardinge, confirmed the order of the lower Court. The plaintiff then presented a petition to the [387] High Court under Section 622 of the Code of Civil Procedure, praying that the lower Court's order might be set aside on the ground, *inter alia*, that the Subordinate Judge had jurisdiction to try the suit and that it was properly valued in the plaint.

Anantan Nayar, for petitioner.
Sankaran Nayar, for respondent.

The Court (HUTCHINS and BRANDT, JJ.) delivered the following

JUDGMENTS.

HUTCHINS, J.—The plaintiff asked for arrears and for a declaration of right with a direction that the defendant should pay certain emoluments annually in future. The Subordinate Judge held that the prayer for a direction for future payments must be struck out, as no cause of action for them had accrued and as they were not of so fixed and definite a character as to come within the term "sums payable periodically" in Clause ii, Section 7, of the Court Fees Act.

It is admitted that, if this prayer is excluded, the suit falls within a Munsif's jurisdiction and the plaint was properly returned.

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It seems to me that the Judge's order was right, and for the reason on which he has chiefly relied, *viz.*, that it would be impossible to order the defendant to make future payments which would only become payable upon the plaintiff performing certain acts which he might never perform.

This application must accordingly be dismissed with costs.

BRANDT, J.—I agree that the petition must be dismissed. The question of jurisdiction does no doubt arise, but if the Subordinate Judge has correctly interpreted the law he had no jurisdiction, and I have some doubt whether we should go back to determine whether or not the Subordinate Judge has correctly decided the point of law raised. If we are to determine this, I have no doubt the conclusion arrived at is right.

The subject-matter of the suit was in reality a claim to the money value of certain emoluments due for past services and for a declaration that the plaintiff has a right or lies under an obligation to perform such services.

The subject-matter of this suit does not require a Court Fee stamp payable in respect of a suit beyond the pecuniary jurisdiction of a District Munsif, unless a sum equal to ten times the [388] yearly emoluments claimed be taken into calculation, and I am clearly of opinion that it is not open to a plaintiff to represent the subject-value of the suit as more than it really is with a view to having his suit filed in a superior Court, and that if this is done by mistake the suit must nevertheless be remitted to the lowest Court of competent jurisdiction.

The words "or other sums payable periodically" in clause ii of Section 7 of the Court Fees Act do not apply to the case of boiled rice, oil, ghee, &c, to which it is the plaintiff's case that he will be entitled on performance of certain services to be rendered, which services, by reason of the death or of the dismissal of the plaintiff for proved misconduct, he may never perform.

The relief that is nominally sought in respect of the declaration asked for is not and cannot be treated as consequential relief.

For the reason stated at the conclusion of the judgment of my learned colleague, a decree for such consequential relief could not be made, and the Subordinate Judge was right in holding that the prayer for a direction for future payment should be struck out or treated as mere surplusage.

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8 M. 388.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Brandt.

KRISHNAMA (*Plaintiff*), *Appellant v.* PERUMAL AND OTHERS (*Defendants*), *Respondents.** [13th October, 1884 and 24th March, 1885.]

Hindu law—Mortgage by father, Suit to enforce against manager of family—Decree for sale—Attachment—Order for sale of property—Sale of right, title, and interest—Rights of purchaser.

V, a Hindu, and his son P executed a mortgage of a house, the self-acquired property of V. V having died, P, the manager of the family, was sued by the mortgagee on his own promise in the mortgage-deed and as representative of V, and a decree was passed for the sale of the house in default of payment by P within three months of the debt then due.

* Appeal 12 of 1884.

[389] This period having elapsed, the mortgagee applied to the Court to enforce the decree by attachment of the mortgaged property, and the property having been attached, application was made for sale. 1885 MARCH 24.

By a warrant, dated 3rd December 1874, the Sheriff of Madras was ordered to sell the property, and on the 12th July 1875 the Sheriff sold the right, title, and interest of the judgment-debtor in the said house to K. APPELLATE CIVIL.

In a suit brought by K against P and the other members of the family to recover possession of the house :

Held, that as the mortgagee intended to enforce his rights under the mortgage by sale, and the Court intended to sell the house as mortgaged property, K was entitled by virtue of his purchase to recover possession of the house—*Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh* (6 I.A. 238) referred to and followed. 8 M. 388.

THIS was an appeal from the decree of Hutchins, J., in civil suit No. 92 of 1883 on the file of the Original Side of the High Court

The plaintiff, Anjemedu Krishnama Chetti, sued to recover possession of a house, the family property of defendants 1—4, tenanted by defendants 5—7.

In 1868, Runkala Virasami Reddi, deceased father of defendants 1—3 and husband of defendant No. 4, and defendant No. 1, Runkala Perumal Reddi, mortgaged this house.

In civil suit 479 of 1874, the mortgagees obtained a decree for the sale of the house in default of payment of the debt then due on the mortgage, and on the 2nd April 1875 the plaintiff purchased the house at public auction and obtained a certificate of sale on the 12th July 1875.

On the 10th August 1882, the plaintiff demanded possession, but the defendants refused to quit—hence this suit.

On the 28th April 1884, the following judgment was delivered by

HUTCHINS, J.—The plaintiff claims to eject the defendants from their family house as purchaser of the same at an auction held by the Sheriff under this Court's decree in civil suit No. 479 of 1874.

That suit was brought against the defendant No. 1 upon a mortgage, which had been executed in 1868 by his deceased father and himself. The defendants Nos. 2 and 3 are undivided half-brothers of defendant No. 1 and appear by him as their guardian *ad litem*. They and their mother, defendant No. 4, have also been present in person. The other defendants are merely tenants lodging in the house and have not put in an appearance.

[390] The plaint avers, among other things, that the house at the time of the mortgage belonged to Virasami, the father of defendants 1, 2, and 3, and that, up to the date of the present suit, these defendants were living together in the same house as members of a joint Hindu family. No written statement was put in, but it may be inferred from the issues that these averments were not traversed. In 1876 the plaintiff applied for delivery of possession of the premises, but he says he was referred to a regular suit. The plaint avers that he gave a formal notice to quit on 10th August 1882, and prays for an account of rents from 2nd April 1875, the date of the auction.

The issues framed are as follows :—

I. Can a decree on a mortgage obtained against one member bind the family ?

II. Was the loan taken for the purposes of the family ?

III. Was the first defendant sued as managing member ?

IV. To what relief, if any, is plaintiff entitled ?

The plaint (A) and decree (D) in civil suit 479 of 1874 show that the first defendant was sued individually and not as manager of the family.

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He is described in the former as the son and only legal representative of Virasami.

It seems hardly necessary to go into the second issue, because I find that the Sheriff proposed to sell and the plaintiff has purchased the right, title, and interest of the defendant only, *i.e.*, of the present first defendant. The certificate of sale and the order of confirmation (C) are explicit upon this point, and the sale was held under the old Procedure Code.

If it were necessary, I should be inclined to find that the mortgage was binding on the family. It was executed by Virasami who had certainly acquired the house in 1855 (B), as well as by his eldest and only adult son. The defendants' suggestion that it was bought with their grandmother's money is evidently untrue. The mortgage purports to have been for one necessity and recites the fact that the family had only been living in the house ten or fifteen years, thus supporting the plaintiff's evidence that Virasami had built it soon after his purchase in 1855 Probably, as alleged, with funds advanced to him by his master, except as to the fact that his master was in difficulties about the time of the mortgage, the defendants' evidence is worthless, and that fact goes to support **[391]** plaintiff's case showing that the master was compelled to realize as many of his outstanding debts as possible.

Having purchased the right, title, and interest of the defendant No. 1 only, the plaintiff is obviously not entitled to eject. He is entitled to the share of defendant No. 1 upon a partition, but this is not a suit for partition.

The suit is dismissed. The only costs incurred by defendants are costs which I cannot allow.

The plaintiff appealed.

Mr. *Branson*, for appellant.

Respondents were not represented.

JUDGMENT.

The judgment of the Court (TURNER, C.J., and BRANDT, J.) was delivered by

TURNER, C.J.—The evidence sufficiently establishes that the site, on which the house in suit was erected, was purchased by Virasami Reddi, who was then in the service of Anga Chetti's son, Somu Chetti, and that he erected the house thereon. The evidence of the first witness that the funds were supplied by Somu Chetti to Virasami is corroborated by the fact, proved by Perumal Reddi, that, when Somu Chetti had need of money, Virasami and Perumal mortgaged the house and supplied him with Rs. 500, which was probably in repayment of the debt due to him for the loan.

The mortgagees brought suit against Perumal Reddi, and in their plaint stated that he was the son and only legal representative of his father, but he was also sued on his own agreement in the mortgage-deed; and on 4th August 1874, a decree was passed against him personally, as well as a sale ordered of the mortgaged property if default was made in payment of the debt and costs of suit for three months from the date of the decree.

On the 5th November 1874, the decree-holders applied to enforce the decree against the then defendant, Perumal Reddi, by attachment of his immoveable property as specified, and the specification described the mortgaged house and ground. On the 6th November, a warrant was issued which recited so much of the decree as decreed the recovery of

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the debt and costs from the defendant, and that application had been made for the attachment of the immoveable property of the judgment-debtor specified as the house and ground mortgaged.

[392] On the 1st December application was made for sale of the attached property.

By a warrant, dated the 3rd December 1874, addressed to the Sheriff and which recited that an order had been issued for the attachment of the immoveable property thereunder specified, *viz.*, the house and ground mortgaged, the Court commanded the Sheriff to sell the said property or so much thereof as might be necessary to satisfy the amount due under the decree. On the 22nd February 1875, the Sheriff of Madras issued a proclamation, which recited that he had been ordered to sell the immoveable property thereunder specified, *viz.*, the house and ground, and declared that he would proceed to sell the right, title, and interest of the then defendant in the said property on a day named.

On the 12th July 1875, by an order of the Court reciting that the Sheriff had made a return that he had, on the 2nd April, in obedience to the warrant of the Court, sold to Anjemedu Krishnama Chetti the right, title, and interest of the then defendant in and to the house and ground mortgaged, the sale was confirmed, and on the same day a sale certificate was issued to the purchaser, which certified the purchase of the right, title, and interest of the then defendant in the house and ground.

There is evidence, which we accept as reliable, that the defendant Perumal Reddi, the only adult male member of the family, was the manager of the family after his father's death.

The Procedure Codes of 1859 and 1877 containing no directions as to the course to be followed for executing a decree ordering a sale for the satisfaction of a mortgage-debt, it was for some time usual to proceed under the Code by attachment, and it was not until long after the date of the sale now in question that the Court ruled that where a sale is ordered by the decree, attachment is not necessary. The circumstance that an attachment was issued will not necessarily show that the decree-holder desired to execute the decree as a mere money decree. Looking to the circumstances that the decree-holder had asked for relief against Perumal Reddi not only as himself liable under the mortgage but as the representative of his father, that he had prayed for, and obtained, an order for the sale of the mortgaged property, and that immediately on the expiry of the time limited for redemption he had taken proceedings to carry out the order, we have no doubt the application [393] for sale was made for the purpose of enforcing the mortgage. The warrant of the Court directed the sale of the property. The Sheriff's proclamation and return and the sale certificate cannot limit the order ; the auction-purchaser was bound to look to the warrant for sale and the decree, and is entitled to whatever rights in the property the Court intended to sell. We have no doubt the Court intended to sell the whole property as a mortgaged property.

The decision of the Privy Council in *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh* (1) appears to us to rule that, although it would have been more proper to have made the minor members of the family parties to the suit, the sale which has been made in pursuance of the decree will bind them, seeing that their eldest brother, the manager of the family, had been impleaded as the representative of his father by whom the property had been acquired. We must, therefore, reverse so much of the original decree in the present suit as dismissed the claim to possession

(1) 6 I.A. 233.

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and mesne profits from the date of suit, and adjudge that the plaintiff do obtain possession and mesne profits from that date, to be calculated in execution.

We refrain from awarding mesne profits prior to suit as the appellant slept over his rights; and inasmuch as the minor sons of Virasami Reddi were not made parties to the former suit, we shall direct each party to bear his own costs in both Courts.

Solicitor for appellant: *Tiruvengadasami Pillai.*

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8 M. 394 (F.B.).

[394] APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

GOUSE (*Plaintiff*), *Appellant* v. SUNDARA (*Defendant*), *Respondent.** [25th November, 1884 and 21st February, 1885.]

Rent Recovery Act, Sections 1, 79—*Landholder—Assignee—Delegation of powers.*

The interest of B in a permanent lease of a jagir was sold in execution of a decree and purchased by J, who assigned his interest to the plaintiff.

In a suit under Act VIII of 1865 (Madras) by plaintiff to compel defendant to accept a patta, defendant objected that plaintiff had no right to enforce acceptance of a patta under the Act:

Held, by the Full Bench (TURNER, C.J., MUTTUSAMI AYYAR, HUTCHINS, and BRANDT, JJ.; KERNAN, J., dissenting) that plaintiff was a landholder within the meaning of the Act and entitled to enforce acceptance of a patta.

Zinulabdin Rowten v. *Vijien Virapatren* (I.L.R., 1 Mad, 49) dissented from.

[R., 11 M. 12 (15) = 11 Ind. Jur. 413.]

THIS was an appeal from the decree of E. N. Overbury, District Judge of Salem, dated 2nd April 1884, reversing an order of C. M. Mullaly, Head Assistant Collector, in a summary suit brought under Section 9 of the Rent Recovery Act, directing defendant to accept a patta from plaintiff.

On the 31st October 1884, the case was heard by a Division Bench (HUTCHINS and BRANDT, JJ.).

Sadagopachariyar, for appellant.

Hon. *T. Rama Rau* and *Varada Rau*, for respondent.

On the 3rd November the case was referred to a Full Bench.

The following judgments were then delivered.

HUTCHINS, J.—The appellant brought this suit under Section 9, Act VIII of 1865, to compel a tenant to accept a patta. There is no dispute about the terms of the patta, but the question to be [395] determined is whether the appellant is a landholder within the meaning of the Act. His position is briefly that of the assignee of a permanent lessee, while the respondent is most certainly a person bound to pay rent, in respect of the lands named in the patta, to whoever may be entitled to such rent and therefore to the appellant.

It may be better, however, to state the facts rather more in detail. The estate is a jagir. The former jagirdar had ten sons and two daughters. He executed a permanent lease to one of his sons, Bade Kaja Sahib. Under a decree passed against Bade Kaja, his interest was

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* Second Appeal 715 of 1884.

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attached and purchased by another of the sons, Jada Sahib, and Jada Sahib transferred his interests in 1874 to the appellant. Upon the appellant taking possession of the estate and attempting to give pattas, he was obstructed by his vendor and brought original suit No. 100 of 1874, in which his possession as permanent lessee was established against Jada Sahib. Notwithstanding this decree, the appellant seems to have met with considerable opposition, and the Head Assistant Collector, in disposing of this suit, characterized the defence as another attempt to prejudice his position. The respondent relies on a purchase in 1883 of the present interests of three of the late jagirdar's sons, *viz.*, Bade Kaja, whose interest has passed to appellant under the Court-sale; Jada Sahib, who sold to the appellant and against whom appellant obtained judgment in 1874; and Chota Kaja Sahib. Bade Kaja formerly had the tenant-right in the lands mentioned in the present patta; he sold it to a Goundan, who exchanged pattas and muchalkas with the appellant. The respondent has now bought it from that Goundan.

These facts seem hardly to be disputed. The Head Assistant Collector gave judgment for the appellant. The District Judge has taken no notice of the proceedings in the suit of 1874, and he rejected other evidence, which at least goes to show that the appellant has been the *de facto* landholder for a series of years. He finally dismissed the suit on the ground that the permanent lease would be the best evidence of the appellant's position as a permanent lessee, but he failed to notice that this lease should be with Bade Kaja, under whom the respondent claims, and that the appellant had established his *status* against Jada Sahib, under whom also the respondent claims.

[396] Upon these facts, and there appearing to be no real dispute as to there having been a permanent lease, we should have sent the case back to the Judge or given a decree for the appellant, but for the decision of a Division Bench in *Zinulabdin Rowten* v. *Vijien Virapatren* (1). It was there held that the assignee of a "farmer from a landholder" was not himself a "farmer from a landholder," and therefore not entitled to take proceedings under the Act to enforce acceptance of a patta. It has always appeared to me that this decision was very questionable, but we are not entitled to overrule it and must, therefore, refer the point to a Full Bench.

I would draw attention first to the fact that the very learned Judges who decided that case had no practical acquaintance with the Act and do not seem to have been at all confident as to the correctness of their conclusion. They simply said "we are inclined to think that the Act does not apply to the case," and refused to disturb the judgment of the lower Court. I very much doubt if they had any idea of the consternation with which their decision was received up-country.

I would next point out that in construing this Act, VIII of 1865, the Courts have repeatedly found it necessary to recognize the fact that it was not drawn by a skilled draftsman and that the terms employed in it cannot always be limited to their strictest legal acceptation. It, therefore, becomes more than usually important to bear in mind the object which the legislature had in view in passing the Act. This object seems to me to have been* put very forcibly, and appropriately to the present reference, in *Vellaya* v. *Tiruva* (2). "By the Regulation the obligation to

* [" been " apparently omitted by mistake.]

(1) 1 M. 49.

(2) 5 M. 76 (83).

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grant pattas was imposed, and the power to collect rents by summary process was conferred not only on proprietors and farmers under Government, but on the farmers under proprietors. The same reason, the necessity for providing for the speedy collection of revenue, suggested the conferring of summary powers on farmers as well as proprietors ; and the same object, the protection of the tenant, was promoted by imposing on farmers the like obligations as on proprietors." It is obvious that these observations apply at least as strongly to the assignees of farmers as to direct farmers under proprietors. Indeed the former require the summary [397] powers even more than the latter on account of the opposition they are likely to incur. I have before had occasion to point out that, if the interpretation of the Division Bench is correct, the position of a farmer's assignee will generally be untenable. Take, for instance, the important zamindari of Sivaganga, the assignment of the lease of which was upheld in *Venkatasami Naick* v. *Kulandapuri Natchiar* (1). Probably that assignee had more suits under Act VIII of 1865 than all the other "landholders" of the Presidency, but every one of them was wrongly decided if the view of the Division Bench is to prevail.

The judgment of the Division Bench concludes by admitting that the term "landholder" includes the direct descendants of those named in Section 1 of the Act and therefore of farmers or lessees. If direct descendants are included, why not collateral heirs, and why not all who succeed to the position of any of those named in Section 1, including transferees whether by assignment or operation of law ?

A zamindar may sell his zamindari in certain circumstances. Is the purchaser not entitled to give a patta ? Or rather, is he not bound to do so ? If the legislature intended that a purchaser or assignee of a zamindar should be as the zamindar and therefore a landholder, it must also have had the same intention with regard to the assignee of a lessee.

There is, however, another view under which the assignee of a lessee may come in. A person farming lands from a zamindar is a landholder, and it appears to me that this may include persons farming directly or indirectly—by lease direct from the zamindar or by an assignment of such lease which the zamindar cannot dispute.

Again, the definition of landholders in Section 1 is, on its face, not exhaustive. It seems to have been suggested that, although Section 1 is not exhaustive, the list in Section 3 of persons who may and must give pattas is exhaustive, but, in my opinion, the two sections must be read together. It seems obvious that Sections 3 and 13 were intended to embrace all classes of landholders, or in other words all persons entitled to exact rent for land. The assignee of a zamindar's lessee is certainly not a "landholder under raiyatwar settlement or in any way subject to the payment of land revenue [398] direct to Government," nor is he "a registered holder of land in proprietary right." He does not, therefore, fall under Section 13. He must, therefore, fall under Section 3 if he is entitled to exact rent at all. But it is admitted, or was by the Judge whose decision the Division Bench refused to disturb, that he can exact rent by suit, and I do not myself see what answer there could be to his suit, except that which would of course be set up, *viz.*, that he had not tendered a patta. But, if he can tender a patta, the very point is gained for which the appellant is contending. If he cannot, Section 7 would not prevent his suing; for he is not a landholder under the Act, consequently his tenants are not

(1) 5 M.H.C.R. 227.

tenants within the definition given by the Act, and "a tenancy" in Section 7 must mean the tenancy of a tenant within that definition. Whether the tenants would in the end be benefited, if they succeed in their contention that the appellant is not a landholder, and therefore that he can sue them in the Small Cause Courts without their having the safeguard of a patta, is a question to which they do not seem to have given sufficient consideration.

With these remarks, I would refer to a Full Bench the question, whether the decision in *Zinulabdin's case* is correct and whether the assignee of a person farming lands from a zamindar or jagirdar is debarred from taking proceedings under Act VIII of 1865 and exempt from the obligations imposed on landholders of the class described in Section 3 and by that Act.

BRANDT, J.—I also desire that the question stated by my learned colleague be referred to a Full Bench.

With the greatest respect for the learned Judges who decided *Zinulabdin Rowten* v. *Vijien Virapatren* (1), I have always entertained some doubt in respect of that case.

In *Ramasami Aien* v. *Manjeya Pillai* (2), the question for decision was whether the plaintiff who held land under a lease from a landlord was a farmer within the meaning of the Act, and it was decided that he was while in *Chauki Gounden* v. *Venkataramanier* (3), to which case also reference is made in *Zinulabdin's case*, as containing a distinction between farming and leasing, the distinction, if indeed it was intended as such, was drawn inci-[399]dentally only, the question for decision there being whether the poligar of an unsettled polliem was or was not a landholder.

One who, in the words of Holloway, J., "contracts to take all the profits of certain lands, and to pay a specified sum to the person from whom he takes" is a farmer under the Act. I do not gather that it was intended by that learned Judge to draw a distinction between farming, and taking a lease of, such rights. In *Vellaya* v. *Tiruva* (4) the learned Chief Justice says, the term *farmer* "also applies to persons who farm *or take a lease* of the rights of proprietors" on certain terms.

Nor do I understand that the learned Judges in apppeal adopted the view apparently taken by the District Judge in *Zinulabdin's case* that an assignee of a lessee is a sub-renter, and therefore not in a position to enforce acceptance of a patta. The assignee of the lessee was, it appears, held by the Division Bench in *Zinulabdin's case* to be not a landholder under the Act, because he was not the direct descendant of one of the persons coming within the class of landholders named in Section 1 of the Act.

I am doubtful whether this is sufficient reason for holding that on the assignment of a lease-hold interest, which it is assumed the original lessee can legally make, the assignee is not in a position to take such proceedings under the Rent Recovery Act as his assignor might have done.

On the 25th November the case was argued before the Full Bench.
Mr. *Wedderburn* and *Sadagopachariyar*, for appellant.
Hon. *T. Rama Rau* and *Varada Rau*, for respondent.

On the 21st February 1885, the following judgments were delivered :—

(1) 1 M. 49. (2) 6 M. H. C R. 61. (3) 5 M. H. C R. 208. (4) 5 M. 76 (85).

1885 FEB. 21. — FULL BENCH. — 8 M. 394 (F.B.).

JUDGMENTS.

TURNER, C.J.—The facts of the case, as I understand them, are as follow :—The former jagirdar, whose power to do so is not now disputed, made a permanent lease of the jagir to his son Bade Kaja Sahib. This lease was in fact a farm of the jagir.

Bade Kaja Sahib's interest was attached and sold under a decree obtained by his brother, Jada Sahib, who became the purchaser.

Jada Sahib sold his interest to the appellant. The permanent lease or farm consequently became vested in the appellant.

[400] The term "landholder" is defined in Section 1, Act VIII of 1865, as including, for the purposes of that Act, *inter alia*, jagirdars and all persons farming lands from jagirdars.

Prima facie then the appellant is a "landholder" within the meaning of the Act. But it is argued that Section 79 impliedly prohibits assignees from exercising the summary powers conferred by the Act on landholders without delegation and that the appellant is assignee of a landholder.

In one sense a farmer is an assignee, but it is clear that the term "landholder" includes farmers from jagirdars. Therefore, Bade Kaja Sahib clearly had the summary powers conferred by the Act. It is, however, argued that assuming he had the powers the appellant has not, because he is an assignee of the farm. It is no doubt true that the appellant is in one sense an assignee : he is an assignee of all the rights of the farmer ; but it does not follow that he falls within the purview of Section 79.

I may observe that section is an enabling section. It was not intended to deprive any person who enjoyed powers under the other sections of the Act of the authority conferred on him by the Act, but to enable the persons defined as landholders to delegate their powers to persons to whom the other provisions of the Act did not extend.

The term "assignee" in this section when read with the context appears to me to mean not a person who stands in the shoes of a landholder in relation to the tenant, but a person whose position does not interfere with the direct relation of the tenant to the landlord and who stands to the landlord in the position of an agent for the purpose of collecting the rent. This description applies neither to a farmer nor to a person who has acquired the whole interest of a farmer but to a person to whom the rents have been assigned, *e. g.*, a landholder may agree with his creditor that he shall collect the rents and apply them in reduction of the landholder's debt. Such an assignee, though he has the right to collect the rent, does not disturb the direct relation of the tenant to the landholder and he cannot exercise the summary powers under the Act as a landholder. If the enjoyment of the summary powers was to be conferred on him, this could only be effected by delegation. The use of the term "principal" in Section 79 is thus satisfied, and it would not be satisfied by the construction proposed. It **[401]** does not express the relation of a landholder to a person who has acquired by purchase the interest of a farmer. The observation of Mr. Justice Hutchins that a "landholder" cannot delegate powers he has ceased to possess appears to me conclusive. The provisions of Section 80 were necessary to confer on heirs and representatives powers to collect *arrears*, which, in whole or in part, would belong to the estate of the person they represent, and I do not think that the provisions of this section throw any light on the provisions of the preceding section.

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KERNAN, J.—I understand that the permanent lease granted to Bade Kaja Sahib constituted him a farmer under the jagirdar within the meaning of the Regulation and Rent Act as explained by the Full Bench in *Vellaya* v. *Tiruva* (1) and the cases there referred to. His interest in that farming lease was seized and sold in execution against him and was purchased by Jada Sahib in 1874, who, I assume, obtained certificate under Section 259, Civil Procedure Code, and thus got a valid transfer.

Jada Sahib transferred the interest in the farming lease to the plaintiff.

Bade Sahib did not delegate his powers as landholder under Act VIII of 1865 to Jada Sahib or to the plaintiff.

The defendant, though one of the jagirdars, there being several entitled to the rent reserved by the lease to Bade Kaja Sahib, is also a tenant in occupation of part of the land comprised in the permanent lease.

The plaintiff sues to compel the defendant to accept patta under the Rent Act. The defendant contends that plaintiff is not a landholder under Section 3 of Act VIII of 1865 and is not entitled under that Act to compel acceptance of patta, inasmuch as he is only an assignee of an assignee of a landholder who did not delegate to the plaintiff or to his assignor the powers given by the Act.

If Section 79 did not provide for the cases of assignees of landholders, I would consider that such assignee, that is a transferee for the full interest in the farming lease, would be a landholder within the meaning of Section 3 of the Act as a farmer under the jagirdar without the necessity for any delegation of powers. There might be several such transfers from time to time, and each succeeding transferee would be a landholder within the mean-[402]ing of Section 3. The position of the original farmer and of each assignee from and after him as regards the tenants would be that he would be only answerable to the tenants for any damage done by him or his agent during his own time and would not be liable after assignment for any act not done by him or his agent. However, Section 79 is inconsistent with such position. The Act when it gave the summary powers to landholders as against their tenants contains various restrictions on the exercise of those powers to prevent damage and injustice to the tenants. Section 79 contains the first reference to such powers being exercised by agents or assignees of landholders, and Section 80 contains the first reference to such powers being exercised by heirs or legal representatives of landholders.

The terms of Section 79 are "landholders are authorized to delegate to their agents or assignees all the powers given to them by this Act, and any persons injured by such agents or assignees shall be allowed to sue either them or their principal or both—provided always that the principal shall in no case be liable to imprisonment, nor to any greater damages than the plaintiff has actually suffered where the act complained of was committed by his agent or assignee and was not sanctioned by him." Now, although it is not inconsistent with this section that the landholders had a right to appoint agents to act for them in respect of the interest vested in them, or inconsistent with the rights of landholders to assign such interests according to the ordinary law and right of property, yet it is inconsistent with such agents or assignees exercising the summary powers given by the Act, unless such powers were delegated to them by the landholders. If it was the intention of the Act that the agent or assignee could exercise those

(1) 5 M. 76 (85).

1885 FEB. 21. — FULL BENCH. — 8 M. 394 (F.B.).

summary powers, what was the necessity for introducing this enabling clause? If it was the intention of the Act that the landholders under the provisions of the Act prior to Section 79 were left free to delegate their powers if they chose, then Section 79, as regards the power to delegate, would be unnecessary. The only construction, therefore, as it appears to me, in respect of the first part of Section 79 is that it was not intended by the prior part of the Act that the landholders should have authority to delegate such powers and that unless the delegation of such powers was authorized expressly, the agents or assignees should not have such powers.

[403] Then, the next part of Section 79 provides that, notwithstanding such delegation of powers, the persons injured by the exercise of the powers may sue the agent or assignee or their principal (meaning the landholder), or both, but limits the liability of the principal to actual damage suffered by the plaintiff and from imprisonment. This portion of Section 79 is not consistent with the general right of a landholder, who, as above stated, is only responsible for acts done by him or his agent and is not responsible for acts done by others without his concurrence after he has assigned all his interest.

This is a valuable provision in favour of the tenants, but it only operates when the assignee acts under delegated powers. The object of Section 79 was, in cases of assignments by landholders, *e.g.*, farmers, by authorizing the delegation of powers, to give summary remedies on the one hand and on the other hand to give the tenants additional remedies in case of injury when they were subject to the exercise by assignees of summary powers.

If the plaintiff is entitled to exercise the summary powers, though he has not got a delegation under Section 79, then of what value is the proviso of that section to the tenants who may be injured? Moreover, in that case the remedy provided by Section 79 for the tenants against Bade Kaja Sahib in case of injury, say by the plaintiff in exercise of the powers, will not be available.

Plaintiff may recover his rent in a Civil Court, but not by summary remedy under the Act.

In case of an assignment by operation of law to the heir or legal representative, the right to exercise the power goes with the estate, Section 80. This clause and Section 79 seem to prove that the summary powers were in the first part of the Act confined to the zamindars, &c., and farmers under them personally. Sections 79 and 80 provided for the cases of agents and assignees under delegated powers and for heirs and representatives. I think that *Zinulabdin's case* (1) is not correctly reported, or, if it is, the point now before us does not appear to have been decided. Mr. Justice Holloway says "this man, the plaintiff, is not a direct descendant of any zamindar, &c. He is, therefore, not a landholder under the Act. This seems to dispose of the case."

[404] In *Vellaya* v. *Tiruva* (2) Mr. Justice Kindersley referring to *Zinulabdin's case* (1) say of that case "it was decided that the *sub-lessee* of the representatives of a lessee was not a landlord as defined by the Act."

The point in this case seems to me not to be concluded by the Full Bench judgment in *Vellaya* v. *Tiruva* (2). There we held that if a mortgagee is to take possession and give credit, or account for a sum certain to the proprietors on account of the collections, he is a farmer *pro tanto* and

(1) 1 M. 49. (2) 5 M. 76.

has the power, and that, when the rights of a mortgagor in respect of the enjoyment of property are simply assigned to the mortgagee, in such case the mortgagee has the powers conferred by the Act on landholders only if they have been delegated to him by Section 79.

That was the case of a mortgagee from a zamindar. In this case I believe it is not contended that the plaintiff is a farmer under the Act. He is only the assignee of an assignee of the estate and interest of Bade Kaja Sahib, who was a *farmer* under the jagirdar. Plaintiff, therefore, is an assignee of a farmer, but as he has not had a delegation of powers under Section 79 of the Act, he is not entitled to exercise the summary powers given by the Act. A zamindar, &c., who has made a farming lease or grant without delegating powers, still retains the powers incident to his estate and may grant them afterwards to his farmer. But a farmer with delegated powers, who assigns his interest, should on the assignment, assign his powers. But I think an assignment of all his estate and interest would carry the right to exercise the powers. I am unable to agree that the observation of Mr. Justice Hutchins referred to by the Chief Justice is at all conclusive.

I would reply to the reference that the decision in *Zinulabdin's case*, as reported, does not appear to bear on this case and that the assignee of a farmer from a zamindar, &c., is debarred in respect of that interest from taking proceedings under Act VIII of 1865 unless the farmer delegated to him, or to his assignor, and his assignee, under Section 79 the power given to the farmer by the Act.

MUTTUSAMI AYYAR, J.—The question which is referred for our decision in this case is whether the appellant is a landholder within the meaning of Act VIII of 1865. The facts from which it arises are shortly as follow:—The lands in the respondent's **[405]** possession are situated in a jagir. The former jagirdar granted a permanent lease of the jagir to his son, Bade Kaja. Bade Kaja's interest passed by a court-sale to his brother, Jada Sahib, who since sold his interests to the appellant. The appellant sued under Section 9, Act VIII of 1865, to compel the respondent to accept patta from him for Fasli 1292.

The respondent contended that the appellant was not a landholder entitled to enforce the acceptance of patta. It is not denied that the permanent lease is an ijara or farm. Nor is it disputed that Bade Kaja was a person farming land from a jagirdar, and therefore a landholder according to Sections 1 and 3 of the Act. It is also not doubted that, if Bade Kaja's interest passed by the operation of law to his heir or legal representative, such legal representative would be competent to exercise the powers conferred by the Act upon landholders. The question then, as to which there is a difference of opinion, is whether the appellant, who purchased the farm from Jada Sahib but did not obtain it either from the jagirdar direct or from Bade Kaja by operation of law, is a landholder.

In so far as the right to rent is concerned, it is of no moment under the general law of landlord and tenant whether the transfer to the appellant is the first or second or third transfer or whether it is voluntary or by operation of law. The only conditions necessary to give him a right of suit as against the tenant are that the transfer is valid, and that the interest transferred is such as would actually substitute the purchaser for the former landlord as farmer. Attornment by the tenant is not required to validate the transfer though the tenant may not be prejudiced by paying rent to the former landlord until he has notice of the transfer.

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If the former landlord sued for rent, the transfer of his entire interest in the farm and the notice of the transfer to the tenant would be a sufficient answer to the claim in India as it would be in England.

In support of these views, I may refer to the English law of attornment contained in Woodfall's Landlord and Tenant, page 243, especially to Statutes 4 & 5 Anne, c. 16, Sections 9 and 10. 11 Geo. II, c. 19, Section 11, and the general law in India is in substance the same as would appear from *Vellaya* v. *Tiruva* (1).

[406] This being so, the next question is whether Section 1 or Section 69 of Act VIII of 1865, bars the recognition of the appellant as the landholder to whom the respondent is liable to pay rent.

A person farming land from the jagirdar is expressly named in Sections 1 and 3 as a landholder for the purposes of the Act. It is not denied that the person who takes the farm first is a landholder. Nor is it denied that his heir or legal representative is a landholder. Is there any sufficient reason then for saying that the appellant who is a purchaser of the farm is not? The words are "persons farming lands from the jagirdar." Do they mean persons who take the farm from the jagirdar in the first instance, or do they include those who lawfully take his place by right of purchase in regard both to the right to sue the tenant for rent and to the liability to pay the ijara amount to the jagirdar, or in other words in regard to the ownership of the farm. It seems to me that they ought to be taken in the latter sense. Section 80 indicates that the intention was to include heirs and legal representatives. It is reasonable to say that they refer to the jagirdar or farmer having some present interest and not to one who was in some former time a jagirdar or farmer.

It is then suggested that Section 79 discloses an intention to exclude all assignees taking the farm by the voluntary act of the landholder from the class of landholders in order that the tenant may not be deprived of his remedy against the original landlord for the abuse of powers conferred by this Act. I do not think that Section 79 admits of such construction. The first part authorizes landholders to delegate to their agents or *assignees* the powers conferred upon them by the Act. As the term "landholder" is specially explained in Section 1, we must read it in construing Section 79 in the sense in which it is used in Section 1. Taking the word then to include any person who farms land from the jagirdar, or any one who lawfully succeeds him by purchase as landlord, the assignee referred to in the section must be some assignee who does not in law displace him as the tenant's landlord. It is conceded that Bade Kaja and Jada Sahib were landholders within the meaning of Section 79. The latter part of the section speaks of the landholder as the principal. Both then reason and the context seem to me to show that the principal referred to is one between whom and the tenant the relation of landlord and tenant still continues to subsist primarily and not **[407]** one who stood in that relation at some former period but who has since ceased to do so. It is said that the tenant's remedy would then be impaired. The answer to the objection is that it is impaired no more than it would be if Bade Kaja still continued to hold the farm. The section premises three classes of persons, first, the landholder who may still be regarded as the principal; secondly, his agent or assignee who is specially authorized to exercise for him and on his behalf the powers conferred by the Act, and thirdly, the tenant. As I read Section 1, the appellant stands in the first class, and if I am right, it follows then that

(1) 5 M. 76 (84)

he cannot also stand in the second. The section must therefore be taken to refer to assignees who have secondary or subsidiary interests but whose legal relation *quoad* the exercise of the powers conferred by the Act is still analogous to that of an agent in that the power has to be exercised for the benefit and on behalf of the landholder for the time being having some subsisting interest. It seems to me that it is not correct first to presume that the tenant must have a certain remedy and then to place a construction on the word "landholder" at variance with Section 1, instead of taking the word as defined by Section 1 and confining the remedy of the tenant to the middlemen exercising the power and to the person who lawfully occupies for the time being the position of a farmer from the jagirdar. The presumption itself is unreasonable, for according to it, a liability attaches to a person who neither abuses the powers conferred by the Act nor indirectly benefits by their exercise. Further, the section implies that the powers conferred by the Act are incidents attaching to the *status* of a landholder, and when that *status* is once effectually transferred, I doubt if a special delegation is at all needed.

In *Vellaya* v. *Tiruva* (1), it was observed "that the effect of the instrument (then before the Court) was not only to create a mortgage but also a farm of the mortgaged villages, determinable in whole or in a specified part, at the end of any fasli year. The mortgagee is, therefore, a landlord within the meaning of Act VIII of 1865, and is entitled to enforce the acceptance of a proper patta."

The result is that, in my judgment, the appellant in the case before us is entitled to enforce the acceptance of patta.

[408] HUTCHINS, J.—In referring this case to a Full Bench I endeavoured to show that the assignee of a person farming lands from a zamindar, &c., came within the definition of a landholder given in Section 3 of the Act. I understand that all my learned colleagues would have come to that conclusion but for the provision of Section 79, which speaks specifically of the assignees of landholders. I shall, therefore, confine my present remarks to the questions, whether such an assignee as the appellant in this case comes under Section 79, and whether Section 79 was introduced for the purpose of restricting or controlling the definition given in Section 3.

Section 79 appears to me to be one of a series of supplemental sections introduced at the end of the Act to provide for cases not previously dealt with. It is an enabling section, and so far from restricting the powers already conferred on all landholders, it gave them the additional right to exercise their powers through "agents or assignees," provided only that as the "principal" of such agent or assignee the landholder should himself remain answerable to his tenants for any wrong done by such agent or assignee. This proviso seems to me to presuppose that the landholder still remains the principal in relation to the agent or assignee and the landlord of the tenant. If his right to collect rent has been wholly and conclusively determined, as by a court-sale of his entire right, title and interest, his powers must also have been determined, and he cannot delegate to another what is no longer vested in himself. He then ceases to be either principal or landlord, and the person in whom his entire right, title and interest has become vested stands in his shoes as the landholder. In my judgment, therefore, the word "assignee" in Section

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(1) 5 M. 7 (87).

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79 does not include the transferee of a landholder's entire interest such as the appellant in the present case. I would answer the question referred in the negative.

BRANDT, J.—It is certainly a question which requires consideration in the case before us whether or not, having regard to Section 79 of the Rent Act, assignees of the landlords do not require delegation to them, capable of proof, by such landlords of the powers given to the latter under the Act.

The answer to this depends in great measure upon the meaning to be placed upon the words "their agents or assignees" in that section. And had not some doubts arisen in my mind with reference to certain observations in *Vellaya* v. *Tiruva*, a Full Bench case, I **[409]** should have had little, if any, hesitation in holding that the word "assign" as there used is used in the sense of "a person appointed by another to do any act or perform any business for that other" (in which sense the word is sometimes used), rather than as describing a person "who takes an interest in the land or real estate of the landlord by an assignment from the landlord;" that is, that it refers to an assignment of powers and not to the assignment of an estate. My reasons for thinking that this is so are that Section 79 of the present Rent Act appears to be an adaptation, reproduction, or intended amendment of Section 42 of Regulation XXVIII of 1802, which Regulation empowered landholders and farmers of land to distrain and sell the personal property of under-farmers and raiyats in certain cases for arrears of rent, and Section 42 authorized such landholders and farmers "to delegate to their naibs, gumastahs and other agents employed in the collection of rent the power of distraining, on their behalf, in the manner prescribed in the Regulation," subject to certain penalties in the case of abuse of the powers so conferred, and subject also to the responsibility of the landlord.

Madras Act VIII of 1865 does not profess to do more than "consolidate and simplify various laws which have been passed relative to landholders and their tenants, and to provide a uniform process for the recovery of rent," and having regard to this fact and to the position which Section 79 occupies in the Act and to the provisions of Section 42 of the Regulation of 1802 for which it is substituted, and to the fact that Section 8 of Regulation XXV of 1802, unrepealed and unaltered, expressly recognizes the rights of proprietors of land to transfer by sale, gift or otherwise, without the previous consent of Government or any other authority, the proprietary right in the whole or any part of their zamindaris consistently with the requirements of Hindu and Muhammadan Law and in a manner not prohibited by the Regulations of the British Government, I have no doubt that the word "assigns" in Section 79 of the present Act was used as an amplification only of, and in the same sense as that in which the word, "agents" is used, the two words being substituted for the words "naibs, gumastahs or agents" in Section 42 of the old Regulation. The use of the word "principal" only in Section 79 of the Rent Act appears to me to support this view.

The decision in *Vellaya* v. *Tiruva* (1), in respect of the powers **[410]** of a mortgagee, apart from express assignment of powers under Section 79, to exercise the powers of landlords under the Act as a farmer, if the effect of the instrument of mortgage be not only to create a mortgage but also a farm of the mortgaged villages, appears to me to apply with at least equal force to the case of a lessee to whom a landlord has made over all his

(1) 5 M. 76 (85).

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rights in the property except a right to receive a fixed sum payable by the lessee "in consideration of obtaining such proportion of the profits of an estate as he (the proprietor) was entitled to." That there is no distinction for the purposes of the Act between leasing and farming appears to have been assumed by the learned Chief Justice in *Vellaya* v. *Tiruva* (1) (as I remarked in my observations in the order of reference in this case), and I am still of opinion that it was not ever intended in this Court to draw any distinction between the two.

The power of proprietors to deal with their property by way of transfer by sale or otherwise in any manner not contrary to law, having then been distinctly recognized, and the general rule being that "every one who has an estate or interest in land and tenements may assign it, as tenant for life, for years, &c." (Comyn's Digest, Vol. 5, p. 686, 5th edition), is there anything in the unrepealed Regulations or in the Rent Act by reason of which, having regard to the aim of legislation on this subject, *viz.*, protection of tenants from undue exactions or oppression on the part of landlords to whom special and summary means for speedy realization of rents are given, it must be held that there is an exception to the general rule, and that an assignee of a farmer or lessee does not stand in the place of the farmer or lessee?

If there is under Section 79 of the Act an assignment or delegation of the landholder's powers, the landholder's responsibility no doubt still continues, along with the liability of the assignee. Does the landholder's liability continue when he farms or gives a lease to another?

Under Section 8 of Regulation XXV of 1802 the landholder is still answerable to Government if he does not register the transfer in the manner therein provided, but there is not, as it appears to me, any express provision in the Regulations or the Act, under which, when he has divested himself of all interest in the property except a right to receive from a farmer or lessee a fixed sum, he is still liable to the tenants for wrongful acts done under the color of the act by the farmer or lessee, who, standing in the place of the land-**[411]**holder, is subject to the obligations and invested with the summary powers of distraint conferred on the landholder under the Act. And, if this is so, it does not appear to me what difference it can make whether such a farmer or lessee transfers his interest to another; the tenant is not consulted as to the choice of the original lessee or farmer any more than he is as to the selection of an assignee of the lessee, who again can only exercise powers of summary distraint if he fulfils the obligations imposed on him as filling the place of a landholder.

Tenants would no doubt be justified in refusing to attorn to a farmer or lessee unless, by due notice given to them by the landholders or otherwise, they be made aware of the transfer, and are authorized and desired to pay rent to the transferee, and so they would be on an assignment by the farmer or lessee, but, subject to these conditions, and under the restrictions above-mentioned, it appears to me that the tenant's rights are sufficiently protected, and that there are not grounds for holding that the assignee of a lessee is not a landholder for the purposes of the Rent Act.

I am of opinion that the appellant is not debarred from taking proceedings under the Rent Act.

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(1) 5 M. 76 (85).

1885
APRIL 1.

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8 M. 411.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Brandt.

SANKARANARAYANA (*Defendant*), *Appellant v.* KUNJAPPA (*Plaintiff*), *Respondent.** [24th March and 1st April, 1885.]

Rent Recovery Act, Section 51—Presentation of plaint -Acceptance by Court of plaint sent by post.

K sent a plaint by post to a Revenue officer, who was on tour and, in obedience to an order issued by such officer to pay batta within a certain date, presented himself and paid the amount demanded within thirty days from the date of the cause of action:

Held, that the suit was instituted within the time prescribed by Section 51 of the Rent Recovery Act—*Moparti Pitchi Naidu* v. *Vuppala Kondamma* (6 M.H.C. R. 136) approved and distinguished.

[R., 8 C.P.L.R 93 (94).]

[412] THIS was an appeal from the decree of J. W. Best, District Judge of South Canara, dated 9th August 1884, reversing the decree of K. Rama Rau, Deputy Collector of South Canara, in a summary suit brought under the Rent Recovery Act by Kunjappa against Sankaranarayanacharyar to recover damages for an alleged illegal distraint. The defendant objected that the suit was not instituted within the thirty days allowed by Section 51 of the Act.

The Deputy Collector dismissed the suit on the ground that the plaint had not been properly presented, having been sent by post—*Moparti Pitchi Naidu* v. *Vuppala Kondamma* (1). The District Judge, on appeal, held that the plaint having been accepted by the Assistant Collector, had under the circumstances been properly presented.

The defendant appealed to the High Court.

Srinivasa Rau, for appellant.

Ramachandra Rau Sahib, for respondent.

The Court (TURNER, C.J., and BRANDT, J.) delivered the following

JUDGMENTS.

TURNER, C.J.—The goods of the respondent were distrained by the appellant. The respondent thereupon went to Mangalore, a distance of forty miles from his house, to institute a suit under the Rent Act.

The Assistant Collector in charge of the taluk was absent on tour and the respondent not being able to ascertain his exact whereabouts, on the 23rd May added a statement to that effect to his petition and sent it by post to the Assistant Collector. He received in reply a notice that he was to pay batta and produce a list of witnesses within fifteen days, or his plaint would be thrown out. According to the evidence of his vakil, who is supported by the evidence of the clerk of the Assistant Collector, the respondent accompanied by his vakil presented himself at the Assistant Collector's quarters, and paid the batta on the 15th June.

It is admitted that the suit would have been in time if the plaint had been presented on that day.

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* Second Appeal 3 of 1885.

(1) 6 M.H.C.R. 136.

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From the 15th to 20th June the Assistant Collector had, according to the clerk's evidence, no time to attend to such ordinary business. He was not allowing parties or petitioners to go before him unless sent for. The Judge finds it proved that the batta **[413]** was paid by the plaintiff accompanied by his vakil on 15th June, and has held that the plaint having been accepted by the Assistant Collector, was, under the circumstances, sufficiently presented.

The presentation ought to have been made to the Assistant Collector and the Act does not state it may be sent by post. The Assistant Collector might have refused to accept it and, if he had done so, the presentation would, this Court has ruled, not have been valid; but in the present case, as the Judge has pointed out, the plaint was accepted. The plaintiff presumably under the Assistant Collector's order received notice that he was to pay batta and that if he failed to do so his plaint would be rejected. He obeyed the order. This in itself I think would have been sufficient to justify the Court in holding that, although the plaint should not have been received unless it was presented by the plaintiff or by a pleader or agent on his behalf, nevertheless, as it was accepted, the suit was sufficiently instituted. But when the plaintiff presented himself with his pleader and paid batta he must be deemed to have presented the plaint on that day, if not before, and the objection that the suit was not properly instituted was rightly overruled by the Judge.

It can hardly be contended, in view of the original defence, that the respondent had executed leases (Exhibits I, IV and V), which, the Judge holds, are not proved, that the parties dispensed with an agreement in writing. The appeal fails and must be dismissed with costs.

BRANDT, J.—In this case the distraint was made on the 16th May 1883; the petition or plaint which appears to have been written by, or on behalf of, the respondent, is dated 23rd May; it was, it seems, sent by post registered, and was no doubt received in the office of the Assistant Collector on the 26th idem: the stamp is obliterated, but on it appear what are evidently the fragments of the initials of the Assistant Collector, and the date, 26th May 1883. On the margin of the petition there are written in pencil these words—"Notice issued to produce process-fees within fifteen days, 1st June 1883"—there is no signature, nor initials to these words. The Assistant Collector's clerk deposes that a list of witnesses, which was put in by the respondent or some one on his behalf was initialled by that officer on the 20th June; the clerk says that between the 15th and 20th June the Assistant had no leisure to attend to ordinary business; that when the respondent paid his **[414]** batta his vakil, Anantayya, had also come; and that though he cannot say on what date the respondent or his vakil produced his batta and list of witnesses he believes that the plaintiff did appear and do what he was called upon to do within the 16th June, "otherwise they" (the fees?) "would not have been accepted."

Evidence in support of these statements is also given by Anantayya, plaintiff's vakil.

The District Munsif considered this evidence not very trustworthy and altogether insufficient to prove that the respondent's plaint had been in any way accepted or acted upon by the Assistant Collector as a plaint, within thirty days from the date of the cause of action; but the District Judge appears to accept it as true.

In second appeal, we are bound to take the District Judge's finding on the facts, and, assuming, as I do, that he finds in effect that the

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respondent and his vakil both appeared at the Assistant Collector's office on the 15th June in connection with and for the purpose of obtaining issue of process on the plaint sent by post, that they on that day paid batta and put in a list of witnesses as directed by the Assistant Collector, and that it was through no fault of theirs that that officer was not accessible in his Court as a Revenue Court till the 20th June, there may, in this particular case, be held to have been a sufficient presentation of a plaint for the purposes of the Act.

The decision in *Moparti Pitchi Naidu's case* (1) appears to me correct in principle, and there are in my opinion obvious reasons why petitions sent by post should not be accepted as plaints presented under the Rent Recovery Act.

I do not agree that a mere order calling on the plaintiff to pay batta, if passed on such a petition sent by post, would be sufficient to constitute acceptance of a plaint: and it is only on the assumption that the District Judge found that the respondent, with his vakil, in person appeared at the Assistant Collector's Court in connection with this summary suit before the 16th June that I concur in thinking that there was on the 15th idem what may be taken to have been a presentation of the plaint as required under the Act.

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8 M. 415.

[415] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

UNNIAN (*Defendant No. 2*), *Appellant* v. RAMA (*Plaintiff*), *Respondent*.*
[30th October, 1884, and 31st March, 1885.]

Malabar law—Kanam tenure Redemption on terms of admitted demise—Improvements —Local custom - Jenmi's right to a moiety—Arrears of rent, Jenmi's right to deduct from amount payable by him.

In a suit brought against A and B for redemption of land, alleged to have been demised to A on kanam tenure in 1874 and to be held by B under A, it was found that the demise of 1874 was invalid because it had been executed fraudulently, but inasmuch as B admitted that he was in possession under a similar demise of 1855 it was *held*, that the plaintiff was entitled to redeem on the terms of the demise admitted by B. *Kunhi Kutti Nair* v. *Kutti Maraccar* (4 M.H.C.R. 359) followed.

Local usage of Ernad, by which the jenmi on redemption of a kanam takes credit for one-half of the value of improvements effected by the kanamdar, upheld.

The right of a jenmi to deduct arrears of rent from the amount payable by him on redemption of a kanam, being a customary incident of the tenure, is not affected by the three years' period of limitation for recovery of arrears of rent.

[Overruled, 25 M. 300 (314) (**F.B.**); **F.,** 19 M. 160 (161); **D.,** 17 M. 271 (273); 18 M. 462 (463).**]**

THIS was an appeal from the decree of E. K. Krishnan, Subordinate Judge of South Malabar, confirming the decree of P. Govinda Menon, District Munsif of Ernad, in suit 215 of 1883.

The plaintiff, Rama Nambi, sued the defendants, Kathi Amma and Natuthodiyil Unnian, to recover certain land demised on kanam, together with arrears of rent from 1051 (1876), "to be set off

* S.A. 591 of 1884.

(1) 6 M.H.C.R. 136.

against a corresponding amount of the kanam advance" due by plaintiff, Rs. 177-12-0.

The rent reserved was alleged to be Rs. 10 per annum.

Defendant No. 2 denied that he held under this demise, but admitted that he held under a kanam of 1855, for Rs. 177-8-0, at an annual rent of 12 annas, and claimed Rs. 3,000 improvements.

The District Munsif found that the kanam on which the plaintiff sued was invalid on the ground of fraud, but decreed that, on payment by the plaintiff of the amount of the kanam admitted **[416]** by defendant No. 2 and one-half of the value of improvements (the other half being allowed to the jenmi in accordance with local custom) Rs. 1,031-10-3, *minus* the arrears of rent at 12 annas per annum, defendant No. 2 should surrender the land.

On appeal the Subordinate Judge confirmed this decree.

Defendant No. 2 appealed to the High Court on the following grounds:—

(1) The demise on which plaintiff brought the suit having been found to be false, the suit ought to have been dismissed.

(2) Plaintiff has not given notice to defendants to surrender the lands.

(3) Defendant No. 2 ought not to have been made liable to pay plaintiff's costs.

(4) Plaintiff's claim to more than three years' rent is barred by limitation.

(5) The indiscriminate deduction of half the value of improvements in favour of the jenmi is unwarranted by law or by the custom of the country.

Gopalan Nayar, for appellant.

Sankaran Nayar, for respondent.

The Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.) delivered the following

JUDGMENT.

It is not denied that the relation between the respondent and the appellant is that of mortgagor and mortgagee, and there is therefore no doubt that the latter was entitled to a decree for redemption. The respondent alleged that there was a renewed demise in 1049 (1874), but the appellant contended that the kanam purchased by him was that of 1030 or 1855. In so far as the mortgage debt is concerned, this contention is immaterial, as the amounts of the original and the renewed kanams are the same. Though there is a difference in the rates at which rent was payable, the Courts below were entitled to adopt the rate mentioned in the admitted demise of 1030, and the appellant cannot be prejudiced by it. As to the contention that the appellant was not called upon before suit to surrender the land, the suit itself may be regarded as a demand so far as the right of redemption is concerned. The question then is only material, if at all, in regard to costs; but as the appellant resisted the respondent's title to a **[417]** decree for redemption in this suit, on the ground that the demise sued upon was not true, and persisted in that contention on appeal, notwithstanding the decision of the High Court in special appeal No. 113 of 1869 that the mortgage relied upon by a defendant as genuine may be made the ground of a decree in the plaintiff's favour if the relief granted be substantially such as was claimed in the plaint—*Kunhi Kutti Nair* v *Kutti*

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Maraccar (1)—we cannot say that the Judge was wrong in assessing the appellant with the respondent's costs. Another objection which requires to be noticed is that the deduction of half the value of improvements in favour of the jenmi is not warranted by the custom of the country. The District Munsif has found that the deduction has been made in accordance with the usage obtaining in Ernad, where the land in suit is situated, and the Judge has virtually adopted the finding. The appellant has not shown that there was no such usage although it was open to him to have produced evidence in support of his contention, and the existence of a similar custom has been recognized in second appeal No. 30 of 1881.

The only question then which remains to be decided is whether the respondent was entitled to deduct from the kanam debt due by him the rent in arrear for more than three years. In the case before us, the respondent has been permitted to deduct from the amount due by him arrears of porapad (rent) from 1051 to 1058 inclusive, and it is argued that the claim to more than three years' rent is barred by limitation. It would clearly be so, unless, by the usage of the district, the jenmi is entitled to treat his right to deduct the arrear of rent at the date of redemption as an incident of the kanam demise. In *Shaikh Rautan* v. *Kadangot Shupan* (2), the jenmi sued to eject the kanamdar on the ground that the rent was in arrear. The Court held that the kanamdar did not forfeit his right to hold for twelve years, and that the jenmi might either sue for the rent in arrear or debit it against the mortgage amount. In *Kunju Velan* v. *Manavikrama Zamorin Raja* (3) the High Court, whilst holding that the jenmi is not entitled to oust the kanamdar for non-payment of porapad (rent), observed, that in such cases, the mortgagee is entitled to the occupation of the property for the period of twelve years from the date of the mortgage notwith-[418]standing such default, and that the proprietor may in the meantime recover the arrear by suit or take credit for the amount on paying off the kanam mortgage after the lapse of twelve years. Again, in *Krishna Mannadi* v. *Shankara Manavan* (4), the Court adverted to certain proceedings of the Sadr Court, dated the 5th August 1856, as embodying a similar opinion. These cases leave no room for doubt that in return for the term of twelve years, for which the kanamdar is entitled to occupy the property demised the jenmi is entitled either to sue for the rent in arrear or to take credit for it when the mortgage is paid off on the expiration of twelve years. The right to take credit for the arrear on the occasion of redemption is, therefore, an incident of the tenure, and as such of the kanam demise, and there can be no question of limitation. The same view has been recently expressed in *Kanna Pisharodi* v. *Kombi Achen* (5) by another Division Bench.

We are of opinion that the second appeal fails and must be dismissed with costs.

(1) 4 M.H.C.R. 359 (366). (2) 1 M.H.C.R. 112. (3) 1 M.H.C.R. 113, note.
(4) 1 M.H.C.R. 113, note. (5) 8 M. 381.

8 M. 418=9 Ind. Jur. 308.

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APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

GOPALASAMI AND OTHERS (*Defendants*), *Appellants* v. SANKARA (*Plaintiff*), *Respondent.** [31st March, 1885.]

Civil Procedure Code, Section 503—*Powers of receiver.*

In 1879 a zamindar granted a lease of part of the zamindari for twenty years, reserving a rent of 18,000 rupees per annum.

In 1881, the zamindari having been attached by a creditor, the zamindar granted a new lease in perpetuity in lieu of the former lease, reserving a rent of Rs. 12,000 a year.

A receiver of the zamindari, having subsequently been appointed with full powers under the provisions of Section 503 of the Code of Civil Procedure, sued the lessee to recover rent at the rate reserved in the first lease from 1881 :

Held, that the receiver was entitled to recover the rent claimed.

The provisions of Section 503 of the Code of Civil Procedure were intended to declare that the receiver, in respect of all property which was or could be attached, had **[419]** the powers of the owner as they existed at the time the property was brought under the orders of the Court by attachment, provided that they have not ceased by the operation of law.

[R., 34 C. 305 (317)=5 C.L.J. 270.]

THIS was an appeal from the decree of C. Ramachandra Ayyar, Subordinate Judge of Madura (East).

The plaintiff, Sankara Ayyar, receiver of the Sivaganga zamindari, sued the defendants, the sons and grandson of Kasivisvanada Nayakar, who obtained a lease of seventeen villages in the zamindari from Dorasinga Tevar, the late zamindar of Sivaganga, in 1879, to recover rent for three years from fasli 1291 (1881). The plaintiff obtained a decree for Rs. 31,816-7-10.

The defendants appealed.

The facts necessary for the purpose of this report appear from the judgment of the Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.).

Bhashyam Ayyangar and *Kalianaramayyar*, for appellants.

Hon. *Subramanyayyar*, for respondent.

JUDGMENT.

The zamindar of Sivaganga, on the 24th November 1879, executed and registered a lease of seventeen villages in the Eluvankotta taluk, being a part of his zamindari, for a term of twenty years, reserving a rent of Rs. 18,000. At that time there were several suits pending against him, and in some decrees had been obtained and had not been satisfied.

On the 26th January 1881 the whole zamindari was attached at the instance of a decree-holder in original suit 35 of 1879.

On the 9th February 1881 the zamindar granted a perpetual lease of the before-mentioned villages in substitution of the former lease, reserving an annual rent of Rs. 12,000 only, the consideration was recited to be past services ; but no evidence has been given of the existence of any necessity for a reduction of rent. Shortly after the making of this second lease, a receiver was appointed (with full powers under Section 503 of the Code of Civil Procedure); and he has brought suit to recover rent at the

* Appeal 120 of 1884.

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rate reserved under the first lease, and if the Court is of opinion that he is not entitled to receive it at that rate, then at the rate reserved by the second lease.

It appears that other decree-holders have taken out execution of their decrees, and are entitled to a rateable distribution with the decree-holder in original suit 35 of 1879 in respect of any sums realized in execution of his decree.

The appellants, the representatives of the lessee, do not deny [420] that they are liable to pay the reduced rent, but they assert that rent cannot be recovered under the first lease. They rely on the language of Section 503, Civil Procedure Code, which declares that the receiver has the powers of the owner, and they argue that as the owner would be bound by the second lease, the receiver is also bound by it. We consider the Judge has rightly overruled this objection. The Procedure Code must be read as a whole and effect given as well to the provision which prohibits alienation after attachment to the prejudice of a decree-holder as to the provisions of Section 503. The second lease is void as against the decree-holder in original suit 35 of 1879, for it was an alienation, and was, moreover, distinctly prejudicial to the interest of the decree-holder, and it could not have been intended that the provisions of Section 503 should practically give validity to such an alienation in cases in which the Court might deem it necessary to appoint a receiver. In our judgment the provisions of Section 503 were intended to declare that the receiver in respect of all property which was or could be attached had the powers of the owner as they existed at the time the property was brought under the orders of the Court, provided that they have not ceased by operation of law.

The manifest result of the lease was to prevent and hinder not only the decree-holder in original suit 35 of 1879, but also all other persons who were then suing the zamindar from obtaining satisfaction of their decrees, and it may be that on this ground the alienation might be avoided as against them; but we need not determine the point. The law which directs that the proceeds realized in execution shall be distributed will not prevent the decree-holder in original suit 35 of 1879 from insisting on the invalidity of the second lease, until his decree is satisfied.

The receiver cannot waive any right to recover what may be legally claimable without the sanction of the Court of which he is an officer.

The appeal fails and is dismissed with costs.

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8 M. 421 = 9 Ind. Jur. 463 = 1 Weir 233.

[421] APPELLATE CRIMINAL.

Before Mr. Justice Brandt.

QUEEN-EMPRESS *v.* CHENCHUGADU.* [30th April, 1885.]

Penal Code, Section 286—Probable danger to human life—Loaded gun left in open place.

C having returned to his house after dawn from watching his crops at night with a loaded gun, and finding his house-door locked, placed the gun, loaded, with the hammer down on the cap, on a cot outside his house and went for a short time to a neighbouring house.

A, the child of a neighbour, four years old, was killed by the gun exploding.

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* Criminal Revision Case 174 of 1885.

1885 APRIL 30. — APPELLATE CRIMINAL. — 8 M. 421 = 9 Ind. Jur. 463 = 1 Weir 233.

C was convicted under Section 286 of the Penal Code for negligently omitting to take order with the gun sufficient to guard against probable danger to human life:

Held, that the conviction was bad in law.

THIS was a case referred to the High Court under Section 438 of the Code of Criminal Procedure by W. F. Grahame, Sessions Judge of Cuddapah.

The case was stated as follows :—

"I am of opinion that the conviction is improper and the sentence illegal. The accused had been watching his crops with a loaded gun on the night of the 1st January. He returned home after dawn. He found his house fastened up. He placed the gun on a cot standing in the open air near his house and went away on some business. The gun was loaded and capped and the hammer was, apparently, down on the cap instead of being on half-cock. During the absence of the accused, Akki, the daughter of a neighbour, a child four years old, came to the cot and would seem to have played with the gun. At any rate the gun went off and killed the child.

"The Second-class Magistrate convicted defendant under Section 286 of the Indian Penal Code 'for his negligent conduct in omitting to take such order with his loaded gun as is sufficient to guard against any probable danger to human life.' The sentence was [422] Rs. 25 fine or thirty days' rigorous imprisonment. The case did not come to my notice till too late to interfere with the imprisonment if undergone.

"I am of opinion that the affair can only be looked on as a lamentable accident. It is possible that a man may with a sinister purpose leave a loaded gun where others may get at it, intending that their meddling with it may cause death. Had the accused in this case left his loaded gun on the cot with such intention, he might be liable to punishment, and, beyond doubt, would deserve punishment; but it would not be under Section 286 of the Indian Penal Code. The fact that there was no intention to bring about harm cannot bring the affair under Section 286. A gun, even if loaded, cannot, I think, be held to be an 'explosive substance,' such as is contemplated in the section. Taking this view of the wording of the section and of this affair, I have thought it my duty to submit the matter to the High Court."

Counsel were not instructed.

The Court (BRANDT, J.) delivered the following

JUDGMENT.

If it were proved that a man "knowingly or negligently omitted to take such order with any explosive substance in his possession as is sufficient to guard against any probable danger to human life," he would be liable to conviction under Section 286, although he had no intention to cause such probable harm.

The word "knowingly" is evidently used here advisedly and the word "intentionally" advisedly not used.

Whatever distinction there may be between "knowingly or negligently" and "rashly or negligently"—and it must be assumed that the former is purposely used in this part of the section while "rashly" is used in the first clause—consciousness is involved in both, while intention is not.

I cannot do better than refer to the elucidation (in the case of

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Nidamarti Nagabhushanam) (1) of the terms culpable rashness and culpable negligence for which we are indebted to Holloway, J. If a person omit to take precautions in respect of explosives in his possession sufficient to guard against any probable danger to human life, being conscious of the probability of danger resulting from such omission, he "knowingly" does that which under this section renders him liable to punishment; and this is sufficient for **[423]** the present purpose, without going on to consider whether something more is required to constitute rashness, or whether acting with such consciousness constitutes or includes rashness; if a person omits to take such precautions without such consciousness, he is liable, by reason of his negligence, if he "has not exercised the caution incumbent on him," and which, if he had exercised it, would have created in him the consciousness that his omission was likely to cause danger.

It appears to me, however, that this case may and should be disposed of on another ground—I will not say independently of the elements of knowledge or of negligence, for the probability of the result and the knowledge or consciousness of the probability cannot but be considered together—namely, that unless it is established that danger to human life was a probable consequence of the omission, the offence is not established. The facts found and admitted are that the accused coming home with his gun loaded and finding his house door locked, placed his gun on a cot outside the house with the hammer down on the nipple on which there was a cap, and went away for a short time to a neighbouring house. If the gun had been left at full cock the case might have been different; but there is no evidence that the hammer could be left at half cock, and the accused states that he put the hammer down on the cap for safety. There is no evidence that the gun in that position would go off easily, and it is not impossible that the child who played with it gave it a severe shock from letting it fall or otherwise, or indeed the child may have lifted the hammer and let it fall on the cap. It would no doubt have been more prudent not to have left the gun there, loaded and capped as it was, but the question is whether the accused can be held responsible for the result as a probable result; and this I think he cannot be. He might reasonably presume that a person unacquainted with the use of a gun and having no occasion to touch it would not touch it at all; that a person acquainted with the use of fire-arms would also not touch it, or that if he did so there would not be danger: and he might also reasonably presume that persons having the custody of children would exercise ordinary care in looking after them: and if reasonable caution is expected of the accused, so it must be expected of others also who are responsible for children unable to take care of **[424]** themselves. The place where the cot was is described as open ground, but it is not stated that it was public ground; from its being close to the accused's house, it is as likely as not it was in his occupation. The mother of the child and the second witness, Papaiya, no doubt say that the children of the place used to play about on this ground, but the fourth witness, Gangi Reddi, simply describes it as ground across which persons had to pass in order to get to the accused's house: and the accused describes it as ground over which there is a short cut to his house from the house of the parents of the deceased child. It cannot, I think, be held that the accused must have known or ought to have considered it to be probable that a child or children would be likely to be playing about

(1) 7 M.H.C.R. 119.

in this place and that it or they would be likely to handle or play with the gun, and that the danger which actually occurred was not such a probable danger as that he can be held responsible under Section 286. On this ground I think the conviction bad in law and do annul the same and direct that the fine, if levied, be refunded.

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APPELLATE CRIMINAL.

8 M. 424 = 9 Ind. Jur. 463 = 1 Weir 238.

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8 M. 424 = 9 Ind. Jur. 309.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

ADIMULAM (*Defendant No.* 1), *Appellant v.* PIR RAVUTHAN AND ANOTHER (*Defendant No.* 2 *and Plaintiff*), *Respondents.**
[16th and 27th April, 1885.]

Landlord and tenant—Tenant on sufferance—Limitation Act, 1877, *Sch. II, Arts.* 139, 140.

Although the English rule of law as to the nature of the possession of a tenant for a term of years, who holds over, has been adopted in British India, the rule of limitation prescribed by 3 & 4 Will. IV. c. 27, by which time begins to run against the landlord from the date of his right of entry, has not been adopted in the Indian Limitation Act, 1877.

If a tenant for years holds over in British India, time does not begin to run against the landlord until the tenancy on sufferance has been determined.

[Diss., 31 A. 514 (519) = 6 A.L.J. 584 = 3 Ind. Cas. 566; 31 M. 163 = 18 M.L.J. 26 (29) = 3 M.L.T. 256; 7 C.L.J. 615 (626); R., 22 B. 893 (897); 21 M. 153 (160) = 8 M.L.J. 92; 24 M. 246 (251) = 10 M.L.J. 415; 16 Ind. Cas. 546 (547).]

[425] THIS was an appeal from the decree of C. Ramachandrayyar, Subordinate Judge of Madura (East), reversing the decree of Venkata Rangayyar, District Munsif of Madura, in suit No. 566 of 1882.

Abdul Rahiman Ravuthan sued Adimulam Pillay and Pir Ravuthan for possession of a house sold by defendant No. 1 to plaintiff in April 1881, and for rent from that date, or for repayment of Rs. 800, purchase money, with interest by defendant No. 1.

The District Munsif decreed delivery of the house and payment of rent by defendant No. 2.

On appeal by defendant No. 2, plaintiff and defendant No. 1 being made respondents to the appeal, the Subordinate Judge reversing this decree, decreed payment of Rs. 800 and interest by defendant No. 1 to the plaintiff.

Against this decree, defendant No. 1 appealed, making plaintiff and defendant No. 2 respondents to the appeal.

The facts necessary for the purpose of this appeal are stated in the judgment of the Court (TURNER, C.J., and HUTCHINS, J.).

Srinivasa Rau, for appellant.

Bhashyam Ayyangar, for respondents.

The tenancy was for a term of seven years, which expired in 1863, and therefore the tenancy expired in 1863, Transfer of Property Act, 1882, Section 111 (*a*). Limitation began to run from that time under Article 139 of the Limitation Act, Schedule II. Article 140 excepts landlords from reversioners, as their case has already been provided for. The holding over is that of a wrong-doer, for it is not alleged or found that any rent

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* Second Appeal 162 of 1885.

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APPELLATE CIVIL.

8 M. 424= 9 Ind. Jur. 309.

was received since 1863, or that assent was otherwise given to the tenant's continuing in possession since 1863—(Transfer of Property Act, Section 116).

The relation of landlord and tenant, which was determined by effluxion of time in 1863, was, therefore, not renewed, and hence the limitation began from 1863.

Of course if a new lease by implication from year to year commenced after 1863, limitation could only begin to run from the determination of such lease.

JUDGMENT.

In this case the plaintiff in April 1881 purchased a house from defendant No. 1 for Rs. 800: the house was in the occupation of defendant No. 2, who denied the title of defendant [426] No. 1. The plaintiff brought this suit to obtain possession of the house and mesne profits, or for the recovery of his purchase-money. It is asserted that in a suit brought by one Gurusami against defendant No. 2 the latter entered into a compromise whereby it was agreed that he should hold the house as Gurusami's tenant and surrender it to him on the expiry of seven years, which expired in 1863. Defendant No. 1 alleged that Gurusami was a mere name-lender for him and assigned the house to him in 1863.

The Appellate Court dismissed the claim for possession, but decreed that the plaintiff should recover the purchase-money and interest from defendant No. 1. Defendant No. 1 has appealed. He contends that defendant No. 2 cannot deny his title or that of Gurusami under whom he claims, and that the plaintiff is not entitled to recover the purchase-money.

As to the payment of the purchase-money, the plaintiff is entitled to its return if the consideration wholly failed. But has the consideration wholly failed? The appellant asserts it has not, and although the Appellate Court held that, in the absence of a written document, the evidence that Gurusami was the benami purchaser for the plaintiff was not satisfactory, it has not decided whether or not the deed of assignment produced by the plaintiff with his application for review was genuine, as it considered the evidence would be immaterial, inasmuch as there had been adverse possession by defendant No. 2 from the date when the term created by the compromise expired.

The appellant maintains that the possession of defendant No. 2 was not adverse, that he held for a term, and on the expiry of the term remained in possession in the same character, and that his tenancy was permissive.

Where a person who has been let into or allowed to remain in possession as a tenant for a term of years holds over, he becomes a tenant by sufferance. The possession of a tenant by sufferance is not adverse to the landlord, and under the English law, until the passing of the Limitation Act, 3 & 4 Will. IV, c. 27, limitation would not have begun to run against the landlord until the tenancy had determined. It might be determined by the act of the landlord, who by assent might convert it into a tenancy at will or by dissent make the continuance in possession tortious. Or it might [427] be determined without the landlord's intervention by the transference of possession to a third party; for having no title the tenant on sufferance could convey none. For the same reason, if a tenant by sufferance dies and his representative enters and holds on, he holds as a trespasser.

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The Statute 3 & 4 Will. IV, c. 27, effected however a change in the Law of Limitation and debarred the landlord, who was entitled to the reversion on the expiry of the term, from maintaining suit unless he instituted proceedings within twenty years from the date when the right to enter accrued to him. The English rule of law as to the nature of the possession of a tenant who holds over after the expiry of a term has been adopted in this country; but the Indian Law of Limitation differs essentially from that of the present English Law with respect to such tenancies. By Article 139, Act XV of 1877, the landlord has a right to sue to recover possession from a tenant any time within twelve years from the determination of the tenancy. It is for the person who resists the right to show that the tenancy has determined. All that is shown in this case is that the tenancy for the term has determined; for aught that appears, the tenancy by sufferance subsisted up to the date of suit.

That the Legislature intended this result is indicated by the following article, which provides that the twelve years allowed for a suit to a remainder-man or reversioner (*other than a landlord*) shall run from the date when his estate falls into possession. We shall set aside the decree and direct a rehearing of the appeal, when the Appellate Court may admit the alleged assignment if it is satisfied that there are sufficient grounds for so doing. The costs of this appeal will abide and follow the result.

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8 M. 428 = 1 Weir 708.

[428] APPELLATE CRIMINAL.

Before Mr. Justice Brandt.

QUEEN-EMPRESS *v.* LALLA AND OTHERS.* [20th May, 1885.]

Act I of 1866 (Madras)—Contonment Rules, Chapter IV, Section 16—Failure to report small-pox, not punishable

Failure by a householder to report a case of small-pox in his house, as directed by Section 16 of Chapter IV of the Cantonment Act Rules, is not punishable under Madras Act I of 1866.

THIS case, with two others of a similar nature, was referred to the High Court under Section 438 of the Code of Criminal Procedure by H. St. A. Goodrich, District Magistrate of Chingleput.

The facts were stated as follows:—

"The accused were charged with having failed to report an attack of small-pox on the inmates in their respective houses, and convicted under Section 16, Chapter IV, Cantonment Rules, framed under Section 19, Military Cantonment Act, I of 1866.

"It would appear that no provision for punishment of breaches of the rules contained in this chapter exists, though breaches of the rules contained in the third, fifth and sixth chapters are made punishable. The punishments awarded seem to have no legal sanction, and the cases are submitted for the orders of the Honorable High Court."

Counsel were not instructed.

The Court (BRANDT, J.) delivered the following

JUDGMENT.

The District Magistrate appears to be right.

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* Criminal Revision Cases 236, 237 and 238 of 1885.

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Chapter III. Section 1 of the Cantonment Rules, renders liable to the penalties provided in Clause XI, Section 19 of Act I of 1866 (Madras), any person who, within cantonment limits, shall commit a breach of any of the rules and regulations *contained in that chapter*, but [429] Chapter IV, which appears to be directory only, and to be principally, indeed almost entirely, concerned with the duties of the Cantonment Magistrate, contains no such provision. No penalty, apparently, attaches to failure on the part of a private individual to report to the Cantoment Magistrate the appearance of an epidemic or contagious disease. The convictions must be, and they are, quashed, and the fines will be refunded.

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8 M. 429.

APPELLATE CRIMINAL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Brandt.

WILSON *v.* THE PRESIDENT OF THE MUNICIPAL COMMISSION, MADRAS.* [2nd March, 1885.]

City of Madras Municipal Acts (V of 1878 *and I of* 1884*), Sections* 103, 105, *Schedule A, Class I.*

Although the tax levied on professions under Section 103 of the City of Madras Municipal Act, 1878, is described as a yearly tax, a half-yearly liability is incurred in respect thereof by the tax-payer.

W having been assessed under Class I, Schedule A of Act V of 1878, Madras, to profession tax at the yearly rate of Rs. 150, paid a moiety thereof for the first half of the year 1884 as provided in Section 105 of the said Act. When the tax for the second half-year became due, Madras Act I of 1884 had come into force and W was assessed for the second half of the year under Class I of Schedule A of that Act at Rs. 125, being a moiety of the yearly tax on the same class:

Held, that the assessment was legal.

THIS was a case stated and referred for the decision of the High Court by W. M. Scharlieb and T. V. Ponnusami Pillai, Presidency Magistrates of Madras, under Section 193 of the City of Madras Municipal Act (No. I of 1884), at the request of the President of the Municipal Commission of the town of Madras.

The case was stated in the following judgment:—

"Mr. C.W. Wilson, practising as an Attorney and Solicitor in Madras, appeals to this Court under Section 192 of the new Madras Municipal Act I of 1884 from the decison of the President of the [430] Madras Municipality, passed under Section 190, taxing him with the sum of Rs. 125 for the *second* half of the year 1884 under class I, Schedule A; whereas he had been assessed at the beginning of the year under the former Act V of 1878 then in force under the same class with the sum of Rs. 150 for the whole year and had paid the moiety thereof, *viz.*, Rs. 75, for the first half of the year. The new Act I of 1884 came into force on the 20th March of that year; and the tax for the year, in the class in which Mr. Wilson is placed, has been raised from Rs. 150 under Schedule A, class I of the former Act for practising Barristers, Attorneys, &c., to Rs. 250 for such professional gentlemen under Schedule A, Class I of the new Act. The facts in this case are all admitted.

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* Referred Case 1 of 1885.

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"Mr. *Shephard*, for Mr. Wilson, contends that the profession tax, provided for by Section 103 of the former and present Acts, is a tax that is assessed for the year, and by Section 105 is made payable in *two equal moieties*, one for each half of the year; and that having been assessed for the year under Act V of 1878 then in force, and having actually paid one moiety thereof, Mr. Wilson could not afterwards be taxed under a new Act for the second half-year and be made to pay the moiety of an enhanced tax. In support of this contention, Mr. *Shephard* refers to the Schedule itself, which is clearly made for the year and assesses the individual for the year, whereas Schedules B and C, which relate to the taxes payable on vehicles and animals, are expressly made to provide for such taxation half yearly. The basis of the contention that the President of the Municipality had no right to introduce a new tax for the second half-year under a new Act is that Section 2 of this new Act, in repealing the former Act, expressly kept it alive so far as it related to any tax already assessed under it, that is, before the coming into operation of the new Act; and that, as a matter of fact, Mr. Wilson had been assessed his profession tax at Rs. 150 for the year 1884 before the new Act came into operation.

"Mr. *Grant*, for the President of the Municipality, contends, firstly, that Mr. Wilson has no right to appeal, because, if he preferred his appeal under the former Act, that Act had been swept away, and if he appealed under the new Act, he had no ground of appeal, because the tax imposed upon him was the right tax under the new Act; secondly, Mr. *Grant* contends that the word *assess*, or *assessment*, is not applicable to the levy of tax on **[431]** professions or salaries, but is, on the contrary, systematically used in respect only to taxes for water and lighting, and to taxes on animals and vehicles; that even if the word *assess* did apply to profession taxation, the assessment was a half-yearly operation; because, under Section 105, the person to be taxed becomes liable to pay each half-year's tax only after the exercise of his profession for sixty days from the beginning of each half-year and that, under Section 104, Clause 2, the President had power to revise his classification from time to time.

"As to the first objection that Mr. Wilson has no right of appeal, we find that he files his appeal under Section 192 of the new Act I of 1884. That Section gives him the right to appeal to two Magistrates from any decision of the President of the Municipality passed under Section 190; and under that Section, the President had decided that Mr. Wilson was to pay for the second half of 1884 the moiety of Rs. 250 prescribed by the new Act I of 1884. Mr. Wilson contends that the President of the Municipality had no right to do this, as, under Section 2 of the new Act, the tax with which he had already been assessed for the year under the repealed Act was the tax to govern the year. In effect Mr. Wilson says, "you have no right to tax me under Section 190 of the new Act, because Section 2 of that Act keeps the old Act alive for me so far as my profession tax for the year 1884 is concerned." We hold, in respect to this contention, that Mr. Wilson has clearly a right of appeal.

"As to the second objection that the term *assess*, or *assessment*, does not apply to taxes on professions and salaries, we find that, as a matter of fact, the term *assess* is actually used in Schedule A, both in the former as well as in the present Act, wherein the rates of such taxes are fixed and determined. *Vide* Classes II, III, &c., where, after the words "practising Barristers, Attorneys," &c., the words "not assessed under Class I" or Class II, or Class III, as the case may be, follow. Moreover, in

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Section 118, both of the old and new Act, the word *assessment* is not only used in relation to taxes on professions, trades, and calling, but is also used in relation to taxes on fixed salaries and incomes even. We cannot understand on what ground it can be said that the term *assess* or *assessment*, is inapplicable to the tax on professions. To us the term conveys the idea of a previous estimate or calculation on which the tax is rated or fixed; and if that be so, as we believe it is, then we agree [432] with Mr. *Shephard* that the term is peculiarly applicable to the profession tax, because the earnings of professional men are not fixed and invariable, but vary from time to time according to circumstances and the amount of business coming in to them.

"The last argument taken is that, even if the term *assess* were to apply, the President had power to assess half yearly, because the tax is payable half yearly, and Section 104 empowers the President to revise his classification from time to time. There is no doubt that the President has power to revise a man's classification. For instance, he might, on further and fuller information placed before him, find that the man ought to be placed in the first and not in the second or third class, and *vice versa*; and he can accordingly remove a man from one class to another. But that is not the present case. Here it is not a case of revising at all, or re-classifying a man. It is keeping him in the same class, but substituting for the second half of the year under a new Act a tax of a different amount, in place of that with which he had been assessed in the same year and the moiety of which he had already paid for the first half. There would be no alternative to doing so if the new Act had absolutely repealed the former Act and had simply substituted itself in its place. Instead of doing so, it keeps the former Act alive for certain purposes until the close of the year; for Section 2 in repealing the former Act V of 1878 repeals it, among other things, "except as to any tax *assessed* before this Act comes into operation." Thus, the whole question comes to this—was Mr. Wilson's profession tax assessed for the year 1884 before the new Act came into operation; and was it assessed for the year, or only the half-year?

"To answer this question, we must first look at the terms of Section 103, both of the former and present Act, by which the obligation to pay the profession tax is created. We find that the words used are these:—'If the Commissioners determine to levy a tax on arts, professions, trades, and callings, *every person*, who within the city exercises any one or more of the arts, professions, trades, and callings specified in Schedule A, *shall pay*, in respect thereof, *the sum specified in the said schedule as payable* by persons of the class in which such person is placed.' The profession tax payer is thus called upon to pay—What? the sum specified in Schedule A as payable by persons of the class in which he is placed.

[433] "If we turn to Schedule A, we find that the profession tax payers are divided into classes from I to VII; that certain specified amounts are set down as payable by each such class; and that those amounts are payable 'yearly'—not half-yearly as in the case of taxes on vehicles and animals (Schedules B and C.) Taking Section 103 and Schedule A together, it follows, that when the section commands that the tax payer shall pay the amount specified in the schedule, such tax payer must pay the amounts which the schedule specifies he shall pay '*yearly*.' The question then arises, how comes it then that, as a matter of practice, the tax payer pays his profession tax by two instalments—one half for each half year? This comes about by the operation of Section 105, which provides that 'the sums payable under Section 103 shall be paid in *two equal moieties*,

one for each half of the year.' The very terms used in Section 105 denote that the tax payable under Section 103, is a yearly tax; for those terms provide that such tax shall be paid in *two equal moieties*, one for each half year. The conclusion is inevitable that the tax payable is a yearly tax; but that the municipality have no right to demand it of the tax-payer, except in two equal instalments after two months of each half year have expired. And this provision has doubtless been made out of pure consideration for the professional man, to protect him from the possible hardship of being forced to meet the entire demand by one payment at one time.

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"It is admitted that Mr. Wilson was required to pay, and did pay Rs. 75 for the first half of 1884. He was thus placed in the first class of schedule A of the former Act V of 1878 then in force, and must necessarily, therefore, have been *assessed* for the year 1884 under that Act; and if *assessed* under that Act, such assessment was kept alive until the end of the year 1884 by the operation of Section 2 of the new Act, and he could not be called upon to pay more than Rs. 75 for the second half of that year. To call upon him to pay Rs. 125 for the second half of the year is entirely out of keeping with the terms of Section 105, which require that the year's tax should be paid in two equal moieties; and, certainly, Rs. 75 and Rs. 125 cannot by any possible process be regarded as equal moieties. As Mr. *Shephard* observed, the object of the Legislature is to preserve the continuity of things; and when the Legislature passed a new enactment, the Legislature, no doubt, intended **[434]** that it should be applied, so far as it could be applied, without disturbing things already set on foot; and thus we find that Section 2 of the new Act repeals the former Act, except for things already done or proceedings already taken under it.

"Such being our view of the question before us, we hold that the President of the Muncipality was not well founded in deciding that Mr. Wilson was obliged, under the new Act, to pay Rs. 125 as the half tax of his class for the second half of 1884; and we accordingly direct that the difference between that amount and the half tax of Rs. 75 properly chargeable to him for the second half of 1884, *viz.*, Rs. 50, be refunded to him."

Mr. *Shephard*, for Mr. Wilson.

Mr. *Grant*, for the Municipality.

The Court (TURNER, C.J., and BRANDT, J.) delivered the following judgments:—

JUDGMENTS.

TURNER, C. J.—The facts of this case are as follows:—Act V of 1878 (Madras) Section 101, empowered the Municipal Commissioners for the City of Madras, with the approval of the Governor in Council, to raise funds for the purposes of the Act from all or any one of the sources mentioned in the preceding section, including, among others, a tax on professions, trades, and callings.

Section 103 provided that, if the Commissioners determined to levy a tax on professions and callings, any person, who exercised within the city any profession or calling, should pay in respect thereof the sum specified in the schedule as payable by persons of the class in which such person might be placed.

The schedule referred to specified certain sums as payable yearly by persons placed in several classes as liable to the tax on professions and callings.

The 105th Section of the Act declared that the sums payable under Section 103 should be paid in equal moieties, one for each half of the

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year; but that the moiety payable in respect of each half-year should be payable only after the person liable to pay it had for sixty days in such half-year exercised such profession or calling. Although then the Commissioners were empowered to levy a yearly tax, and its payment was prescribed in equal moieties, the liability of the tax-payer was distinctly limited to each half-year; and by Sections 106, 189, and 190 a person who had omitted to pay the tax, and been served with a notice requiring him to pay it, might, in [435] any half-year within a time specified, complain or apply for the revision of the classification or tax.

The Act did not prescribe that the approval of Government, required by Section 101 as a condition of the exercise of the power of taxation by the Commissioners, should be sought or obtained in any particular form or any particular seasons.

In order to secure to the Government some control over municipal expenditure, the 85th and following sections prescribed that budgets should be submitted annually to the Governor in Council containing an estimate of the available municipal income, and an estimate of expenditure as approved by the Commissioners.

While the Act intended that the Municipal Commissioners should submit a budget in anticipation of sanction yearly, it also empowered them to submit, at any time, a supplemental budget which might contain apparently whatever might have been contained in the original budget and might have been dealt with by the Governor in Council in like manner as the original budget.

When Act I of 1884 (Madras) came into force, proposals had been submitted and sanctioned in accordance with the provisions of Act V of 1878, and under Section 2 of Act I of 1884 the taxes so sanctioned and imposed might clearly have been collected as imposed and assessed under Act V of 1878. But by Act I of 1884 the Commissioners had like power as under Act V of 1878 to send in a supplemental budget, and a proposal for taxation was submitted and was sanctioned when the Act I of 1884 had come into force.

That Act authorized collection of a higher tax on professions, trades, arts and callings than under the former Act, and it is difficult to see how it can be contended that the Commissioners had not power to propose, and Government to sanction, collection of the tax up to the limit allowed by law at the time the proposal was made.

Let us assume that the Commissioners had made no proposal in their budget for 1884 (which budget should have been submitted before the close of 1883) for collection of the tax on arts, trades, and professions; could it be said that the Commissioners might not by a supplemental budget have, in May 1884, proposed the collection of the tax also in addition to the taxes proposed by them in the original budget? Clearly they could: and if they could, they undoubtedly might do so up to the limit allowed by the law then in force.

[436] And this appears to be an answer to the argument founded on the provision in the Act of 1878 and in the corresponding Section 105 of the Act of 1884 that payment of the professional tax is to be made "in two equal moieties, one for each half of the year"; that although the tax is described as yearly tax, the tax-payer incurs only a half-yearly liability. If he does not carry on his profession in the first half of the year, he is liable to pay the tax only for the second half-year. If, having carried on his profession during the first half-year, he ceases to do so, he cannot be charged with the tax for the second half-year. Moreover, if the tax had

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been originally proposed in a supplemental budget, although Government might possibly have sanctioned its imposition for the whole year, it obviously would have been more fair for the tax-payers that Government should have sanctioned it only for the half-year which was about to commence.

If originally the Municipal Commissioners had proposed and Government had sanctioned a rate on houses at half the maximum rate allowed under the Act, they might respectively have proposed and sanctioned the collection of the whole rates for the second half-year.

The provisions relating to supplemental budgets are not limited to any particular time; the Municipal Commissioners appear to have been left unfettered in this respect in order to enable them to meet any emergency occasioned either by a failure in an anticipated source of income or an unexpected expenditure. The order of Government, dated the 9th January 1884, passed upon the budget for 1884, contemplated the allowance of the Act which received the sanction of the Governor in Council the day on which the order was passed, and suggested the submission of a supplemental budget in order to give the Municipal Commissioners the benefit of the new tax which the new law proposed to allow. In admitting a proposal to collect the professional tax at the higher rate allowed by the amending Act the Commissioners acted on this suggestion and the Government accorded the necessary sanction.

The Magistrates' order directing the refund to Mr. Wilson of the difference between the sum claimed under the Act of 1884 for the second half year and the sum which would have been payable under the Act of 1878 for that half-year if the latter Act had remained in force must then be set aside.

[437] Although we have no discretion to deal with the question of costs, I think we are justified in expressing an opinion to the effect that the case being one of considerable public importance, and the question of law involved being by no means easy of disposal, an order directing each party to bear their own respective costs would probably not be improper.

BRANDT, J.—I agreed in the conclusion arrived at by the learned Chief Justice and in the observations as to the costs in these proceedings, but I should have preferred to deliver a written judgment, and wish to record the reasons which lead me to conclude that the view taken by the Magistrates making the reference is not in my opinion correct.

It appears from the Municipal Acts under consideration that the Legislature intended that a budget for the ensuing year, "containing an estimate of the available municipal income, an estimate of expenditure as approved by the Commissioners; and proposals as to the amount of taxes necessary to be levied......for the purpose of meeting such expenditure in the next ensuing year of municipal taxation," should be submitted to Government in sufficient time to allow the Governor in Council to consider it and to "pass, reject or modify all or any of the items" entered in it "or to add thereto any items" before the commencement of the year for which the budget was prepared.

A budget for 1884 was submitted before the close of 1883 and was approved generally, and the levy during the year 1884 of the taxes proposed was sanctioned, but provisionally only, as it would appear, with reference to the probability of the new Act (I of 1884), which had received the assent of the Governor in Council, taking effect during the year; at all events the Government expressed a wish or directed that "a supplemental budget be sumitted when the new Act takes effect"

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(see order of the Government of Madras, dated 9th January 1884, No. 41 Financial Department).

It is not necessary to consider the result if the Commissioners had decided not to submit a supplemental budget, for, on the 21st May 1884, they proposed to levy during the then current year taxes similar to those already sanctioned in the budget, but at the rates and under the authority of the Act of 1884 which had by that time become law, and on the 4th June 1884, Government sanctioned under Section 99 of Act I of 1884 the levy of the taxes **[438]** proposed by the Commissioners (see notification in the *Fort Saint George Gazette* of the 10th June 1884, p. 356).

To support the conclusion arrived at by the Magistrates, it must be shown that the Governor in Council had no power to sanction the levy of, and the Municipal Commissioners no power with such sanction to levy, the tax taken from Mr. Wilson for, and in respect of, the second half-year of 1884.

The budget for 1884 passed under the Act of 1878 remained, under the provisions of Section 2 of Act I of 1884, the budget for the year 1884, but the latter Act authorized the levy of taxes at the rates specified in the schedules appended to it; and under Section 99 of the Act it was open to the Commissioners "with the approval of Government" (which they obtained) "to raise the funds required for the purposes of the Act from all or any of the sources specified in section 98" at rates not exceeding those set out in the schedules; and it cannot, in my opinion, be held that the levy of the taxes authorized under the Act of 1884 is illegal by reason of the proposals of the Commissioners to levy, for the remainder of the year or for the second half of the year 1884, taxes already sanctioned for the year, but at the rates authorized under Act I of 1884, not having been submitted in the precise form of a supplemental budget (if this was so in fact); or by reason of the sanction of Government to those proposals not having been accorded in terms as sanction in respect of a supplemental budget. It can make no practical difference if instead of re-printing the whole original budget, the only alteration made being entries of the higher rates allowed in some cases in the schedules to the Act of 1884, the Commissioners asked for the sanction in the form of a proposal to levy the taxes, and the Government sanctioned the levy thereof, under the new Act, the estimated receipts and expenditure remaining in other respects the same as before.

As to the argument that the profession tax is a yearly tax, assessed once for all and payable in two equal moieties, and that on this account it was not legal for the Commissioners to charge Mr. Wilson the rate payable by persons placed in Class I in Schedule A referred to in Section 103 of the Act of 1884, it appears to me to present little or no difficulty.

As observed by the learned Chief Justice the profession tax is a yearly tax, but with a half-yearly liability.

[439] Mr. Wilson was no doubt placed for the year 1884, once for all, in Class I in Schedule A under the Act of 1878, and (putting aside all consideration of revision of classification, for he is placed in the same class under the Act of 1884) had the Act of 1878 remained in force and had he exercised his profession during the second half-year for the period specified in Section 105, he would have been liable to pay for the second half year of 1884 a sum equal in amount to that paid by him for the first half-year: but Act I of 1884 became law before the second half commenced, and under it gentlemen placed in the class in which he was placed for the year were chargeable at a higher rate;

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and it appears to me that the intention of Sections 103 and 105 of the two Acts is fully carried out, so far as the interests of the tax-payer are concerned, in this manner: Mr. A is making and is classed as making 1,000 rupees a month at the beginning of 1884; before the end of the first half-year he is making 5,000 rupees a month, but he is classed for the whole year, and the tax assessable or assessed on him is so much; without revision of classification at all events he cannot be called on to pay more during the second half-year, and it is extremely doubtful if such revision could be made, if indeed not clear that it could not; but the President and Commissioners might certainly, if they saw reason, revise the classification in favour of Mr. A, if he could show at the beginning of the second half-year that his income had fallen to Rs. 100 a month; in which case the sum payable by him during the second half-year would not be a "moiety" equal to the sum paid by him for the first half-year, so that the mere fact that the two sums happen not to be "equal moieties" in the case before us cannot determine the question; by parity of reasoning it might be argued that professional tax could not be collected for the second half of a year from any one who had not been assessed for the whole year, because he had not paid any "moiety" for the first half-year.

The Acts did not perhaps contemplate a case precisely similar to that before us, but it cannot on that account be held that the collection of the tax authorized by the law in force when it was collected was illegal.

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8 M. 440=9 Ind. Jur. 349.

[440] APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

VIRASANGAPPA (*Plaintiff*), *Appellant v.* RUDRAPPA AND ANOTHER (*Defendants*), *Respondents.** [30th March, 1885.]

Hindu Law—Lingaits—Marriage—Desertion of wife—Re-marriage of wife valid.

According to custom obtaining among the Lingaits of South Canara, the re-marriage of a wife deserted by her husband is valid.

[R., 19 B. 428 (453).]

THIS was an appeal from the decree of C. Venkoba Rau, Subordinate Judge of South Canara, in suit 33 of 1883.

The plaintiff, Virasangappa Shetti, sued the defendants, Bangalore Rudrappa Shetti and Kusava, a minor, to recover a portion of the estate of his maternal grandfather, valued at Rs. 11,500 in the possession of the defendants.

The plaintiff alleged that his maternal grandfather's estate was inherited by his three daughters—Kusava, Malakama, and Doddava (plaintiff's mother). That Kusava, who survived her sisters, died in 1877, after having made over the greater portion of the land belonging to the estate to plaintiff. That the property now sued for was in the possession of Nanjamma, daughter of Malakama, till her death in 1883, having been allowed to her and to her daughter Rudrava, since deceased, for maintenance.

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* Appeal 112 of 1884.

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That Nanjamma married plaintiff's father after the death of Doddava, and Rudrava was the issue of the marriage. That Kusava, defendant No. 2, was the illegitimate daughter of Rudrava, and defendant No. 1 was her putative father.

Plaintiff as daughter's son claimed to be entitled to the property in preference to defendant No. 2.

Defendant No. 1 pleaded that plaintiff had no right to the property, it having been assigned to Nanjamma and Rudrava [441] absolutely in 1860 by a family partition deed. That Nanjamma and Rudrava having died, Kusava was the sole heir to the property.

That Kusava was the legitimate daughter of Rudrava and himself, born in lawful wedlock, according to the custom of the caste (Lingaits).

That although Rudrava, prior to her marriage with himself, had been betrothed to one Kottur Rudrappa, that marriage had not been consummated, Kottur Rudrappa having disappeared for twenty years.

The Subordinate Judge found that in 1860 the property sued for was assigned absolutely to Nanjamma and Rudrava and their descendants, and not for maintenance only. Upon the other issues raised in the suit the material portion of his judgment was as follows:—

"The third, fourth, and fifth issues have to be considered together. These raise the questions as to the legitimacy of defendant No. 2, and as to her right to retain the properties in question as against plaintiff. The decision of the first question involves the consideration of the subordinate questions (1) whether defendant No. 1 married the late Rudrava, (2) whether the said marriage was legalised by the custom of the caste to which the parties belong. It is clear that Rudrava was betrothed to Kottur Rudrappa, and though there was no consummation of marriage between them, yet, for all legal intents and purposes, he was her husband. This marriage took place eighteen years ago when Rudrava was about twelve or thirteen years old. The husband of this marriage is alive. Plaintiff's vakil's contention is that, assuming defendant No. 1 went through a form of marriage with Rudrava, it was in fact no marriage, and that defendant No. 2, the issue of that marriage, is illegitimate, being the fruit of an adulterous intercourse. It is admitted that among Lingaits widow marriage prevails, but it is said to be confined to lower orders. Defendant's contention is that the second marriage of a wife forsaken by the first husband is allowed among Lingaits; that such a marriage is known as Serai Udiki * as distinguished from the Lagna or Dhara, the first marriage; that defendant No. 1 was married to Rudrava in the Serai Udiki form; that plaintiff and all the members of the [442] family and the caste recognised the marriage; and that defendant No. 2 is therefore legitimate and is entitled to the plaint properties in preference to plaintiff. In order to arrive at a conclusion on the several points which are involved in the consideration of these questions, it seems necessary first to see whether the custom contended for is made out. The *onus* of showing the existence of the custom is on defendants. According to law and the decisions, the usage asserted must be established by 'clear and unambiguous evidence, and it must be shown that it is exercised in pursuance of a custom understood to have the force of law, and not to be a merely repeated violation of law'—*Vishnu* v. *Krishnan* (1). Plaintiff says in his deposition before the District Court that Serai Udiki is a widow

* Giving a cloth.

(1) 7 M. 3 (10).

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re-marriage; his seventh witness, Sivappaya, describes it as a re-marriage of a wife deserted by the husband, and the ceremony consists in tying a tali, and giving a new cloth to the woman. This is exactly the description which has been given by the defendant's side. Defendant's first witness is the head of a Lingait mutt; he deposes to the custom; to the marriage of defendant No. 1 with Rudrava in accordance with that custom; to his knowledge of other instances in the cases of defendant's second witness Rudraya and Nanjanna of Ullal. Second witness, Rudraya, says he has married Puttani in Serai Udiki form This Puttani was first married to Siddhaya, and, after his abandonment of her, she married second witness and has children by him. He and his wife and children live in a mutt and mix with society. This man's instance is a well-authenticated one. His children were initiated in the religious order by a Swami of the Lingait class in the same way as children of Dhara or regular marriages. He also proves Nanjanna's Serai Udiki marriage with sister of Basavappa. His brother attended the marriage. Nanjanna's Serai Udiki marriage is also confirmed by the testimony of plaintiff's ninth witness, who says that the children of Nanjanna, born of such marriage, are received in society and in mutts and are allowed to mess with the members of the caste. Third witness is also the head of a mutt, and gives more instances of the re-marriage of widows than of wives. His knowledge is partly derived from hearsay and partly from the couple living together [443] as husband and wife. In matters of this kind hearsay evidence like tradition may, I think, be received. Direct evidence of such marriages is not always possible, and one of the ways in which they may be proved is from the manner of their living and from the way in which they are treated by the neighbours. Fourth witness married a widow in Serai Udiki form. Fifth witness deposes to first defendant's Serai Udiki marriage with Rudrava and to the prevalence of custom in caste. Sixth witness deposes to the custom and gives an instance in his own family of a wife deserted marrying again in the lifetime of her husband. He knew her desertion by her first husband, and he heard of her Serai Udiki from his brother-in-law.

"From the testimony on plaintiff's side, it appears that widow and wife re-marriages are put on the same footing, and that among the lower orders the practice of Serai Udiki marriage does obtain. Almost all the plaintiff's witnesses who are Lingaits, admit the prevalence of the custom of wife and widow re-marriages, but qualify their evidence by saying that it does not take place in their caste or in that of Melpavada or Dhulpavada, to which caste or sub-division plaintiff belongs.

"The Lingaits are declared by the Bombay High Court to be Sudras(1). This class is probably more numerous in the Bombay Presidency than in this district, where the Lingait population is comparatively small. It numbered 708 in the census of 1871. In the recent census the figure does not appear separately, as it seems the class has been put under the head of Sivites. It may be that in this class, as elsewhere, there exists among Sudras various sub-divisions of the caste, but what those sub-divisions are—which is higher and which is lower, and in which class the custom does or does not prevail—are not clearly shown. One witness says plaintiff belongs to Banijiga caste, another says he is a Melpavada, and a third says he is a Dhulpavada. It appears, however, that Ayyachari class is superior to these classes, being a purohit or priestly

(1) See Wilson's Glossary—Lingait.

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class; yet in this class we find widow marriages to be of frequent occurrence; and we also find that in the Banijiga class, a wife re-marriage has taken place. Puttani's father is a Banijiga, and her re-marriage with Rudranna, which is a living instance, **[444]** shows that in the caste or class to which plaintiff belongs this custom prevails. In respect to the vague statements of witnesses that the custom prevails only in the lower classes, and not in the higher, they should be received with caution, seeing that some of them were unwilling to speak to instances in higher classes to which their attention was directed, and in which either they took part or which, in the ordinary course of things, have come to their knowledge.

"According to the theory of the founder, Basava, of this sect, caste distinctions were unworthy of acceptance, and, therefore, he abolished caste and other Brahmanical observances. A man of low birth may become a Lingait as well as the highest caste Brahman. Brahmans who have joined this sect are termed Aradhayas. (These abound in Northern Circars.) They do not discard the sacred thread and are consequently looked upon by ordinary Jangams, who have foresworn caste, as idolaters —(Dr. Cornish's Census Report, 1871). He also describes what is Jangam, Lingam, and Stanara Lingam. In Mr. MacIver's report in the census of 1881 he says that the question of status among Sudras is hopeless; and he adds that the test of social pre-eminence as a guide to grading the castes is impracticable.

"The custom alleged may doubtless be at variance with the general Hindu law. If the deviation from the general law has not been received with repugnance, and if it found favour with the classes affected by its operation, I cannot see why it should not be received as a usage recognised by the community among whom it prevails; the usage accepted by the community and acted upon may become a valid custom. No written law has been referred to in this case as governing the customs of this class; but the instances shown in the evidence and the consciousness of the people seem to prove the existence in the class of the custom of wife remarriage in the case of desertion by the first husband. It is alleged that the evidence to prove custom is insufficient. From the very nature of things, wife re-marriages must of necessity be fewer than widow marriages. Both are exceptions to the general rule, and if one is common and the other rare, it does not necessarily go to negative the custom, if we bear in mind that the class in which this custom prevails is comparatively small in this district. From the evidence of plaintiff's third witness, the father **[445]** of Kottur Rudrappa, it is clear that the custom prevails in the Bellary district. There seems to be no learned men, or men of note in this class, who can speak with authority on the customs and practices of this sect of Sivites. Defendant's first witness is the only learned priest who seems to know something of the doctrines of his sect and of the rites and the ceremonies to be performed. He said he had also heard of the existence of the custom from his father and a spiritual teacher, Rudrappa Sannyasi, who is admitted in the evidence to have been a learned man of note and an authority in the caste rules and customs. This gentleman's presence at first defendant's marriage with Rudrava must be taken as sufficient to show that the marriage was sanctioned by custom. This witness is said to be interested in first defendant. I am unable to say so, and I think from his deportment that his evidence is fully reliable. I also find nothing suspicious in the testimony of defendant's other witnesses, and this, coupled with the evidence on plaintiff's side, and the acts and conduct

of the parties, and the whole taken together lead to no other conclusion than that the existence of the custom is sufficiently made out. These customs, which may be at variance with the general law, seem to be influenced a good deal by the surroundings. In this district, which by its isolated position still retains many primitive customs and usages, we find the Jains, who recognize no divine authority in the Vedas, and do not practise the Sradhas or ceremonies for the dead, following the Aliyasantana law and worshipping Bhuts. (Devil-worship is very common in this district.) The adoption of sister's sons by the Nambudris of Malabar may probably have had its origin in the customs of Nayars. It seems that in places which were not influenced by Brahmanical laws, communities preserved their customs and usages, and if there was any change perceived, or attempted, as for instance in Malabar, to reform the marriage and other laws, it was owing to the influences of education and civilization which are now steadily permeating through several conditions of Hindu society. Mr. Mayne in his Hindu Law, s. 87, says that among Jats, a wife who has been deserted or put away by her husband may marry again, and will have all the rights of a lawful wife. In Western India Pat and Natra marriages prevail, and the 'right to a divorce and second marriage has been frequently affirmed by [446] the Bombay Courts.' He refers to other classes in South India who follow these customs. In Steele's Hindu Law and Customs he observes that one of the points which is at variance with law and custom is the custom of a second and inferior marriage allowed to wives and widows in many castes. He mentions Nika, Pat, Natra and Oorkee (should be 'Udiki') as the inferior marriages allowed to wives and widows under certain circumstances. In Bengal, there appears to be Sagai and Shanga marriages corresponding to the Udiki in this case—*Kally Churn Shaw* v. *Dukhee Bibee* (1), *Hurry Churn Doss* v. *Nimai Chand Keyal* (2). These decisions show that the marriage according to the custom of a particular caste is sufficient. In *Kudcmee Dossee* v. *Joteeram Kolita* (3), it was held that divorce, though not contemplated by Hindu Law, yet, if it were a custom in the place, would have the force of law. If, therefore, a particular usage exists in a particular class or place, it should be respected, though it may be repugnant to Hindu Law. The plaintiff's vakil relies on the decision reported at *Rahi* v. *Govind Valad Teja* (4). The High Court held that the sons of a Punarbhu (twice-married woman) by a duly contracted Pat marriage are legitimate, and, as to the right of inheritance and extent of shares, rank on a par with the sons by Lagna marriage. In the present case the evidence is uniform as to the right of Serai Udiki children being on a par with the right of children by Dhara marriage. In the case above quoted it was held that, as the wife did not receive a 'chor chiti' (release) from her first husband who was then living, or obtained any other sanction of her Pat, the intercourse between the wife and second husband was adulterous. In the present case it is true there was no 'chor chiti' or writing of divorcement. It, in fact, was not obtained. Defendants' case on this point is that Rudrava's first husband had forsaken her and that therefore her mother and relations had her married to first defendant, an eligible and respectable person, according to Udiki from. First defendant is acknowledged to be a member of the Committee for Religious Endowments of Lingaits."

Upon the evidence the Subordinate Judge found that Rudrava was forsaken by her first husband, and held that, according to the [447] custom

(1) 5 C. 692. (2) 10 C. 138. (3) 3 C. 305. (4) 1 B. 97.

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prevailing in her caste, she was at liberty to marry again and had married defendant No. 1 and proceeded as follows :—

"Even supposing that defendant No. 2 is illegitimate and was the offspring of adulterous intercourse, it is argued that she can inherit her mother's estate—*Mayna Bai* v. *Uttaram* (1). In this case the High Court held that there was heritable blood between the illegitimate children of a European by a Hindu mother. This seems to be also the law in America under the New York Civil Code."

The plaintiff's suit was dismissed.

The Advocate-General (Hon. *P. O'Sullivan)* and *Srinivasa Rau*, for appellant.

Ramachandra Rau Saheb, for respondents.

It was contended, *inter alia*, for the appellant that there was no divorce known to the Hindu Law, and that the custom, if proved, was bad for immorality. Mayne's Hindu Law, s. 61, *Rahi* v. *Govind Valad Teja* (2), *Narayan Bharthi* v. *Laving Bharthi* (3).

The Court (TURNER, C.J., and HUTCHINS, J.) delivered the following

JUDGMENT.

The Subordinate Judge has written so able and complete a judgment in this case, that we are relieved from the necessity of entering into a minute discussion of the different issues on which the opinion of this Court has been sought in appeal ; and it is sufficient for us to say that, with the exception of the Subordinate Judge's finding on the question as to the right of the respondent Kusava to succeed, if there was no valid marriage contracted by her mother with the defendant No. 1, an issue which we do not think it necessary to determine, we agree with the conclusions at which the Subordinate Judge has arrived and adopt his reasons.

Virasangappa, the original ancestor, in arranging for the succession to his property, intended that the ordinary law which regulates Hindu inheritance should be to a certain extent abandoned. In the first place, he desired that the husband of his third daughter, if she married, should be placed in a higher position than an ordinary son-in-law, and that the third daughter [448] and her husband should enjoy a larger proportion of his estate than they would have enjoyed, unless they had survived at least one of the other daughters ; and he also intended, if the first and second daughters left issue of whatever sex, that that issue should succeed to the shares which, if a division were made under the settlement, would pass to the daughters.

In 1860, one daughter (Kusava) alone survived ; her sister Malakama had left one daughter Nanjamma, and Nanjamma had left one daughter Rudrava ; while Doddava, the third daughter of the ancestor, had left a son, the plaintiff (appellant) Virasangappa. The appellant's father had married, as his second wife, Nanjamma, consequently that lady was the step-mother of the appellant and Rudrava his step-sister ; and, as the Advocate-General has pointed out, this relationship entailed on him the necessity of maintaining them, and may have influenced him to assent to the arrangement, to which we shall next refer.

Such being the position of the members of the family in 1860, Kusava, the daughter of the common ancestor, executed the document, Exhibit I, which is described as her will, but which was in fact also a family settlement, with the consent of the appellant and of Nanjamma.

(1) 2 M.H.C.R. 196. (2) 1 B. 97. (3) 2 B. 140.

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It is said she was at that time 65 years of age, and that the appellant had no reason to expect, having regard to the age she had attained, that he would greatly benefit by the immediate advantages secured to him by the settlement. As a fact, the lady lived for seventeen years after the date of that deed. The effect of the deed was to secure to the appellant the immediate enjoyment of a very considerable property, and it is not disputed that there was sufficient evidence of his assent to the arrangement, whatever the effect of it may be. It is, however, contended on his part, that by Exhibit I, the interest secured to Nanjamma and her daughter Rudrava was an interest only for their lives, and that in the events which have happened the appellant is entitled to the property assigned to them.

We agree with the Subordinate Judge as to the construction of Exhibit I, *viz.*, that it gave to Nanjamma and Rudrava a life interest in the property set apart for them with remainder to their descendants if they left any, and that although Rudrava predeceased her mother Nanjamma, if respondent No. 2, Kusava, fulfils the description of a "descendant" of Nanjamma or Rudrava, she **[449]** is entitled to inherit the property set apart for those ladies and their descendants by this instrument.

The learned Advocate-General has called our attention to the deed which was subsequently executed by Kusava the settlor, disposing of the house which she had retained for herself under Exhibit I. In that document (Exhibit D, which recites Exhibit I) she refers to the arrangement made for her nieces and grand-nieces as having been made for their maintenance, and it is argued from this expression, and from the circumstance that she gives the property conveyed by that document to the same persons from generation to generation, that they understood that the provision secured to them by Exhibit I was no more than an interest for life. So far as they are personally concerned, we have already intimated our opinion that it was only an interest for life, but it is not incompatible with provisions for maintenance that there should be a transfer of property to ladies for their absolute benefit or for the benefit of themselves for life with remainder to their descendants.

Ordinarily, no doubt, a provision by way of maintenance is intended to take effect only for the life of the person entitled to claim it, and therefore no more is necessary than to secure to such person the income of a fund for that period. But it is competent to the heirs, if they please, to make an arrangement for maintenance by an absolute grant, or to make it by a grant which provides more than an income, but yet is not absolute.

We cannot place a construction in Exhibit D which necessitates the conclusion that the settlor Kusava understood she was conferring on Nanjamma and Rudrava and *their descendants* by Exhibit I a less interest than that which we have found to have been secured to them.

The Subordinate Judge has alluded to conduct on the part of the appellant himself as illustrating the construction to be placed upon the settlement evidenced by Exhibit I. The descendants of Nanjamma and Rudrava being then entitled, in our opinion, to claim the benefit under Exhibit I of the property assigned to those ladies, the question remains whether defendant No. 2 is such a descendant? The learned note of Mr. V. N. Mandlik in his work on Vyavahara Mayuka lays down the only rule which could be safely adopted in Southern India to determine what are valid **[450]** marriages, and what are the incidents of marriages, *viz.*,

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that we must look to existing usage which, even in the case of the higher castes, has more or less modified the Bramanical Law.

The parties are Sudras, and the sect to which they belong is rightly described by the Subordinate Judge to owe its origin to one Basava, who held that caste distinctions were unworthy of acceptance, and who repudiated Brahmanical observances.

The sect is largely represented in Mysore, to a certain extent in the Wynad, also in the Ceded Districts, in Coimbatore and South Canara in this Presidency. Instances have come before the Court in which the re-marriage of widows amongst this sect has been supported (1); and we agree with the Judge that there is sufficient evidence in this case to establish the further divergence from the Brahmanical Law in the permitted re-marriage of wives by a secondary form of marriage. It is to be observed that some of the customs which are found among the Sudra castes appear to be supported by earlier law than that which now regulates the custom of the castes known as regenerate. In Narada, and the collection which bears the honoured name of Manu, there are to be found texts recognising the re-marriage of widows and of wives who have been deserted by their husbands, and the period within which such a marriage may be made by a deserted wife differs according to the caste to which the parties belong. To the Sudras no period is ascribed, for the caste immediately above them a period of one year or, in certain events, two years. Kamalakaran quotes the text of Narada in a passage which will be found translated in Mr. Mandlik's work, page 434.

We advert to this ancient law, not with the intention of suggesting that it is to be regarded as now of force to regulate the decisions of the Courts, unless it is found to be in harmony with existing usage, but as affording evidence of the antiquity and corroborating other proof of the existence of a custom still in force among certain sections of Hindu society.

Several of the witnesses for the plaintiff admit the right of re-marriage among what they term the lower divisions of the sect to which the parties belong, a distinction which is somewhat opposed to the very fundamental doctrines of the sect. But we have proof of an instance in which a member of the priestly caste [451] has contracted a second marriage with a lady who was either a widow or a wife, the evidence being conflicting as to whether or not her first husband was alive at the time of her second marriage. Others of the witnesses for the appellant profess they are unable to speak accurately as to the custom of their sect, but declare the question as to the validity of such marriages must be decided by the gurus of their mutt. The only evidence we have of that character is produced on the part of the respondents. The first witness for the defendant, Guru Santayya, who is a member of a priestly caste and a purohit, deposed to the existence of the custom alleged by the respondents, and he not only gave instances of it, but stated that he was informed of the custom by his father and his spiritual teacher one Rudrappa Sanyasi, who was (it is admitted) a man of learning and an authority in the rules and customs of the castes.

The second witness deposes that there were present at the marriage, which is now impugned, this very Rudrappa Sanyasi, besides the head of the Hosa Mutt, Guru Basavayya, and the head of the Murji Mutt, Virama Parvatayya. There were in all three heads of mutts present.

(1) 7 M. 321.

We have also the evidence that the lady was treated as a lawfully wedded wife both by the appellant and by the other members of his family and by her caste, and we have also proof to show that the children of marriages contracted by wives deserted by their husbands and are not regarded as inferior in any respect to the parties to this suit are received in the mutts of the sect and initiated as the children born of a first marriage.

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That Rudrava was deserted by her husband is sufficiently shown by the evidence to which the Judge alludes. He had never consummated his marriage, and he expressed himself ready to return and live with Rudrava only on condition that certain property was secured to him by deed. When his request was not acceded to, he took no further notice of Rudrava, but left her without information about him and did not attempt to prevent her from forming a new connection.

In the view we have taken of the validity of such a marriage it is unnecessary for us to determine whether, if it had not been so, the respondent Kusava could have claimed as a descendant of her mother.

[452] We do not of course express any doubt that the illegitimate child of a Hindu might inherit property to which the mother is entitled in her own right absolutely; but in this case the further question would have arisen, whether Kusava would, if illegitimate, have fallen within the description of a "descendant" either of the natural grandmother or of her mother within the meaning of that term in the deed on which her title must rest.

The appeal is dismissed with costs.

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8 M. 452.

APPELLATE CIVIL.

Before Sir Charles A Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

AMMUTTI AND ANOTHER *(Defendants* Nos. 1 and 10), *Appellants v.* KUNJI KEYI AND OTHERS *(Plaintiffs), Respondents.**
[16th April, 1885.]

Mapillas—Adoption of Hindu Law—Presumption as to joint property.

Although Mapillas in Malabar ordinarily follow the Hindu custom of holding family property undivided, yet, as they are not subject to the same personal law as the Hindus, their claims cannot be governed by the legal presumption of joint ownership.

[Expl., 15 M. 60 (61).]

THIS was an appeal from the decree of F. H. Wilkinson, District Judge of South Malabar, reversing the decree of C. Chandu Menon, District Munsif of Calicut, in suit 668 of 1882.

The facts necessary for the purpose of this report are set out in the judgment of the Court (TURNER, C.J., and HUTCHINS, J.)

Sankaran Nayar, for appellants.

Anantan Nayar, for respondents.

JUDGMENT.

The Judge has erroneously stated that the same presumption as to joint ownership is to be applied as a presumption of law in the case of

* Second Appeal 200 of 1884.

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Mapilla families as in the case of Hindus. Although Mapillas in Malabar ordinarily follow closely the Hindu custom of holding family property undivided, yet, as the Mapillas are not subject to the same personal law as the [453] Hindus, their claims cannot be governed by the legal presumption of joint ownership. The Judge has also found as an issue of fact that the members of the appellants' family held their property jointly till the death of Koyama, and there is evidence which warrants that finding.

This appeal fails and is dismissed with costs.

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8 M. 453 (F.B.)

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

REFERENCE UNDER STAMP ACT, SECTION 46.* [24th April, 1885.]

Stamp Act, Schedule I, Article 57—Settlement—Stamp duty.

Under Article 57 of Schedule I of the Indian Stamp Act, 1879, stamp duty on a settlement is to be calculated on the value of the property settled as set forth in such settlement:

Held, that these terms do not mean the value of the interest or interests created by the settlement, but refer to the value of the property settled, which, it was intended by Legislature, should be set forth in the settlement.

THIS was a case referred by the Board of Revenue, under Section 46 of the Indian Stamp Act, 1879, for the decision of the High Court.

The case was stated as follows :—

"On 22nd May 1880, Rajangam Ayyar executed a deed of settlement in favour of his wife, Santhammal, to whom was given a limited interest in cerain immoveable property and an absolute interest in certain moveable property, the value of the whole being Rs. 1,500. The deed was duly registered by the District Registrar of Tanjore.

"In 1883, Santhammal sued upon this transfer deed, to the admissibility of which defendant took exception on the ground that it bore an insufficient stamp, because the properties were not valued according to their market-price, to ascertain which the Munsif issued a commission, which resulted in the report that the aggregate market values of the properties were Rs. 4,674-14-3 as against Rs. 1,500 recited in the deed, notwithstanding which, [454] the Munsif admitted the deed as sufficiently stamped, because it conveyed a limited interest only in the immoveable property. Defendant then petitioned the Collector to prosecute executant under Sections 7 and 63, Act I of 1879, and to decide that the stamp duty should be assessed on the values of the properties as found by the Commissioner.

"The Collector referred the question to the District Judge, with an expression of opinion that the stamp duty should be determined on the market-value as found by the Commissioner, in which opinion the District Judge concurred and passed a declaration that the stamp-duty should be determined with reference to the Commissioner's valuation, Rs. 4,674-13-6.

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* Referred Case 1 of 1885.

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"On receipt of this declaration, the Collector called on executant to show cause why he should not be prosecuted, and finally passed an order that he should pay the deficient duty, Rs. 17-8-0, *plus* a penalty of Rs. 175, or stand a prosecution.

"Executant paid the deficient duty and penalty, and has now appealed to the Board for a refund of the latter under Section 42 of the Act, on the ground that the original valuation and stamp-duty paid thereon was correct, because the deed transferred a limited, and not an absolute, interest in the immoveable property.

"The point for decision is the correct interpretation of Schedule I, Article 57, which declares that the stamp-duty shall be calculated on 'the value of the property as set forth in such settlement.' It is an open question whether the setting forth is to govern the property only and not its value; in the interest of the stamp-duty it ought to be the former, but the wording is vague; hence the necessity for an authoritative ruling."

The Acting Government Pleader (Mr. Powell), for the Board of Revenue.

JUDGMENT.

The judgment of the Full Bench (TURNER, C.J., KERNAN, MUTTUSAMI AYYAR, HUTCHINS, and BRANDT, JJ.) was delivered by

TURNER, C.J.—If the terms "as set forth in such settlement" refer to the property settled, the duty is chargeable not on the value of the whole property which may be mentioned in the settlement, but on the value of the interest or interests created by the instrument which may, or may not be, co-equal to the value of the property. But if this was intended, the intention might have been less clumsily expressed.

[455] We are, however, of opinion that the terms apply not to the interests created by the instrument, but to the value set forth in the settlement, and that the law suggests that the settlor should insert the value.

It is obvious that it must be often difficult, and sometimes impossible, to value the interests created by a settlement, and the Legislature has, we imagine, on this ground amended the law by the introduction of the words we are considering. There are provisions which appear sufficiently to protect the revenue, if we adopt this construction.

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8 M. 455.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

THE AGRA BANK (*Petitioner*), *Appellant* v. CRIPPS AND OTHERS (*Defendants*), *Respondents*.* [27th April, 1885.]

Civil Procedure Code, Section 232—Purchase of decree by creditor of one of several judgment debtors—Probability of decree being executed against another judgment-debtor, no ground for refusing execution to purchaser.

A decree for damages and costs having been obtained against P and C, A, to whom P was indebted and was about to assign property as security, in order to prevent P being adjudicated an insolvent, and with a view to execute the decree against C, if possible, purchased the decree.

A applied, under Section 232 of the Code of Civil Procedure, for leave to execute the decree. This application was rejected by Kernan, J., on the ground that the

* Appeal 9 of 1885.

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decree was certain to be executed against C and not against P, under whose orders and for whose benefit C acted when he infringed the right of, and became liable in damages to the plaintiff in the suit.

Held, on appeal, that the benefit likely to be gained by P by this transaction was no sufficient ground for refusing leave to A to execute the decree.

[R., 35 M. 659 (668) = 12 Ind. Cas. 657 = 10 M.L.T. 442 = (1911) 2 M.W.N. 568.]

THIS was an appeal from an order of Kernan, J., dated the 24th of March, 1885, dismissing an application made in Civil Suit 165 of 1884, under Section 232 of the Code of Civil Procedure, to place on record, in lieu of the plaintiff, the Agra Bank as transferee by assignment of the decree in the said suit.

[456] There were four defendants in the suit—Pinsent, R. Cripps, F. Cripps, and Venkatasami.

The decree directed delivery of indigo in the godown of Pinsent to the plaintiff, and that the defendants (except F. Cripps) should pay damages and costs. The indigo had been delivered, and the damages and costs amounted to Rs. 3,400.

Pinsent was arrested under this decree by the plaintiff, but was discharged at the request of the plaintiff before this application was made.

The application by the Agra Bank was opposed by R. Cripps, who filed an affidavit in which it was stated, on belief, that the application was made in the interest of Pinsent to relieve him from the decree by arresting Cripps and obliging Cripps to pay the amount of the decree.

Mr. *Shaw*, counsel for Cripps, referred to Section 232, (*b*) of the Code, and contended that, though there was no transfer to Pinsent, the case came within the equity of the provision, and that the Court ought not to "think fit" to allow the decree to be executed at the instance of the Bank—*Soroop Chunder Hazrah* v. *Troylokhonath Roy* (1).

The judgment of Kernan, J, was as follows :—

" In order to consider the circumstances under which the Bank took an assignment of the decree which, *prima facie* required to be explained, I examined Mr. Atkins, the Bank Manager, and Mr. Morgan, the Attorney for the Bank, and who had been Attorney in this suit for Pinsent, and Mr. Champion, now the Attorney for Pinsent, and I am satisfied that the main object of the Bank in paying, as they certainly did, the amount of the sum due on the decree to the decree-holder was to prevent Pinsent from becoming insolvent, and that such main object was not so far to benefit Pinsent, but to prevent litigation between the Official Assignee and the Bank and between Willis & Rodwell of London and the Bank and the Official Assignee and to enable the Bank to realise from Pinsent and his property already pledged to, or agreed to, be secured to the Bank a large debt due by Pinsent. Shortly I may state that it appears that Pinsent in the beginning of 1884 and up to the present owes a large debt, upwards of Rs. 50,000, to the Bank, which was secured by (amongst other ways) deposit of title-deeds **[457]** of his properties. These properties he had, some time before he was arrested, agreed to assign to the Bank, and for this purpose one or more deeds have been prepared, but these were not executed when Pinsent was arrested. When the arrest took place, Mr. Champion advised Pinsent that, as insolvency might follow, it was not desirable that Pinsent should then execute the deeds. There were also some questions between W. Rodwell & Co., who gave a guarantee to the Bank in 1884 for Pinsent, and Pinsent and the Bank as to the produce of goods exported to England

(1) 9 W.R. 230.

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for which Pinsent had drawn and negotiated bills through the Bank and some other questions as to funds standing with the Bank as security against loss on the shipment of those goods and otherwise. Under these circumstances Mr. Champion suggested to Mr. Morgan acting for the Bank that it was desirable that the insolvency should not take place. After some necessary delay of a day or so Mr. Morgan, having been consulted by Mr. Atkins, told Mr. Champion that the Bank would take a transfer of the decree from the plaintiff. The transfer was taken, Pinsent was by order released from arrest, and the insolvency was prevented. Then the main object of the Bank was accomplished and Pinsent was left free to give the securities to the Bank, who also was left free to accept them. Most probably the arrangement was worth to the Bank the sum they paid for it, Rs. 3,400. It was quite competent to the Bank to protect themselves from loss by making that arrangement which was so far wholly unobjectionable.

"But then arises the question, why was a transfer taken of the decree which did not create any charge on property, and which could only be made available against the defendants personally or by seizure of property? As regards Pinsent, it does not appear that the Bank or their Attorney Mr. Morgan contemplated such arrest. Mr. Morgan, however, says he was not sure that Pinsent could not be re-arrested, and that at all events his property might be seized. However, it appears that Pinsent's property to a large extent was pledged to the Bank, and he had executed before he was arrested a deed of trust to one or more trustees for the benefit of his creditors; but Mr. Morgan says that there were only two or three creditors including the Bank and that Pinsent had other property not secured to the Bank or by the trust-deed. Before the transfer was finally settled, Mr. Atkins and Mr. Champion [458] and Mr. Morgan had at least once met at the office of the latter to consider the matter, and then it appears that the question was suggested whether Cripps was of sufficient means to pay the decree amount, and Mr. Morgan said he thought so. As to Venkatasami, the other defendant, it is not said there was any reference to his ability to pay. Apparently he has not means to pay. Mr. Champion says it was spoken of by the parties that Cripps would be liable to pay the amount by the ordinary legal means, which meant, of course, by arrest or by seizure of his property at suit of the Bank in execution as transferee of the decree. There is no doubt, therefore, that the object of the transfer was to execute the decree against Cripps. It is said for the Bank that it as transferee should have the right to realise the decree from Cripps, who was liable with Pinsent, and that no prejudice is due by the exercise of that right more than followed legally from the decree, inasmuch as the plaintiff could have arrested Cripps if the debt was not paid and if Pinsent became insolvent. Cripps might still be arrested and there could be no contribution, as the action was one for a wrong and not on contract. To this it may be said that Cripps could not resist the legal right of the plaintiff in the suit, unless it was executed by agreement with, or on behalf of, and for the benefit of, Pinsent, and to throw the *onus* on Cripps. If this decree had been transferred to Pinsent, it could not be executed against the others. The circumstances under which the transfer was arranged to be taken are peculiar, and would seem to show that, so far as Messrs. Morgan and Champion were concerned, there may have been an object on their part to have the transfer made in order to release Pinsent and throw the burden on Cripps. The circumstances are these: Mr. Champion has been for some

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years Attorney for Mr. Pinsent, but he was absent in Europe when this case was tried, and Pinsent then retained Mr. Morgan to defend this suit. The case was vigorously contended for Pinsent for two or three days, and then Pinsént stated that he did not see way he should defend the suit further, or someting to that effect. At one of the interviews between Messrs. Morgan and Champion as to stopping the insolvency, the latter observed to the effect that the suit ought not to have been defended. Therefore, both these gentlemen have a professional interest in Pinsent and not unnaturally would wish to see their client free from the burden of the [459] damages and costs. The arrangement for the transfer would place the power of relieving Pinsent in the hands of the Bank, which Mr. Morgan was advising, and enable the Bank to realise from Cripps. If this was part of the real object of the transfer, I am not prepard to say that Section 232 might not apply as a transfer substantially for the benefit of one defendant. But both these gentlemen say that they had no such object in view as to throw the *onus* on Cripps and hereby save their client Pinsent. I cannot say that I am prepared to draw an inference from the facts which are contrary to these positive statements. Moreover, the amount is unpaid to the Bank. Mr. Morgan states that he thought Mr. Champion was acting in the matter on his own behalf, as costs were due to him by Pinsent for which Mr. Champion had a lien on the deeds entrusted by the Bank to Pinsent to realise debts. Mr. Champion, however, admits he acted as Attorney for Pinsent, though he also acted for himself, and was paid by the Bank the amount of his lien. But though there may not have been any definite intention to release Pinsent and throw the *onus* on Cripps, yet it is, I think, clear that such will be the result if the Bank as transferee is allowed to issue execution. It is clearly for the interest of the Bank not to execute the decree against property of Pinsent, as he is so deeply indebted to them. This consideration, with circumstances I shall presently mention, raise in my mind a serious question whether I ought, within the discretion given by Section 232, to see fit to allow the transferee to issue execution. As between Cripps on the one hand and Pinsent on the other, the latter is the person who ought to bear the damages and costs, and not Cripps. As regards the plaintiff in the action, all defendants were liable to the plaintiff for damages and costs, as they improperly interfered with the plaintiff's property; but Pinsent was the person in whose godowns the property of the plaintiff was, to recover which the suit was necessary, and Pinsent resisted the plaintiff's right to recover. The circumstances I referred to above, and the facts of this case as appear on the evidence before me, are as follow :—

"Plaintiff, at the instance of Venkatasami and Cripps, the dubash of Pinsent, brought indigo to the godown of the latter for examination by him, and, if he approved of it, that price should be settled and plaintiff paid out of advances made by Pinsent to [460] Venkatasami. Then plaintiff put his lock on the godown, and though the indigo was examined and partly packed for shipping, plaintiff was not paid and would not let the goods be removed until he was paid. he never was paid, and brought this action to recover it against Venkatasami, Cripps, and Pinsent, and afterwards against F. Cripps. It appeared on the admission of Pinsent that he refused to make any advance to Venkatasami, and, at the instance of Mr. Willis, he agreed, however, that this should be done, *viz.*, that Venkatasami should assign plaintiff's goods (as if his own) to Cripps, and that then he (Pinsent) should give to Cripps a warehouse

receipt, stating that Cripps had deposited these goods in Pinsent's godown, and that he (Pinsent) held them, and then that Cripps might, on deposit of the transfer of the goods and his (Pinsent's) warehouse receipt and on a promissory note, raise from the Madras Bank Rs. 5,000. Accordingly Pinsent personally approved of the assignment of the goods from Venkatasami to Cripps, and he (Pinsent) signed the warehouse certificate of the deposit of the indigo as if received by him from Cripps, and thereupon the 5,000 rupees was got from the Madras Bank. When the money was received by Cripps, he gave it to Venkatasami, and Rs. 3,500 of it were applied to release some indigo of Kondaya in Pinsent's godown, which he refused to give possession of until he was paid. The next day, or a few days after payment, Kondaya's indigo was shipped through Pinsent and a bill on London for the amount and for other goods was negotiated by Pinsent. The amount so raised has passed through Pinsent's books, and the entries of it were proved before me. Pinsent said he did not know personally that any portion of the money was paid to release Kondaya's indigo; he was told it was; and he says that the entry in the book was made without his knowledge and was afterwards corrected; but while I was trying the suit, it did not appear that the entry was so corrected. It was plain that Pinsent got at all events to the value of Rs. 3,500 of the Rs. 5,000, though it also appeared that Venkatasami gave Cripps Rs. 300 or Rs. 500 out of the Rs. 5,000 for some commission due to him. Pinsent did not afterwards pay any part of that Rs. 5,000, but it was paid partly by R. E. Cripps to the extent of Rs. 1,000 and Rs. 4,000 was lent to him by F. Cripps on the deposit of the documents of transfer of the goods and the warehouse receipt.

[461] "The plaintiff demanded possession of the indigo from Pinsent, but he declined to give it up, though he had not paid anything on foot of it, and he admitted that he directed that a lock, covered with cloth which was put on the doors of the godown where the indigo was, forcibly struck off by his directions and in his presence, was plaintiff's lock. When the suit was first filed, Venkatasami, Cripps, and Pinsent were defendants, the Bank of Madras were then made defendants as holding the warehouse receipt and transfer and promissory note of Cripps. But the Bank required Cripps to pay, and he did so, and then F. Cripps was made defendant. An injunction was granted against the defendants Venkatasami, Cripps and Pinsent forbidding the removal of the goods, and at that time Pinsent said he had no interest on the goods, except as warehouse-keeper. However, he afterwards defended the suit and protracted the hearing by his resistance until he, on the last day, withdrew. Pinsent was, therefore, the person principally concerned in the illegal endeavour to pawn the plaintiff's goods. He approved of the false transfer by Venkatasami and gave the false warehouse certificate; he took the benefit of the loan on plaintiff's goods to the extent of Rs. 3,500; the transaction passed through his books; and he shipped the indigo released with the Rs. 3,500 and never paid any part of it. He defended this suit and was the cause why it became necessary. As regards Cripps he acted in the transaction as the servant of, and for, Pinsent. I do not consider that the receipt by Cripps of Rs. 300 from Venkatasami for some debt due for commission out of the Rs. 5,000 should lead me to believe that Cripps acted fraudulently. I think he only acted illegally in raising the money by the direction of Pinsent.

"Neither Cripps nor Venkatasami appeared by Counsel to defend the suit—Pinsent did. As I have already observed Pinsent is the person as

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between him and Cripps and Venkatasami who ought to pay the costs. The suit was one *ex delicto*, and there can be no contribution.

"Though the Bank have paid the money, they have accomplished the main object they had in doing so. If they had asked Pinsent to allow them to pay it for him and charge him for it, I have little doubt he would have readily assented, and they could then debit him with this amount and have his security for it. The recovery of this money, paid to avoid the insolvency of Pinsent, was **[462]** a secondary object with the Bank, and they selected the mode of taking a transfer of the decree at the advice of their Solicitor, who was aware of the facts as to Pinsent's conduct and that he was the master of Cripps and the person who directed Cripps to act illegally as regarded plaintiff's goods and was the real cause of the suit. If the Bank are now allowed to issue execution in this suit, can there be a doubt that Cripps will be proceeded against and that Pinsent will be allowed to go free? It is the interest of the Bank that this should be so, as Pinsent is so deeply their debtor. A transferee of a decree is not entitled, as a matter of right, to execute the decree. In ordinary cases where there is no doubt in case of the payment of the full amount to the decree-holder, the Court would make the order. But in a case where I cannot but feel that the assignment which enables the Bank to apply will, if carried out by them, release the person who really ought to pay the damages and costs and throw that burden on another. I do not think I ought to interfere or grant this motion.

"The first proposal that the insolvency should be prevented was made by Mr. Champion, the Attorney of Pinsent, and no doubt in the interest of Pinsent. Mr. Champion says that he did not propose that the decree should be transferred. It was, of course, greatly for the benefit of Pinsent to release him from practical arrest and prevent the insolvency, and still more to have an arrangement between him and the Bank, his largest creditor. Though the Bank acted in view to protect their own interest mainly, as they have accomplished that object, and as the whole proceeding is one which was, as a matter of fact, a benefit to Pinsent, and the levying this amount of the decree from Cripps would still further benefit Pinsent, I think it would be inequitable on the facts to allow the Bank to levy the amount, not from the person who really ought to pay, but from his dubash, Cripps, who became liable to the plaintiff's claim of damages and costs by doing the acts which Pinsent for his own benefit and purpose required him to do. I have already pointed out that Mr. Morgan, the Bank's adviser in the matter, was the Attorney for Pinsent in the action and in the arrangement to transfer. I do not doubt that for the great benefit conferred on Pinsent by releasing him from the practical arrest and consequent insolvency, the Bank will not find much difficulty in getting Pinsent to acknowledge liability for the damages and costs.

[463] "I refuse the motion, but without costs. The point is novel."

The Bank appealed.

Mr. *Grant*, for the Bank.

Mr. *Shaw*, for Cripps.

JUDGMENT.

The judgment of the Court (TURNER, C. J., and HUTCHINS, J.) was delivered by

TURNER, C. J.—With the highest respect for the opinion of the learned Judge, we are unable to see that sufficient grounds exist for refusing

the transferee of the decree permission to execute it in its own name. Indeed all that would be done by refusing permission would be to compel the Bank to execute in the name of the original decree-holder.

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The facts are these: the Bank desired to impede the execution of the decree against Pinsent, as it might drive him to the Insolvent Court, and, having ascertained that Cripps was of sufficient substance to answer the decree, the Bank purchased the decree.

It was originally represented that the Bank was merely a benami holder for Pinsent, in which case the order of the Judge would, of course, have been most proper. The benefit which indirectly accrued to Pinsent had not, however, the effect of depriving the Bank of its right to enforce the decree against Cripps or the third judgment-debtor. It is not shown that the judgment-debt had been satisfied by payment.

If it had been, of course the Bank could not be regarded as the transferee of an existing decree and therefore could not be allowed to execute it.

In the events which have happened we do not find any ground which would justify us in refusing the application.

The order dismissing the application is therefore reversed, and the application for permission to execute is allowed. The appellant must recover his costs of the original application and of the appeal from the respondent Cripps.

Solicitors for the Agra Bank: *Barclay & Morgan.*

Solicitors for Cripps: *Grant and Laing.*

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8 M. 464=9 Ind. Jur. 267.

[464] APPELLATE CIVIL.

Before Sir Charles A Turner, Kt,. Chief Justice, and Mr. Jusice Hutchins.

MIRABIVI AND ANOTHER (*Plaintiffs Nos.* 1, 2), *Appellants v.* VELLAYANNA AND OTHERS (*Defendants*), *Respondents.**
[1st May, 1885.]

Custom—Practice—Labis—Ravuthans of Palgat—Muhammadan religion—Hindu Law of inheritance Exclusion of widow and daughters by sons—Evidence necessary to support valid custom.

A claim by the widow of S. Ravuthan, a Labi of Palgat, and her daughters for their shares of his estate under Muhammadan Law was opposed by other members of the family, who pleaded that, according to a special custom obtaining among the Ravuthans of that part of the country, adopted from Hindu Law, females are excluded from inheritance if sons or sons' sons exist. In two instances it was proved that women of this class had obtained shares under Muhammadan Law by suits without this plea having been put forward.

The District Munsif described these cases as interruptions and found on the evidence that the custom was proved.

On appeal this decree was confirmed by the Subordinate Judge.

Held, that no valid custom was established by the evidence.

A custom to be valid must be consciously accepted as having the force of law.

[F., 29 M. 24 (27)=16 M.L.J. 8; R., 19 B. 428 (459); 8 Ind. Cas. 897 (902)=4 S.L.R. 88; 16 Ind. Cas. 641 (652)=6 S.L.R. 1 (24).]

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* Second Appeal 11 of 1884.

1885 May 1. — Appellate Civil. — 8 M. 464 = 9 Ind. Jur. 267.

THIS was an appeal from the decree of C. Ramachandravyar, Subordinate Judge of South Malabar, confirming the decree of B. Kamaran Nayar, District Munsif of Temelprom, in suit 240 of 1882.

The facts necessary for the purpose of this report appear from the judgment of the Court (TURNER, C. J. and HUTCHINS, J.).

The Acting Advocate-General (Hon. *H. H. Shephard*) and *Gopalan Nayar*, for appellants.

Mr. *Branson*, for respondents.

JUDGMENT.

The parties to this appeal belong to a Ravuthan family of Palgat. The appellants are one of the widows of Sheithu Ravuthan and her daughters; the respondents, the son and other [465] representatives of the same deceased person, and the sons, widow, and daughters of his brother. Appellants sued for partition of the property. Respondents pleaded, *inter alia*, a special custom among the Ravuthans of that part of the country restricting females to maintenance and marriage expenses where there are sons or son's sons. Both the Courts below have found in favour of this custom and have dismissed the appellants' suit for partition. The question before us is whether there is evidence on which such custom could reasonably have been found to exist.

It is not contended that these Ravuthans are not in other respects governed by the Muhammadan Law. What is alleged is that, though following the law of their religion generally, they have adopted this principle of the exclusion of females, from the Hindu Law, subject to the qualification that there are sons or sons' sons, and that the custom has been so universally recognised among them as to have the force of law.

It must be admitted that instances have been adduced in which the claims of daughters and sisters to a share have been ignored, or they have been allotted maintenance, though the cases mentioned by the Judge of a partition in the father's lifetime are not inconsistent with Muhammadan Law. There are also cases in which married daughters have been treated as estranged from the family. But instances of this kind will be found to occur where there is no doubt that the family is governed by pure Muhammadan Law. Indeed, in many parts of the country it is unusual for Muhammadan ladies to insist on their unquestioned rights. They will often prefer being maintained by their brothers to taking a separate share for themselves, and when they are married the marriage expenses and presents are often, by express or implied agreement, taken as equivalent to the share which they could claim. Moreover, Muhammadan females are so much under the influence of their male relations, that the mere partition of the property among the males without reference to them cannot count for much. A single instance to the contrary would outweigh many such partition deeds when the existence of a binding custom is in question. Instances to the contrary have been established, and notably two suits in which women of the class in question have recovered their shares, and the custom now set up was not even pleaded against them. The District Munsif describes these [466] instances as interruptions; but, in our opinion, they deprive of all force those partition deeds and other similar agreements in which voluntarily, or for some consideration, or under advice of mediators, the females may have simply abstained from pressing their claims.

The evidence of the Kazi of Palgat is peculiarly noticeable to show that what the respondents assert as a custom is a mere practice, more or

less common, and that it has not the characteristic of a genuine custom, *viz.*, that it is consciously accepted as having the force of law.

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The judgment of Mr. Justice Innes (1) is certainly valuable evidence in support of the custom; but it could not bind the present parties even if it had been affirmed on appeal. But, as the Subordinate Judge has shown, the appeal was not dismissed on the merits, but settled by a compromise in which substantial provision was made both for the plaintiff's unmarried sister and for his widowed sister-in-law, and against that judgment there are those just mentioned which awarded shares to female plaintiffs.

With some reluctance we have come to the conclusion that the decrees below cannot be maintained. They must be reversed and the suit remanded to the Court of First Instance for decision on the merits. We are not to be understood as declaring that the plaintiffs are absolutely entitled to their full legal shares of the whole property. It is in evidence that two of the younger ladies have been married and received portions. It may well be that these portions were paid in full discharge of their claims on the estate, and the evidence that these Ravuthans lean toward Hindu usages renders this not improbable, though it fails to establish a custom having the force of law.

The costs hitherto will abide and follow the result.

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[467] APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

VIRESA AND OTHERS (*Plaintiffs*), *Appellants v.* TATAYYA AND OTHERS (*Defendants*), *Respondents.**
[1st April, 1885.]

Fishery—Tidal river—Prescription.

The right of the public to fish in tidal waters in British India may be curtailed by an exclusive privilege acquired by grant or prescription by certain persons within certain limits.

Such an exclusive privilege being an infringement of the general rights of the public, could be acquired by a period of enjoyment which would suffice for the acquisition of an easement against the Crown.

[N.F., 39 C. 53 (57) = 15 C.W.N. 972 = 11 Ind. Cas. 180; R., 12 M. 43 (44, 46); 27 M. 551 = 14 M.L.J. 248 (273) = 1 Weir. 405.]

THIS was an appeal from the decree of W. J. H LeFanu, District Judge of Kistna, dated 15th February 1884, reversing the decree of O. S. R. Krishnamma, District Munsif of Masulipatam, in suit 828 of 1881.

The plaintiffs, fishermen living at Kondangi on the banks of the river Upputeru, sued for the removal of fishing stakes and nets erected by the defendants contrary to the alleged customary right of the plaintiffs, and for a perpetual injunction against the defendants, prohibiting them from placing stakes and nets in the river above the plaintiffs' stakes and nets.

The District Munsif decreed the claim.

On appeal the District Judge dismissed the suit.

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* Second Appeal 478 of 1884.

(1) In Civil Suit 5 of 1877 in the High Court.

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The material portion of his judgment was as follows:—

"It may be, as stated in the Lower Court's judgment, that there is evidence that no one except the members of the four villages in question for sixty years planted stake-nets in the Upputeru; but population has increased, fresh villages have sprung up, and what is a right at common law, accruing to each individual at his birth, cannot be annihilated by any such possession. It is possible that no one but the residents of a certain village may, [468] for a long series of years, have used a certain highway; but the highway being open to all, this would not avail them to restrict any person not belonging to their village from using the said highway.

"The right to catch animals *feræ naturæ* of the creek in question is a right belonging to all, subject to the restriction contained in the maxim '*sic utere tuo ut non lædas alieno*,' and, when equal rights conflict, the way out of the dilemma is, not to rob one party of their rights, but to find some *modus vivendi*, some plan whereby, by mutual concession, the owners of these rights may exercise their rights without, as far as may be possible, infringing the rights of others.

"This is a suit for a perpetual injunction, and, if plaintiffs fail, there is an end of the suit: had there been a prayer 'for such relief as the Court thinks fit to grant,' I would have sent down an issue to find within what distances and at what hours the riparian residents of the Upputeru can put down stake-nets with the minimum of injury to the existing rights of the several villages. This is the general purport of the issue which I would have proposed. It would no doubt be subject to modification, but as it is impossible to send it down, the point need not be considered."

The facts necessary for the purpose of this report appear from the judgment of the Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.).

Anandacharlu, for appellants.

Subbarayudu and *Gopalacharyar*, for respondents.

Appellants' pleader referred to *Baban Mayacha* v. *Nagu Shravucha* (1) and Angell on Water Courses, p. 73.

Respondents' pleader cited *Lord Rivers* v. *Adams*, (2) *Empress* v. *Charu Nayiah*, (3) and *Lutchmeeput Singh* v. *Sadaulla Nushyo*. (4).

JUDGMENT.

In the district of Kistna there is a lake named the Kolleru, whence a stream, the Upputeru, takes its rise and flows into the sea, being throughout its whole course tidal. At a distance of from 6 to 8 miles from the head of the Upputeru is situated a village named Kondangi, the residence of the plaintiffs (appellants).

At a particular season of the year, *viz.*, from the beginning of [469] the rainy reason to the end of harvest, fry of fish bred in the lake and in sundry irrigation channels which empty themselves into the Upputeru pass down the river towards the sea and are intercepted by stake-nets placed across the river by the inhabitants of certain villages on the banks of the stream.

The plaintiffs in this suit claim that there appertains to the residents of Kondangi, by immemorial prescription, a right to place stake-nets across the river in the neighbourhood of their village, and to prevent any other person from placing similar nets at any point between their village and the place at which the stream issues from the Kolleru lake. They complain

(1) 2 B. 19. (2) 3 Ex. D. 361. (3) 2 C. 354. (4) 9 C. 698.

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that in 1880 the defendants interfered with the exercise of this right and erected stake-nets so as to interrupt the free passage of the fry to the nets at Kondangi. They prayed for an order for the removal of the nets placed by the defendants and for a perpetual injunction to restrain them from replacing such nets.

The defendants who appeared and opposed the claim set up several defences: the defendants 1—5 pleaded that they had for thirty years erected stake-nets at their village, Sunnampudi; they denied that the plaintiffs enjoyed an exclusive right to the fishery between Kondangi and the source of the Upputeru; and they also contended that if the plaintiffs had any right it was not injured by their act, inasmuch as there were irrigation channels below the point at which their nets were placed. whence fry might pass to Kondangi. The 8th, 11th, 14th, 16th, 17th, 18th, 20th and 27th defendants contended that they had an equal right to fish with stake nets with the plaintiffs, and that their nets were placed at a distance of 8 miles from Kondangi and could not interfere with any right claimed by the plaintiffs.

The Munsif, Mr. O. S. R. Krishnamma, in a very able judgment, discussed the nature of the claim made by the plaintiffs, and held that it was one of which the law would take cognizance.

Finding that for upwards of sixty years the plaintiffs had enjoyed the exclusive right claimed by them, and that they had resisted successfully attempts to interfere with it after that period, that the acts of the defendants, or of some of them, of which the plaintiffs complained, practically deprived the plaintiffs of the benefit of their fishery, and that they had been committed in and subsequent to October 1880, he granted the injunction prayed.

[470] On appeal the Judge, while he considered it proved that the plaintiffs had enjoyed a customary right of fishing with stake-nets at Kondangi, held that they had not proved they had an exclusive customary right to the fishery between their village and the souce of the Upputeru. He regarded a decision passed by the Munsif in original suit No. 162 of 1877 as conclusive on that point, but, without basing his judgment on this ground and allowing that there might be evidence that for sixty years before 1876 no one except the residents of the plaintiffs' village had planted such nets in the Upputeru at are above the plaintiffs' village, he held that the right to fish in a tidal stream was a right belonging to all men, and that no one could be deprived of it by any such prescription or custom as was claimed by the plaintiffs. At the same time probably in reference to the decision in *Baban Mayacha* v. *Nagu Shravucha* (1), he intimated that if the plaintiffs had not asked for a perpetual injunction, but for such relief as the Court thought fit to grant, he would have sent down an issue to ascertain within what distances and at what hours the riparian residents of the villages above Kondangi could put down stake-nets with a minimun of injury to the existing rights of the plaintiffs and the inhabitants of three other villages below Kondangi to whom the plaintiffs concede the possession of a right of fishing further down the stream.

Although the general if not the universal law of civilized nations recognizes in all citizens a common and general right of fishing in the sea and in all bays, coves, branches and arms of the sea and in all navigable and tidal waters (Angell, ch. 3, § 65 *a*), this right within the territorial waters may be restrained or regulated by the legislature, and it may be

(1) 2 B. 19.

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curtailed by an exclusive privilege acquired either by grant or prescription by certain persons within certain limits. This exclusive privilege may apply to all fish to be found within such limits and to all methods of fishing or only to certain kinds of fish or a certain method of fishing. Inasmuch as the property in the soil is presumed to vest in the sovereign power on behalf of the public where private ownership of the soil is not proved, the right to fish in the waters which flow over it can be asserted in England only in virtue of a grant from the sovereign power or by such a degree of exclusive [471] use and occupation as is sufficient to raise a presumption that such a grant has been made though not now appearing.

Sir William Blackstone proposes to confine the term free fishery to an exclusive right of fishing in a public river. This use of the term has not been adopted by other authorities; but it seems there is no difference between the opinion of Blackstone and other lawyers that it is a royal franchise and was so regarded in all countries where a feudal policy prevailed—(I Stephens Blackstone, p. 679).

In England the importance of protecting the common right of all classes to fish in public waters was so highly regarded, that by Magna Charta the prerogative of the Sovereign to make such grants was restrained. And in the reign of Edward I a statute was passed which prohibited the total interruption of navigable streams by the erection of weirs or other machinery for fishing.

In England, then, such a prescription in public waters must be founded on immemorial use and occupation, and in the case of navigable streams the maintenance of a fishing weir which interrupts navigation cannot be claimed, if there is evidence that it came into existence subsequently to the statute of Edward I. In this country we know of no law which prevented the Sovereign from making a grant of a common of fishery. There is no law, nor do we know of any custom, which distinctly determines the period of exclusive possession necessary to prove a title by prescription to such a common of fishery; but as an infringement on the general rights of the public it is clear that the right could be acquired by a period of enjoyment which would suffice for the acquisition of an easement against the Crown.

In the case now before us, if the plaintiffs established as the Munsif found that for sixty years they had enjoyed the exclusive right of fishing with stake-nets in that portion of the stream which lay between their village and the lake, and that when their right was invaded, they had successfully resisted the invasion and enjoyed and maintained their exclusive right up to the period which is asserted as the date of the cause of action, it appears to us they would have been entitled to the relief they claim.

The evidence adduced by the defendants showed that from time to time attempts have been made by persons who were not residents of the villages in which the plaintiffs admit a right of [472] fishery exists, to establish their common law of rights of fishery in Upputeru. On two occasions, *viz.*, in September 1868 and again in April 1871, the then Collectors had, it would appear, expressed an opinion that the fishery was open to the public. In 1870-71 the Government had leased the fishery in the Upputeru, and their renters or sub-renters practised fishery with stake-nets; but at the instance of the local fishermen, the lease was withdrawn and its issue was characterised by the Board of Revenue as

oppressive (Board's Proceedings, No. 472, dated 28th March 1873—G.O., dated 7th April 1875).

In November 1875 the Collector ordered the Kykalur Sub-Magistrate to remove the stake-nets which were fixed in other than the customary places (exhibit B).

On the 3rd November 1876 the Collector published a notice prohibiting persons from placing stake-nets in places where it was not usual to place them (exhibit D), and certain persons were punished for a disobedience of this order (exhibits E, F, G and H).

Some of the defendants, feeling themselves aggrieved by the notice in the gazette of June 1876, instituted original suit 162 of 1877 against the Collector praying for a declaration that the order was invalid so far as it affected the construction of stake-nets at Sunnampudi; and the District Munsif, although he found that the practice had its origin only in 1871, held that the Collector's order was *ultra vires*, and gave the inhabitants of Sunnampudi a decree.

This decree obviously could not bind the present plaintiffs who were no parties to that suit.

We see nothing in the proceedings now on the record which could deprive the plaintiffs of the right claimed by them if it be found that they had established it prior to 1868.

But, assuming that the plaintiffs had not established a right to such a common of fishery as they claimed, they may have established a right to a fishery of such a nature that they are entitled by custom to prevent the exercise of a similar right by any other persons within a distance, which would necessarily injure the exercise of the right by the plaintiffs. The learned judgment of the late Chief Justice of Bombay in the case to which we have already referred establishes that a fishery common to the public **[473]** may be used subject to such regulations as are essential for its enjoyment by members of the public.

In the case now before us, if it be shown that the nets of the defendants, or of any of them, are placed in such a position as to destory the benefit the plaintiffs would derive from the stake-nets erected at their village, although the Court would not be justified in granting an injunction to the full extent claimed by the plaintiffs, it might possibly find the plaintiffs entitled to an injunction of a more qualified character. As yet the Appellate Court has pronounced no judgment upon the facts, and it would be premature for us to do more than indicate what we believe to be the law.

We shall set aside the decree of the Judge and direct a rehearing of the appeal.

OIOIThe costs of this appeal will abide and follow the result.

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APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Brandt.

SANKARAVADIVAMMAL (*Defendant No.* 7), *Appellant v.* KUMARASAMYA (*Plaintiff*), *Respondent.** [10th and 25th April, 1885.]

Civil Procedure Code, Sections 224, 331, 332—*Decree on compromise—Execution against party to suit, not party to compromise—Resistance to execution—Procedure.*

In a suit for partition a compromise was entered into by all the parties except S, and a decree obtained on the terms thereof. In execution S was dispossessed and presented a petition to the Court, objecting that the decree was not binding on her. The petition was rejected:

Held, that the objection raised by S ought to have been investigated under Section 244 of the Code of Civil Procedure, and that S was entitled to appeal against the order rejecting the petition.

[**Diss.**, 23 A. 346 (350); 30 C. 134 (137)=6 C.W.N. 10 (12); **Appr.**, 23 M. 361 (366) (F.B.); **R.**, 17 B. 49 (52); 2 O.C. 51 (55).]

THIS was an appeal against the order of J. C. Hughesdon, District Judge of Tinnevelly, confirming an order of the Subordinate Judge, K. R. Krishna Menon, in execution of the decree in suit 37 of 1882.

Appellant was defendant No. 7 in that suit, which was brought for partition of family property by the respondent, Kumarasamya **[474]** Pillai, against his brothers Defendant No. 7 was the mother of the other parties to the suit and claimed to be entitled to a portion of the property in suit. The parties, other than defendant No. 7, compromised the suit and a decree was passed on the terms thereof behind her back. Execution having issued, defendant No. 7 was dispossessed of certain property. She thereupon presented a petition to the Court objecting that the decree could not bind her, and praying that the delivery of possession of the property made by the amin might be cancelled.

This petition was heard with others presented by the plaintiff and another defendant in the suit.

The Subordinate Judge held that, as defendant No. 7 had no possessory or proprietary right under Hindu Law, she could not present a petition under Section 332 of the Code of Civil Procedure and that Section 244 was not applicable.

On appeal the District Judge referred to *Venkatammal* v. *Andyappa* (1) and rejected the appeal.

Defendant No. 7 appealed on the grounds—

(1) that she was not bound by the decree;

(2) that she could not be dispossessed under the decree.

With this appeal defendant No. 7 also presented a petition under Section 622 of the Code of Civil Procedure against the order of the Subordinate Judge.

Balaji Rau, for appellant.

Bhashyam Ayyangar, for respondent.

The Court (HUTCHINS and BRANDT, JJ.) delivered the following

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* Appeal against Appellate Order 2 of 1885.

(1) 6 M. 130.

JUDGMENTS.

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HUTCHINS, J.—The only difficulty in this case is due to the irregular manner in which all the proceedings have been conducted in the Subordinate Court. The doubt is whether the appellant is not in this dilemma—either she is not a party and cannot appeal, or she is a party and therefore bound by the decree. The respondent admits that her contentions have not been properly disposed of, but relies on this dilemma.

The suit was brought by one of appellant's sons for partition. Her defendant-sons said she held possession of some of the property and she was made defendant No. 7. She claimed to be in possession of some and entitled to a share of all; admittedly she **[475]** is entitled to maintenance and her claim to maintenance ought to be provided for in any decree distributing the property. An issue was framed with regard to her claim, but, instead of proceeding to trial, the other defendants and the plaintiff appear to have come to an arrangement behind her back, and a decree, purporting to deal with all the property and to bind the appellant as one of the parties thereto, was passed behind her back and without her consent.

So far as appears, the first time she knew of this decree was when an amin came and sought to eject her in execution. She at once put in a petition No. 323, setting out the above facts, and it is on that petition, and others less material, that the Subordinate Judge's order was passed. But that order entirely ignores the facts relied on and the material contention that the decree cannot affect or be executed against the appellant. It treats the appellant not as a party-defendant, but simply as the mother of the contending brothers, and it deals with her claim as if it had been made under Section 332 by one not a party to the suit.

The order of the District Judge in appeal also passes over the principal grounds in the appeal petition; but it is possible that the case was presented in a different light in the argument.

It seems to me that the question between the plaintiff and his mother, the appellant, whether she can be turned out in execution, is clearly one relating to the execution of the decree, and as such to be determined under Section 244. I also think that the defendant No. 7 is a party to the decree, although it would apparently satisfy the terms of the section if she were a party to the suit only and not to the decree. Of course it is true that a party to a decree is generally bound by it and cannot go behind it, but here the appellant took the first opportunity of contending that she was not bound by it, and asked the Subordinate Judge to decide that she could not be bound by it. This she was competent to do by petition: the petition raised the point and the Subordinate Judge was bound to determine it. The way in which he ought to have determined it is quite clear. The compromise behind her back cannot possibly affect her position, nor can the decree, which on its face has no basis beyond an agreement between other parties. The decree is a nullity so far as defendant No. 7 is concerned, and the matter in dispute between her and the plaintiff has still to be determined as an issue in the regular suit.

[476] The result would probably have been the same if the suit had been abandoned against defendant No. 7 and her petition could have been dealt with under Section 331. She would then have been a person, other than the judgment-debtor, claiming in good faith to be in possession and entitled to hold possession till her maintenance had been provided for. There is no doubt that as against her sons her maintenance is a charge on

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all the property. The dispute would have had to be registered and tried as a regular suit, and the only question for us would have been whether there was such material irregularity in the order of the Subordinate Judge as to justify our interference under Section 622.

The appeal must be allowed, the orders of the Courts below reversed, and the Subordinate Judge directed to restore the case to his file and pass fresh orders The respondent (plaintiff) will pay the appellant's costs throughout, except that the revision petition will be dismissed without costs.

BRANDT, J.—A suit was brought in the Court of the Subordinate Judge of Tinnevelly in which the plaintiff (respondent) sued various members of his family for partition of family property. The appellant, mother of the plaintiff and other parties, was admitted to the suit as defendant No. 7 at her own request, in order that she might establish her right to possession—for her life at least—of some three acres of land, of which she alleges she is in possession, and of a part of a house, in lieu of, or as, maintenance. The members claiming partition put in a razinama, under which it was mutually agreed that they should each take a certain share of the property in suit. The appellant was no party to that razinama. Decree was passed in accordance with the terms of the razinama, in which, and in the decree passed in accordance therewith, there is no reference to, nor adjustment of, the claim of the appellant; but in the heading to the decree the names of all the parties on the record, including that of the appellant, appear. When one or more of the sharers under the decree applied for ascertainment division and delivery of his or their shares, the appellant objected by means of a petition in execution, that, inasmuch as she was no party to the decree, it could not be legally executed so as to affect her interests in any way or to deprive her of possession.

The Subordinate Judge in effect allowed her objection in so far as it related to possession of a part of the house in which she [477] resided when the suit was brought, on the ground that " she has, of course, a right to live in the family-house and to her exercise of that right," and that " the plaintiff (her eldest son) does not object;" but as to the land, though there is no express order, the Subordinate Judge must be taken to have disallowed it on the ground that " under the Hindu Law the mother has no possessory or proprietary right in the family property, and what she has is only a right to maintenance."

On appeal against that order the District Judge rejected the appellant's petition on the ground that the order of the Subordinate Judge appears to be in accordance with the decision in *Venkatammal* v. *Andyappa* (1).

It is contended on behalf of the appellant that as she is a party to the suit in which the decree was passed, any question arising between her and another party to the suit and relating to the execution of the decree can and must be determined in execution-proceedings and not otherwise.

As to whether or not the appellant is a party to the decree by reason of her name appearing in the heading thereto, the vakil for the appellant appeared to be in some doubt, and also as to the result, if it were held she was or was not a party.

For the respondent it was contended that there is no appeal in this case, the appellant not being a party to this decree, or that if she is a party

(1) 6 M. 130.

to the decree, she is bound by it, and her only remedy is to apply to the Court which passed the decree for a review or amendment of the decree; and that if she is not a party to the decree, her remedy is to bring a fresh suit, or to make a claim or objection as a person not a party to the decree, who, being in possession, is dispossessed.

It appears to me that it is open to the appellant to have the objection raised by her heard and determined under Section 244, the wording of the section being "questions arising" not between parties to the decree, but "between parties to the suit in which the decree was passed." She was and is a party to the suit: her claim has not been adjudicated on. The other parties to the suit having elected to settle the matters in dispute between them without reference to her, and a decree having been made in accordance **[478]** with such agreement, the decree must be treated as one entitling them to partition of their shares, subject, however, to all the appellant's asserted rights; or, if they claim in execution more than this, the Court must either disallow the claim as having been virtually given up as against the appellant, or it must re-open the case, and, after deciding the questions at issue between the appellant and the other parties, amend the decree or pass a fresh decree.

The adjustment of the suit is final only in so far as it relates to so much of the subject-matter of the suit as is dealt with by the agreement.

There is no such adjustment or agreement in respect of this appellant's interest as can be recognised, for she did not consent thereto; and, indeed, it is not pretended that the razinama purported even to deal with her interest.

With these observations I would set aside the order of the Lower Appellate Court and the order of the Court of First Instance in so far as it disallowed or did not deal completely with the objection of the appellant in respect of the land which was in her occupation and enjoyments. It is unnecessary and undesirable to express any opinion upon the merits of the appellant's claim. I would, except as regards the revision petition, allow the appellant's costs throughout, as the parties to the decree put in their agreement and got their decree behind the back of the appellant and then tried to execute it as against her.

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8 M. 478.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

KARUTHASAMI (*Defendant No.* 1), *Appellant v.* JAGANATHA (*Plaintiff*), *Respondent.** [9th January and 27th April, 1885.]

Mortgage—Decree for redemption—Second suit to redeem—Civil Procedure Code, Sections 13. 244.

A decree obtained by a mortgagor, which declared that the mortgagee should deliver up possession on payment of the sum found due to him, not having been **[479]** executed for three years, a purchaser of the equity of redemption sued the mortgagee to redeem:

Held, that this suit was not barred by the former decree and that the plaintiff was entitled to redeem. *Sami* v. *Somasundram* (I.L.R., 6 Mad., 119) approved. *Gan Savant Bal Savant* v. *Narayan Dhond Savant* (I.L.R., 7 Bom., 467) dissented from.

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* Second Appeal 732 of 1884.

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[Overruled, 25 M. 300 (325) (F.B.); F., 15 M. 366 (371); R., 21 A. 251 (261); 24 A. 44 (64) (F B.)=21 A.W.N. (1901) 194; 13 B. 567 (570); 16 B. 243 (249); 19 M. 40 (51) (F.B.); 21 M. 18 (24); 3 O.C 371 (380) (F.B.); 93 P.R. 1908 (F.B.)=164 P.L.R. 1908=133 P.W.R. 1908; 100 P.R. 1905=16 P.L.R. 1906.]

THIS was an appeal from the decree of T. Ganapathi Ayyar, Subordinate Judge of South Tanjore, dated 21st April 1884, confirming the decree of S. Subbayyar, District Munsif of Tanjore, in suit 332 of 1882.

The plaintiff, Jaganatha Pillai, alleged that a certain garden had been mortgaged by its owner, Rangasami, to defendant No. 1, Karuthasami Vandayan, and was in his possession. That one Panchanadayyan, the father of defendants Nos. 3, 4, 5, bought the said garden at a sale in execution of a Small Cause Court decree against Rangasami in 1877, and in 1879 brought a suit to redeem the mortgage and obtained a decree directing that the property should be delivered up to him on payment of the mortgage debt.

That in 1880 Panchanadayyan sold his interest to defendant No. 2, who transferred the same to plaintiff on 5th June 1882. That plaintiff attempted to execute the decree obtained by Panchanadayyan, but, as no transfer of the decree had been obtained, the Court by an order, dated 18th November 1882, refused to allow him to execute the decree. The plaintiff, therefore, claimed either to be allowed to redeem or to be declared entitled to execute the decree obtained by Panchanadayyan. Defendant No. 1 pleaded, *inter alia*, that the plaintiff had no cause of action, and that his remedy was to execute the former decree, and that execution of the said decree was barred by limitation.

The District Munsif held that the former decree, being merely declaratory, was no bar to the suit and decreed redemption, citing *Sami* v. *Somasundram* (1).

On appeal this decree was confirmed. Defendant No. 1 appealed to the High Court.

Mr. *Wedderburn*, for appellant.

Sadagopachariyar, for respondent.

For appellant it was contended that the decree in the former [480] suit, though not framed in the manner now prescribed by Section 86 of the Transfer of Property Act, 1882, was, nevertheless, a decree which could have been executed, and that Sections 13 and 244 of the Code barred this second suit, for which there ought not to have been any necessity if plaintiff had obtained a transfer of the former decree.

If this was not so, any number of suits might have been filed, and any number of decrees given for redemption.

The fact that the former decree could not now be executed ought not to affect the question. The mortgage was merged in the decree. *Higgin's case* (2), *King* v. *Hoare* (3), *Anrudh Singh* v. *Sheo Prasad* (4), *Sheik Golam Hossein* v. *Alla Rukhee Beebee* (5), *Doobee Singh* v. *Jowkee Ram* (6), *Gan Savant Bal Savant* v. *Narayan Dhond Savant* (7).

[The Chief Justice referred to Coote on mortgages and to the practice of the English Court of Chancery (see Chapter 84, Sections 3, 7, 13).]

The only procedure which can be followed in India is that laid down by the Code.

For the respondent *Sami* v. *Somasundram* (1), *Periandi* v. *Angappa* (8) were relied upon.

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(1) 6 M. 119. (2) 6 Rep. 45. (3) 13 M. & W. 494. (4) 4 A. 481.
(5) N.W.P. (1871) 62. (6) N.W.P. (1868) 381. (7) 7 B. 467.
(8) 7 M. 423.

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The Court (TURNER, C J., and HUTCHINS, J.) delivered the following

JUDGMENT.

The appellant relies on the cases of *Sheik Gholam Hoosein* v. *Alla Rukhee Beebee* (1), *Anrudh Singh* v. *Sheo Prasad* (2), and *Gan Savant Bal Savant* v. *Narayan Dhond Savant* (3). In the first of the cases cited, the original suit was not, strictly speaking, a suit for redemption, but a suit to recover property on which the mortgage debt had, it was alleged, been discharged. The decree was absolute and not conditional. In *Anrudh Singh*, the facts are not reported. It is only stated that the Court followed the decision in *Sheik Golam Hoosein* v. *Alla Rukhee Beebee*. It may be presumed the facts of the two cases were similar. It may be admitted that the decision of the High Court of Bombay is in favour of the appellant, but Mr. Justice Kemball apparently relies on the decision in *Sheik Gholam Hoosein's* case without noticing the difference [481] between the case decided in the Allahabad Court and that which he was considering.

In the case before us, Panchanadayyan, in December 1879, obtained a decree in original suit 224 of 1879 for the recovery of the mortgaged property conditionally on his discharging the mortgaged debt ; but the decree did not go on to declare that, if the condition was not fulfilled within a time limited, the suit should be dismissed and Panchanadayyan foreclosed. The rights of Panchanadayyan in the mortgaged property were sold by Panchanadayyan to the defendant No. 2 and by him to the respondent, who thereupon applied to the Court which passed the decree for redemption for leave to execute it. The Court refused the application as the decree had not been assigned to him. The respondent then instituted the present suit in which he prayed that it should be declared that he was entitled to execute the decree in original suit No. 224 of 1879, or that it should be ordered that the mortgaged property should be delivered to him on payment of the amount due on the mortgage. Before the trial of the suit three years had elapsed from the date of the decree in original suit No. 224 of 1879, and accordingly the Munsif awarded the alternative relief claimed and the Appellate Court affirmed the decree.

In our judgment the relation on which the mortgagor and mortgagee stood to one another was not terminated by the decree. It was intended by the decree that it should be terminated on the happening of a certain event, which event has not occurred The relation then still exists, and the right to redeem is inseparable from the relation so long as it exists. An unexecuted decree for partition would not alter the relation of the members of a joint family. The estate would still be joint and the right to obtain a partition would attach to it whenever a fresh demand for partition was made and refused.

We dismiss the appeal with costs.

(1) N.W.P. (1871) 62. (2) 4 A 481. (3) 7 B. 467.

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APPELLATE CIVIL.

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[482] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

KARUPPAN AND OTHERS (*Defendants*), *Appellants v.* RAMASAMI (*Plaintiff*), *Respondent.** [17th April, 1885.]

Civil Procedure Code, Section 375—*Compromise of suit—Consent withdrawn before decree.*

By an agreement made in writing, before the hearing, the parties to a suit entered into a compromise by which the plaintiff agreed for consideration to withdraw the suit. When the case came on for hearing, the plaintiff refused to fulfil his promise.

The defendant having produced the agreement, the Munsif held that it must be enforced, and dismissed the suit.

On appeal the District Judge held that the agreement could not be treated as a compromise, as the plaintiff did not consent, and remanded the suit.

Held, that the agreement could be enforced —*Ruttonsey Lalji* v. *Pooribai* (I.L. R., 7 Bom., 304) approved.

[F., 9 M. 103 (107); Appr., 20 B. 304 (308); 24 C. 908 (F.B.); R., 19 M. 419 (422); 12 C.P.L.R. 56 (58); 12 M.L.J. 360 (362); 5 O.C. 49 (53) (F.B).]

THIS was an appeal against the decree of C. W. W. Martin, District Judge of Salem, reversing the decree of S. Manavalayyar, District Munsif of Salem, in suit 280 of 1883.

The plaintiff, Ramasami Goundan, sued the defendants, Karuppan and two others, to compel them to execute a conveyance of certain land which the defendants had sold and delivered to plaintiff.

The defendants pleaded that the matter in dispute had been settled out of Court after issue of summons, and produced a document stamped with an anna stamp purporting to be a receipt for Rs. 100, executed by plaintiff, stating that he had transferred the land to the defendants and that he undertook to have the suit dismissed by presenting a petition for withdrawal.

The plaintiff, admitting the genuineness of this document, objected, *inter alia*, that, as the consideration had not been paid, he was not bound by it.

The District Munsif held that, as the money was placed in the [483] hands of a third party until plaintiff performed his part of the agreement, the agreement should be enforced, and dismissed the suit.

The District Judge reversed this decree and remanded the suit on the ground that, as both parties did not consent, the document could not be treated as a compromise of the suit.

The defendants appealed.

Ramasami Mudalyar, for appellants.

Sadagopacharyar, for the respondent.

The Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.) delivered the following

JUDGMENT.

The District Judge has declined to admit evidence of an agreement out of Court whereby the respondent agreed to withdraw his suit in consideration of a sum of Rs. 100 which is said to have been deposited for him with a third party. The question is whether an adjustment out of

* Appeal against Order 31 of 1885.

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Court of a pending suit is binding on the parties, or whether either party is at liberty to withdraw from such adjustment at any time before it has been formally assented to in Court.

The question came before Mr. Justice Scott in *Ruttonsey Lalji v. Pooribai* (1), and he held that no party was at liberty to withdraw from a compromise once unconditionally agreed to. It appears to us that this is the correct view. If a defendant satisfies the plaintiff by an actual payment before the final hearing, it could not be contended that he is not entitled to prove such satisfaction by the plaintiff's receipt if it is denied, and Section 375 puts an adjustment by any lawful agreement on the same footing as a satisfaction.

We set aside the Judge's decree and direct him to restore the appeal to his file and pass a fresh decree after such inquiry as may seem necessary.

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8 M. 484 (F.B.).

[484] APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

ITTIACHAN (*Defendant No.* 1), *Appellant v.* VELAPPAN AND ANOTHER (*Plaintiff's Representatives*), *Respondents.**

SYED KUTTI AND ANOTHER (*Defendants Nos.* 3 *and* 4), *Appellants v.* KANNAN (*Plaintiff No.* 1), *Respondent.*†

KANNACHI AND ANOTHER (*Plaintiffs*), *Appellants v.* NARAYANA AND ANOTHER (*Defendants*), *Respondents.*‡

VIRAN ALI (*Defendant No.* 6), *Appellant v.* KUNHAMAD AND OTHERS (*Plaintiffs*), *Respondents.*§

RAMAN (*Plaintiff*), *Appellant v.* CHATHU AND OTHERS (*Defendants*), *Respondents.*||

RAMA AND OTHERS, (*Petitioners*) *v.* KRISHNA (*Respondent*).¶

KRISHNA (*Petitioner*) *v.* NANU AND ANOTHER, (*Respondents*).**

[24th April, 1885.]

Malabar Law—Karnavan, Decree against—Execution against tarwad property—Sale—Right of purchaser—Res judicata—Right of junior member of tarwad not impleaded to contest sales of tarwad property in execution of decree against karnavan sued as such.

When the karnavan of a Malabar tarwad has not been impleaded, as such, in a suit, and there is nothing on the face of the proceedings to show that it was [485] intended to implead him in his representative character, tarwad property cannot be attached and sold in execution of the decree, even though it is proved that the decree was obtained for a debt binding on the tarwad.

Although the property of a tarwad may be attached and sold in execution of a decree when the karnavan is sued as representative of the tarwad, members of the tarwad who are not parties to the proceedings and have not been represented in the manner prescribed by the Code of Civil Procedure are not estopped from

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* Second Appeal 443 of 1883.
† Second Appeal 900 of 1883.
‡ Second Appeal 431 of 1884.
§ Second Appeal 442 of 1884.
|| Second Appeal 564 of 1884.
¶ Civil Revision Petition 266 of 1884.
** Civil Revision Petition 279 of 1884.

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showing that the debt for which the decree was passed was not binding on the tarwad.

[**Diss.**, 20 M 129 (135) (F.B.); **F.**, 15 A. 405 (406) = 13 A.W N. (1893) 172; 17 M. 214 (215); **Appl.**, 13 M. 480 (483); **Appr.**, 10 M. 79 (83); 15 M. 333 (334); **R.**, 10 M. 322 (326); 12 M. 434 (437); 29 M. 390 (395) (F.B.) = 16 M.L.J. 307 = 1 M.L.T. 183; 35 M. 685 (691) = 10 Ind Cas. 874 = 21 M.L J. 508 = (1911) 1 M.W.N. 442; **Cons.**. 27 M. 375 (376); **D.**, 10 M. 117 (120) = 11 Ind. Jur. 100 = 11 Ind. Jur 294; 10 M. 223 (225); 10 M. 355 (356); 16 M. 335 (338); 1 M.L.J. 390 (391); 1 L.B.R. 180 (182).]

Second Appeal No. 443 *of* 1883.

Appeal from the decree of E. N. Overbury, Acting District Judge of South Malabar, confirming the decree of N. Sarvothama Rau, dated 30th September 1882.

Mr. *Branson* and Mr. *Michell*, for appellant.

Sankaran Nayar, for respondents.

Second Appeal No. 900 *of* 1883.

Appeal from the decree of T. von D. Hardinge, Acting District Judge of North Malabar, reversing the decree of B. D'Rozario, District Munsif of Pynad, dated 4th November 1880.

Mr. *Shephard*, for appellant.

Sankaran Nayar, for respondent.

Second Appeal No. 431 *of* 1884.

Appeal from the decree of C. Ramachandrayyar, Subordinate Judge of South Malabar; reversing the decree of B. Kamaran Nayar, dated 21st June 1883.

Sankara Menon, for appellants.

Sankaran Nayar, for respondents.

Second Appeal No. 442 *of* 1884.

Appeal from the decree of T. von D. Hardinge, Acting District Judge of North Malabar, confirming the decree of A. C. Kannan Nambiar, District Munsif of Kavai, dated 7th July 1883.

Srinivasa Rau, for appellant.

Mr. *Branson*, for respondents.

Second Appeal No. 564 *of* 1884.

Appeal from the decree of T. von D. Hardinge, Acting District Judge of North Malabar, confirming the decree of D. D'Cruz, District Munsif of Chavasheri, dated 7th August 1883.

[486] *Anantan Nayar*, for appellant.

Sankaran Nayar, for respondents.

Civil Revision Petition No. 266 *of* 1884.

Petition under Section 622 of the Code of Civil Procedure, against the order of N. Sarvothama Rau, District Munsif of Palgat, dated 25th March 1884.

Sankaran Nayar, for petitioners.

Sadagopacharyar, for respondents.

Civil Revision Petition No. 279 *of* 1884.

Petition under Section 622 of the Code of Civil Procedure against the order of N. Sarvothama Rau, District Munsif of Palgat, dated 18th June 1884.

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Mr. *Wedderburn* and *Sadagopacharyar*, for petitioner.

Sankaran Nayar and *Gopalan Nayar*, for respondents.

THESE cases were referred from time to time to a Full Bench for decision.

The facts and arguments appear sufficiently for the purpose of this report from the judgment of the Full Bench (TURNER, C. J., KERNAN, MUTTUSAMI AYYAR, HUTCHINS, and BRANDT, JJ.)

JUDGMENT.

In these cases the question has been raised—under what circumstances a decree passed against a karnavan of a Malabar tarwad will be binding on the other members of the tarwad who may not have been made parties to the suit, so that a sale in execution will convey the rights of the tarwad in the property sold in execution to a purchaser?

The customary law of Malabar vesting in the senior male or karnavan the management of the family property, an error unfortunately crept into the procedure adopted by the Courts of Malabar, and it was considered not only that a karnavan might sue alone on behalf of the tarwad, but that he might be impleaded alone as representing the tarwad. Indeed, the practice seems to have gone further, and it has been supposed that a decree obtained against a person who filled the position of karnavan would bind the tarwad, although he was not impleaded as karnavan, and although there was nothing on the face of the record to show that it was the intention of the parties that he should be sued in a representative character. Similarly it has been the practice to **[487]** treat a decree obtained against a person holding the position of karnavan as a decree against the tarwad, of which he was the managing member, and to bring to sale in execution of it tarwad properties, although there was nothing on the face of the proceedings to indicate the liability of the tarwad or that the judgment-debtor had been impleaded as representing it. In *Kombi* v. *Lakshmi* (1) this Court pointed out that, in order to bind the members of a tarwad, the proper procedure was to implead all of them, though in cases in which the members of the tarwad were numerous, advantage might be taken of the provisions of the Code of Civil Procedure which enabled the plaintiff to bring before the Court certain persons to represent themselves and others, having a similar interest in the subject of the litigation. It is very possible that the error in procedure to which we have adverted had its origin in the inconvenience of impleading so numerous a body as frequently constitutes a Malabar tarwad, of whom some may be minors and some may reside at a considerable distance from the tarwad house. Nevertheless, when it is sought to bind persons by a decree or by an order made in execution of a decree, some grounds must be shown to justify the imposition of the obligation. Ordinarily no persons are bound by a decree who are not parties to the suit or proceedings, or who do not claim through or under persons who are parties to the suit or proceedings. The Privy Council has nevertheless recognised that, for certain purposes, the manager of a Hindu family sufficiently represents all the members of a family, if it appears on the face of the proceedings that he has been impleaded in that character.

This is no doubt a concession to the *inexperience* in pleading which attended the constitution of regularly organised Civil Courts in this country, and to the extent to which the ruling of the Privy Council in the

(1) 5 M. 201.

1885 APRIL 24. — FULL BENCH. — 8 M. 484 (F.B.).

case to which we have alluded (*Bissessur Lall Sahoo* v. *Maharajah Lachmessur Singh* (1) authorises us to go, the circumstances of the Courts of Malabar appear to us to require us to go. But we cannot go further. No doubt it inflicts some hardship on a plaintiff who has obtained a decree against a person holding the position of a karnavan, in the belief that he has thereby secured a remedy against the tarwad, to find that his **[488]** decree is imperfect : it is a greater hardship on a purchaser at an auction sale held in execution of a decree of Court that he should find that the sale is not binding on the tarwad. But inasmuch as the recent amendment of the Procedure Code has declared that a sale in execution may be set aside where nothing passes by it, and in a sale in execution of a decree passed against a person who is the karnavan, but is not impleaded in that character, no interest in tarwad property could be conveyed, the purchaser will not be greatly injured. On the other hand, it would be extremely hard to hold that the members of a tarwad are bound by a decree or sale where they are not parties to the suit or proceedings, and where there is nothing to show that it was the intention of the person who procured the decree or sale to seek any remedy against them or to affect their interests. For this reason, it was held in *Haji* v. *Atharaman*(2) that where a suit was brought against a person who was karnavan of a tarwad but who was not impleaded as such, nor was the debt alleged to be a tarwad debt, a sale in execution of the decree would not bind tarwad property. It must of course be understood that where the members of a tarwad are not parties to the proceedings and have not been represented in the manner prescribed by the Code, they are not estopped from showing that the debt was not a tarwad debt.

We propose then to examine the circumstances of the several cases referred to separately.

Second Appeal No. 443 *of* 1883.

In second appeal 443 of 1883, the plaintiff sues for a declaration that certain tarwad property, which he has attached in execution of a decree obtained by him in suit No. 633 of 1875, but which had been released from attachment on the objections of defendants Nos. 1 and 2, is liable to be brought to sale for satisfaction of his decree. It appears that defendant No. 3 was the karnavan of the tarwad, and that in 1865-66, he purchased several pieces of land at Court-sales and expended on the purchase about Rs. 9,000. Among the lands so purchased are the lands of which the plaintiff claims the sales. Although it is said that the lands were purchased with borrowed monies, it is found by the Court **[489]** of First Instance and the Appellate Court that the lands in suit were purchased for, and are the property of, the tarwad.

We have then to consider whether the decree obtained by the plaintiff confers on him a right to bring the property to sale.

That decree was passed on a bond executed by defendant No. 3 in November, 1872. The bond purports to have been executed for the sum due on settlement of account, and the plaintiff's case is that the account related to a bond-debt created by the defendant No. 3 in 1867, when he borrowed Rs. 1,000 on the representation that he wanted the money to deposit it in Court in respect of a purchase of land at a Court-sale: and it appears that about that time defendant No. 3 made such a purchase, and the Court of First Instance and Appeal have found it is sufficiently proved

(1) 6 I. A. 233 (237). (2) 7 M. 512 (514).

that the land was bought with the money borrowed. The defendants Nos. 1 and 2 contended that they could not be bound by the acts of defendant No. 3 in November 1872, because they had given notice in the gazette that they revoked any authority defendant No. 3 enjoyed to manage the tarwad properties and they had already instituted a suit No. 120 of 1872 for his removal from the office of karnavan. That suit was eventually withdrawn on a compromise, and it was not until 1875, that defendants Nos. 1 and 2 eventually obtained a decree in suit 263 of 1875 for the removal of defendant No. 3 from his office. The Courts of First Instance and Appeal have held that these circumstances were insufficient to invalidate the obligation created by defendant No. 3 to the plaintiff as regards defendants Nos. 1 and 2, and finding that the plaintiff lent his money in good faith, and that the money was used for the benefit of the tarwad, they have held that the plaintiff is entitled to bring to sale tarwad property to satisfy the decree he had obtained in original suit 633 of 1875 against defendant No. 3.

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On appeal it is urged that defendant No. 3 was not impleaded in that suit as karnavan, and that there is nothing on the face of the proceedings, to show that he was impleaded in a representative character.

This cannot be controverted. In reference to the observations we have made, we must hold that the property of the tarwad cannot be made liable to the decree, and reversing the decrees of the Courts below, we must dismiss this suit, but, under the circumstances, without costs.

Second Appeal No. 900 *of* 1883.

[490] In second appeal 900, plaintiffs and defendants Nos. 1 and 2 were members of a tarwad, and they have sued for a decree declaring that certain tarwad properties mentioned in the plaint are not liable to sale in execution of decrees obtained in Small Cause Court case 1167 of 1880 against defendants Nos. 1 and 2 by defendant No. 3, and in Small Cause Court case No. 980 of 1879 by defendant No. 4 against defendant No. 1.

Small Cause Court case 1167 of 1880 was brought against defendant No. 1, who was karnavan, but was not so described in the suit, and against defendant No. 2, another member of the tarwad who was described as anandravan.

It is shown that the bond on which the suit was brought was executed to secure a loan obtained by defendants Nos. 1 and 2 for reconstructing the tarwad house which had been destroyed by fire, and that it was written by another anandravan who is dead.

The circumstance that defendant No. 2 was impleaded as anandravan appears to show that it was the intention of the defendant No. 3 to implead the defendants Nos. 1 and 2 as representing in that suit the other members of the tarwad, and agreeably to the principle we have laid down we consider it may be held the tarwad properties are liable to sale in satisfaction of the claim.

In Small Cause Court case 980 of 1879, the present defendant No. 4 sued defendant No. 1, but did not describe him as karnavan, and there is nothing in the proceedings in that suit which are produced to us to show that the defendant was impleaded as karnavan or sued for a tarwad debt as the representative of the tarwad.

The debt was contracted for the rent of two parambas (gardens) which the defendant No. 1 held on verumpatam (simple lease).

1885 APRIL 24. — FULL BENCH. — 8 M. 484 (F.B.).

We must hold that the tarwad properties are not liable to sale in execution of this decree.

The appeal in so far as it relates to the defendant No. 3 will be decreed and the suit dismissed with proportionate costs in all Courts. In respect of the claim of the defendant No. 4 the appeal will be dismissed and the decree of the lower appellate Court affirmed but without costs.

Second Appeal No. 431 *of* 1884.

[491] In second appeal 431 of 1884 the plaintiffs and defendants Nos. 2 and 3 are members of a tarwad. The interest of the tarwad in certain property was mortgaged by the plaintiffs and defendants Nos. 2 and 3 jointly on kanam for Rs. 2,478 to defendant No. 1 who held possession as mortgagee, but granted a lease to the karnavan at a rent equalling the interest he was entitled to receive on the kanam.

The interest was allowed to fall into arrears, and the karnavan in whose name the lease was granted died, whereupon defendant No. 1 instituted a suit 553 of 1877 against defendants Nos. 2 and 3 and the plaintiffs, and recovered judgment on their karnavan's engagement to pay rent.

In liquidation of the judgment-debt the plaintiffs and defendants Nos. 2 and 3 executed a deed of further charge on the properties, and defendants Nos. 2 and 3, who had become managers of the tarwad property, executed another engagement to pay rent equal to the interest on the original kanam and further charge. Again default was made, and defendant No. 1 brought original suit 564 of 1880 against defendants Nos. 2 and 3 on the engagement made by them, and obtained a decree.

It may be observed that defendant No. 2 was the karnavan and the defendant No. 3 the senior lady of the family, and it has been stated, and probably correctly, that she took part in the execution of the rent engagement, and it is argued that she was included in the suit 564 of 1880 as a representative of the family.

Both the Courts have held that the debt was, in fact, a tarwad debt contracted for the benefit of the tarwad, but in view of the fact that the plaintiffs were not parties to original suit 564 of 1880, the Munsif held that the tarwad property cannot be brought to sale, but the appellate Court reversed that decree. There is nothing on the face of the decree to show that the defendants Nos. 2 and 3 were sued as representing the tarwad: on the contrary, it appears they were sued on their personal undertaking. The decree of the appellate Court is reversed and that of the Munsif restored but without costs.

Second Appeal No. 442 *of* 1884.

In second appeal 442 of 1884, the plaintiffs sued for the cancelment of sale of a paramba and a house in execution of the decree **[492]** in Small Cause Court suit 768 of 1881 obtained by the defendant No. 6 against defendants Nos. 1 to 5, the karnavan and the senior anandravans of the plaintiff's tarwad.

It has been found by the appellate Court, and for sufficient reasons, that the debt was in fact a tarwad debt, *viz.*, a debt contracted by the defendants 1 to 5 for interest on a kanam which they had executed to the defendant No. 6 to discharge a debt previously incurred by them in the purchase of certain properties for the family and for other family purposes.

It appears from the plaint that, although the defendant No. 1 was not described as karnavan, the other four defendants were described as anandravans.

1885 APRIL 24. — FULL BENCH. — 8 M. 484 (F.B.).

We consider it sufficiently appears that they were sued as representatives of the family, and that the sale ought not to be set aside.

The appeal must be decreed, and the decrees of the Courts below reversed and the suit dismissed with costs in all Courts.

Second Appeal No. 564 *of* 1884.

In second appeal 564 of 1884 the plaintiff sues to obtain a declaration that certain tarwad property attached by him in execution of decree in original suit 429 of 1879, but released on the application of the defendants Nos. 2 to 6 is liable to sale for the satisfaction of the decree.

It appears that in 1874 defendant No. 1, who is the managing member of the tarwad to which he and the other defendants belong, borrowed Rs. 100 from the plaintiff and executed a bond pledging the family property as security for the repayment of the loan. It is alleged that the object of the loan was to make a payment to induce a former karnavan of the family to retire from its management, because he was injuring the interest of the family by mismanagement. Both the Courts find that there is no evidence that the former karnavan was guilty of mismanagement, and they have come to the conclusion that the object of defendant No. 1 in inducing the late karnavan to retire was that he himself might secure the position of karnavan.

It does not appear that the suit was brought against defendant No. 1 in his representative character, nor that the debt was a debt **[493]** created for any necessity binding on the family. The tarwad property is not liable to sale.

The appeal fails and is dismissed with costs.

Civil Revision Petition No. 279 *of* 1884.

In this case a decree had been obtained against a person who was the karnavan of a tarwad, but who had not been impleaded as karnavan or otherwise as representing the family, nor is there anything on the face of the proceedings to show that the decree was obtained against the defendant as representative.

The tarwad property was attached in execution of the decree, and certain of the anandravans objected to the attachment, but their objections were overruled. Two other anandravans then presented an objection, and the Munsif, having his attention called to the case of *Venkata* v. *Kaveri* (1), held that the family property was not liable and released the attachment.

In our judgment he was right in so doing, and even if we had had power to interfere under Section 622, Civil Procedure Code, we must have supported the order. The application is dismissed with costs.

Civil Revision Petition No. 266 *of* 1884.

The application in civil revision petition 266 of 1884 is presented against an order disallowing the objection of the anandravans in the case mentioned in civil revision petition 279. We have no power to interfere under Section 622, Civil Procedure Code—the petitioner's remedy is by suit. The application is dismissed but without costs.

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(1) 7 M. 201.

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8 M. 494.

[494] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

SANJIVI (*Petitioner*) *v.* RAMASAMI (*Respondent*).*
[17th April, 1885.]

Civil Procedure Code, Sections, 244, 583, 622—*Claim for rateable distribution by creditor rejected—Sum detained in Court, pending application to High Court—Application rejected—Interest on sum detained claimed in execution—Procedure.*

In execution of a decree by R, S, another creditor, claimed a rateable share of the proceeds realized. His claim was rejected. Pending an application to the High Court under Section 622 of the Code of Civil Procedure to set aside this order, the share claimed by S was detained in Court at his request. The High Court rejected the application of S, and R took out execution for the costs incurred therein, and for interest on the sum detained in Court at the request of S:

Held that the interest could not be awarded to R in execution of the decree for costs.

[R., 11 M. 220 (229) (F.B.)=12 Ind. Jur. 49.]

THIS was a petition under Section 622 of the Code of Civil Procedure against an order of H. T. Knox, District Judge of North Arcot, dated 21st January, 1885.

In execution of the decree in suit No. 2 of 1879, in the District Court of North Arcot, Kotha Sanjivi Chetti, the petitioner, claimed to be entitled, as a creditor of the judgment-debtor, to a rateable distribution of the proceeds realized in execution of the decree by the respondent, Kotha Ramasami Chetti. His claim was rejected, but pending an application to the High Court under Section 622 of the Code of Civil Procedure to set aside the order rejecting his claim, the rateable share claimed by Sanjivi was detained in Court at his request. The High Court having rejected the application for revision, Ramasami took out execution for Rs. 38-11-0, the costs awarded to him in the matter of the petition to the High Court by Sanjivi, and for Rs. 216, interest on the amount detained in Court at Sanjivi's request pending his application to the High Court. Sanjivi tendered Rs. 38-11-0, but objected to pay the interest claimed.

[495] The District Judge held that the claim was in substance a claim for mesne profits, and that it could and ought to be decided in execution under clause (*c*) of Section 244 of the Code of Civil Procedure, and that as Ramasami had been kept out of his money by the action of Sanjivi, he was entitled to interest.

Sadagopacharyar, for petitioner.

Bhashyam Ayyangar, for respondent.

The Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.) delivered the following

JUDGMENT.

The share which would have fallen to the petitioner, if a rateable distribution had been allowed, was retained in deposit on his application, pending his revision petition to this Court, asking that such a distribution might be ordered. That revision petition, however, was dismissed and the money has been paid out to the respondent—the question is whether the Judge had power by a summary order to award interest on the amount

* Civil Revision Petition 81 of 1885.

for the time it was retained in Court at petitioner's request. He had no jurisdiction under Section 244, for the parties are competing creditors and not parties to any suit. Section 583 has no application, for the High Court simply dismissed the revision petition. The order under which the money was retained was unconditional, and it was not competent to the Judge to add to it or to direct, when the stop order was withdrawn and the money paid, that it should be paid with interest. The respondent's remedy, if any, would be by regular suit.

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We set aside so much of the District Judge's order as awards interest and direct the respondent to pay the costs of this application.

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8 M. 496.

[496] APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Hutchins.

THANAKOTI AND OTHERS (*Plaintiffs*), *Appellants* v. MUNIAPPA AND OTHERS (*Defendants*), *Respondents*.*
[4th March, and 25th April, 1885.]

Civil Procedure Code, Section 13, *explanation* 5.

In 1881 A sued B, C, and others for damages for the loss of his crops by the diversion of a water-channel by the defendants. A claimed a right, common to himself and other raiyats of his village, to use the water during the day-time under an arrangement by which B, C, and the other defendants in the suit were entitled to use the water during the night time. The suit was dismissed.

In 1882 A and four other raiyats, not parties to the former suit, sued B C, and thirteen others, not parties to the former suit, for a decree declaring that the plaintiffs were entitled to the exclusive use of the water in the channel by day.

The Lower Courts *held* that the suit was barred by Section 13 of the Code of Civil Procedure :

Held, that as between the plaintiffs other than A and the defendants, and as between A and the defendants other than B and C, the suit was not barred by Section 13 of the Code of Civil Procedure.

[**R.**, 33 C. 905 (912) = 10 C.W.N. 867 ; 23 M. 28 (32) ; **D.**, 6 C.W.N. 178 (180) ; 16 C.P.L.R. 161 (162).]

THIS was an appeal from the decree of C. W. W. Martin, District Judge of Salem, confirming the decree of H. Krishna Rau, District Munsif of Dharmapuri, in suit 476 of 1882.

The facts necessary for the purpose of this report appear from the judgments of the Court (KERNAN and HUTCHINS, JJ.).

Bhashyam Ayyangar and *Kaliana Ramayyar*, for the appellants.

Ramachandra Rau Saheb, for respondents.

JUDGMENTS.

HUTCHINS, J.—This is a suit brought by five raiyats of Chandrapuram to establish an arrangement whereby the water of a certain channel is reserved for the nanjai lands of Chandrapuram during the twelve hours of the day, but for the gardens of Chandrapuram and another village during the night. The plaint alleges that since June, 1881, the defendants have shut off the waters of the channel from both nanjai and garden lands of Chandrapuram and have been using them exclusively for the garden lands of the other village and of a third village named

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* Second Appeal 998 of 1884.

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Agaram. Both the [497] Courts below have found that the claim is *res judicata* by the decree of the same Munsif in original suit No. 82 of 1881.

That was a suit brought by the present plaintiff No. 3 against two of the present defendants and others to recover damages on account of his crops having withered in consequence of the present defendants Nos. 1 and 13 and the other defendants in that case diverting the channel now in question in the day time of the 5th July, 1880, when under the alleged arrangement it was the turn of the then plaintiff to have the water. The two defendants who are defendants in this case, denied the arrangement, and contended that the village of Agaram was also entitled to the use of the channel by day as well as by night. The first issue framed was whether the then plaintiff was entitled to the water during daytime to the exclusion of the defendants. This issue was found against the plaintiff and his suit was dismissed.

There is no doubt that as between him, that is the present plaintiff No. 3, and the defendants arrayed against him in that suit, including the present defendants Nos. 1 and 13, the finding of that issue is *res judicata*, and conclusive. But as between the other plaintiffs and the defendants, even including defendants Nos. 1 and 13, the finding will not be *res judicata*, unless it is shown that those plaintiffs were sufficiently represented by plaintiff No. 3 and the other defendants by Nos. 1 and 13.

The former suit was brought by plaintiff No. 3 personally for damages caused to himself by the loss of his own individual crop. It was brought after Section 30 of the Civil Procedure Code came into force, but it is not pretended that there was any permission of the Court to enable the then plaintiff to sue, or the then defendants to be sued, on behalf of other parties interested in establishing or denying the same arrangement, or that there was any notice of the institution of the suit to parties so interested.

The Munsif relies on *explanation* 5 to Section 13 of the Code, but the then plaintiff, although he alleged a private right which he claimed to have in common with others, did not claim it on behalf of those others, but sued for damages caused to himself individually by the infraction of that common right. Neither with reference to Section 30, nor under the law as it existed before the amendment of the Code, was the suit a representative suit brought by the then plaintiff on behalf of himself and others interested.

[498] The District Judge on the other hand relies on the words 'for any of them" in Section 13. "No Court shall try an issue decided in a former suit between the same parties, or between parties under whom they *or any of them* claimed." We have already shown that this is not a suit between the same parties, although one of the plaintiffs was a party to the other suit, and none of these plaintiffs claim under him ; and it seems quite clear, "parties under whom they or any of them claim," is to be be construed with reference to the preceding words "the same parties," so as to include the representatives of any in the term "parties." On the District Judge's interpretation it would be open to a plaintiff to estop all his opponents by joining as defendant the representative of one against whose predecessor he had obtained a decree.

The dismissal of the suit as *res judicata* is wrong, and we set aside the decree of the Lower Appellate Court and remand the suit for a decision on the merits. The costs of this appeal will abide and follow the result.

KERNAN, J.—As between Vedanta Ayyangar, the plaintiff No. 3 (plaintiff in suit 82 of 1881), and such of the defendants to the latter suit as are defendants in this suit, the plea of *res judicata* is a bar to plaintiff's claim. It makes no matter that in this suit the plaintiff No. 3 asks for a declaration not asked for in the former suit. He could have asked for it in the former suit if his claim was good. The matter in issue in this suit and in the former suit is directly and substantially the same in respect of plaintiff No. 3, and the defendants to this suit who were defendants to suit No. 82 of 1881. As between those parties, Section 26 will apply, and this suit may be dismissed as between those parties.

But when the record is so far cleared, there still remain for decision rights not yet tried as between all the plaintiffs and such of the defendants as were not defendants in the former suit, and as between all the plaintiffs, except No. 3, and all the defendants in the suit.

These rights have not been determined, the Courts below having disposed of the case upon an erroneous view of the construction of Section 13, *explanation* 5. Both Courts decided that because plaintiff No. 3 claimed a right in common with the rest of the plaintiffs—that is, because this right put forward by the plaintiff [499] No. 3 was, in suit No. 82 of 1881, held to be unfounded—therefore, the other plaintiffs in this suit are barred from bringing this suit.

Now in Suit 82 of 1881 plaintiff No. 3 did not put forward any claim as being claimed in common with the other plaintiffs. No doubt he stated that he was one of the villagers, but his claim was made exclusively for injury done to himself. His claim to the right of water was plainly a claim in common with other villagers, but he did not put forward their rights, though, if he succeeded, they would have probably been benefited. Now, unless the other plaintiffs were aware of the suit of plaintiff No. 3 and authorized him to make the claim for them (of which there is neither allegation nor evidence), plaintiff No. 3 would have had no authority to claim on their behalf so as to bind them from afterwards bringing their own suit. One party having a right in common with others is not at liberty or authorized to sue in his own name to establish the right of the others except by their authority. *Explanation* 5 must be read with the provisions of Section 30 and the principles to be found in that section. If that section had been followed, which it was not, then the other plaintiffs would be bound.

The words "any of them" in Section 13 do not affect the case. Those words refer to any of the parties claiming under any party bound by the former proceeding.

As to limitation, if plaintiffs' claims are good, there may have been a new obstruction or interference, with their rights in 1881 and afterwards up to the filing of the suit. Therefore this question of limitation must be tried. The decrees of the Munsif and of the Lower Appellate Court are reversed and the case remanded for trial, it having been disposed of on a preliminary point.

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MARCH 19.

APPELLATE CIVIL.

8 M. 500.

8 M. 500.

[500] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

LAKSHMAKKA AND ANOTHER (*Defendants*) *v.* BALI (*Plaintiff*).*
[5th and 19th March, 1885.]

Regulation IV of 1816—*Village Munsif—Jurisdiction—Power to transfer suits.*

In a suit under Regulation IV of 1816, the defendant having objected to the Village Munsif trying the suit on the ground of personal hostility, the Munsif transferred the suit to another Village Munsif:

Held that this transfer was illegal.

Per HUTCHINS, J.

Semble :—In such a case the Village Munsif should report the facts to the District Court, and the District Judge should transfer the case for trial to another Village Munsif.

THESE cases were referred to the High Court by W. F. Grahame, District Judge of Cuddapah.

The facts necessary for the purpose of this report appear from the judgment of the High Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.).

Srirangacharyar, for plaintiff.

Defendants were not represented.

JUDGMENT.

HUTCHINS, J.—In these cases one Bali Reddi sued two persons, Lakshmakka and Ramasami, respectively, for Rs. 18, being the value of manure agreed by them to be delivered in respect of certain houses said to have been built on the plaintiff's land. The Village Munsif gave judgment for Rs. 12 in each case. The District Judge has referred the decrees as illegal on the ground that, although there is no evidence that the Munsif acted with such corruption or gross partiality as would entitle the District Court to interfere under Section 29, Regulation IV of 1816, the property which the Munsif "thought fit to divide into two parcels, each worth Rs. 18, is really one," and the splitting of the claim was in order to clutch a jurisdiction which he did not really possess.

[501] On referring to the pleadings I find a separate contract alleged with regard to each defendant, and that neither defendant set up the plea which has now been raised before the District Judge. The evidence taken by the Village Munsif shows that the two defendants between them have three houses, and whether these are held by them jointly or severally, the objection that the two suits were in respect of the same house cannot be raised now, nor is there anything to support the statement that the Munsif thought fit to divide the property.

There is, however, an entirely different ground for holding that the Munsif had no jurisdiction. The parties reside within the jurisdiction of the Village Munsif of Mamillapalle, before whom the suits were originally instituted. The suits were transferred by him to the neighbouring Munsif of Utkur, and it is the Munsif of Utkur who has passed the decrees. The transfer is said to have been made by an endorsement of the Munsif of Mamillapalle. The reason for the transfer does not appear; but it was not because the Munsif was himself a party: probably it was because the defendants in their written statements objected to his trying the cases himself, as he was their enemy.

* Civil Revision Cases 397 and 398 of 1884.

Section 5 of the Regulation empowers Village Munsifs to try suits the value of which does not exceed Rs. 10, and this limit has since been raised to Rs. 20. Section 8 prohibits a Village Munsif from taking cognizance of a suit against any person or persons not actually resident within his jurisdiction. Section 7 further forbids his trying any suit in which he himself or any of his immediate servants is personally interested. Section 26 provides that suits in which the Village Munsif is a party shall be tried by the Munsif of another village or by any competent authority.

I am disposed to think that Section 26 does not operate to give the Munsif who has jurisdiction power to transfer a suit to another Munsif: if it did, it would practically give one of the parties to the suit the right to choose the person by whom his case shall be determined : it is admitted by both these Munsifs that they are intimate friends. But even if Section 26 could by implication be held to confer such a power, it does not apply here for the simple reason that the Munsif of Mamillapalle was not himself a party.

[502] It seems to me, therefore, that the Munsif of Utkur had no jurisdiction, and that both the decrees must be set aside.

It is a question of some difficulty what course the Munsif of Mamillapalle ought to have followed when he found the defendants objecting to his trying the claims against them on account of his personal hostility. I am inclined to think that, like any other Court possessing jurisdiction over the subject-matter, he should have reported the facts to the superior Court having power to say what ought to be done and to transfer suits *i.e.*, to the District Court. It is true that nothing in the Procedure Code affects the jurisdiction or procedure of Village Munsifs (Section 6), and that, therefore, the District Court's power to transfer such a suit under Section 25 might be questionable; but the power to select a tribunal is impliedly given to some one, and, as I hold that it cannot have been given to the Munsif himself, it must be vested in the person contemplated in the Regulation as the Munsif's official superior, *i.e.*, the District Judge. Any other interpretation must lead to an absurdity.

MUTTUSAMI AYYAR, J.—I am also of opinion that the decrees which are referred to us as illegal must be set aside.

I come to this conclusion on the ground that the Village Munsif who tried the suits had no jurisdiction to try them. The defendants did not reside within his jurisdiction, nor was the imputation of enmity between them and the Village Munsif of Mamillapalle a ground upon which it was competent to him to transfer the suits to another Village Munsif either under Section 26 or any other section of Regulation IV of 1816. I do not, however, think that it is necessary to consider for the purpose of this reference whether in a case properly falling under Section 26 the Village Munsif of Mamillapalle would not be entitled to transfer the suit to another Village Munsif, or whether the District Court might interfere to transfer a suit from one Village Munsif to another when the defendant objects to the Munsif of his own village trying it on the ground of personal hostility.

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JULY 10.

APPEL-
LATE
CIVIL.

8 M. 503.

8 M. 503.

[503] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

In re QUARME.* [10th July, 1885.]

Civil Procedure Code, Sections 336, 341, 344, 349—*Judgment-debtor—Imprisonment—Discharge.*

Sections 336 and 349 of the Code of Civil Procedure, 1882, are applicable to judgment-debtors under arrest, but not committed to jail. A judgment-debtor committed to jail can only be discharged under Section 341.

[F., 12 B. 46 (48); R., 8 Ind. Cas. 319 (320)=95 P. R. 1910=190 P.L.R. 1910=133 P. W.R. 1910; 30 P.L.R. 1910.]

THIS was a case stated under Section 617 of the Code of Civil Procedure by W. E. Clarke, Subordinate Judge, Nilgiris, in Small. Cause Suit No. 289 of 1884.

The statement of the case was as follows.

In Small Cause No. 289 of 1884, one Mr. E.A. Quarme being arrested in execution of the decree, and being unable to pay the decree amount, was sent to jail under Section 336 of the Code of Civil Procedure; he now seeks to be released on furnishing security, pending the hearing of an insolvency petition which he has filed.

My doubt is, whether I have the power to release a judgment-debtor who is undergoing imprisonment on his furnishing security, pending the determination of his insolvency petition.

It appears to me that, according to the Code, there are only two ways in which a judgment-debtor can obtain his release after *arrest*, and only one method by which he can obtain release after *imprisonment*. After being arrested he may be released on furnishing security under Section 336 or Section 349; but he can only be discharged from jail under Section 341. What makes me entertain a doubt as to this view being correct, however, is, that by Section 344 a judgment-debtor either *arrested* or *imprisoned* may apply to be declared an insolvent, and Section 349, which is contained in the same chapter as Section 344, allows him, if *arrested*, to be released on furnishing security, but apparently has purposely been silent as to what is to be done with regard to his release if he has been imprisoned and yet seeks [504] to be declared an insolvent. The practice in this Court, which has existed, as I am given to understand, before I had any connection with it, has been to release applicants for insolvency, although imprisoned, on their furnishing security; but now that my attention has been particularly directed to Section 349, I am of opinion that the practice hitherto prevailing is erroneous, the point is of considerable importance, and therefore I have ventured to seek a definite decision regarding it from the High Court. I would, therefore, respectfully solicit an answer to the following question:—

Whether when a judgment-debtor has once been imprisoned he can be released from jail on furnishing security after he has filed his insolvency petition under Section 345.

Counsel were not instructed.

The Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.) delivered the following

* Referred Case No. 5 of 1885.

JUDGMENT.

1885 JULY 10. APPELLATE CIVIL. 8 M. 503.

There is no provision in the Code of Civil Procedure for releasing a judgment-debtor who has been imprisoned on security pending the disposal of his petition to be declared an insolvent. Sections 336 and 349 are applicable to judgment-debtors who are under arrest and not already committed to jail. When a debtor is imprisoned he can only be discharged under Section 341.

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8 M. 504.

APPELLATE CIVIL.

Before Mr. Justice Brandt.

In re NARISI AND OTHERS.* [1st May, 1885.]

Civil Procedure Code, Section 592—Pauper appeal—Application by party, not by pleader, necessary.

An application for leave to appeal *in forma pauperis*, under Section 592 of the Code of Civil Procedure, must be made by the party in person, subject to the exemption contained in Section 404 of the Code of Civil Procedure.

[N.F., 26 M. 369 (370).]

THIS was an application for leave to appeal *in forma pauperis* to the High Court from the decree of the District Court of Godavari in suit 17 of 1883.

The applicants, plaintiffs in the suit, minors, represented by [505] their mother Subbamma, had brought the suit *in forma pauperis* in the District Court. The application was presented by *Subba Rau*, Vakil of the High Court, under a power-of-attorney executed by Subbamma, but was rejected in the Admission Court on the ground that it could not be presented by a vakil.

JUDGMENT.

The following judgment was delivered by

BRANDT, J.—The appeal is one which I should have admitted, as it is doubtful whether the District Judge has dealt properly with the suit, having regard to the issues framed.

But a question arises as to whether an application for leave to appeal *in forma pauperis*, when not presented by the applicant in person, such applicant not being exempt from appearing in Court, can be entertained.

Section 592 of the Code provides that any person entitled to appeal, if unable to pay the fee required, "may, on presenting an application, accompained by a memorandum of appeal, be allowed to appeal as a pauper, subject to the rules contained in Chapters XXVI (relating to pauper suits), XLI, XLII and XLIII (relating to appeals) in so far as those rules are applicable."

Section 404 in Chapter XXVI provides that "notwithstanding anything contained in Section 36 (relating to recognized agents and pleaders) the application (to sue as a pauper) shall be made to the Court by the applicant in person," unless he is exempt under Section 640 or Section 641 from appearing in Court, in which case it may be presented, not by any pleader or vakil, but "by a duly authorized agent who can

* Civil Miscellaneous Petition 158 of 1885.

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answer all material questions relating to the application and who may be examined in the same manner as the party" might have been examined if he or she had appeared in person.

Now, although the same necessity for the personal appearance of the party may not, and probably does not, exist in the case of an appeal as exists at and before the proceedings prior to admission of a pauper's suit, and though it might be even preferable to have a vakil of the Court to show that the decree appealed against is contrary to law, or otherwise erroneous or unjust, I cannot hold that this rule is not applicable to pauper appeals.

The Code of 1859 (Section 368) did not in terms require the application for leave to appeal as a pauper to be presented in person; it required the application "to be written and presented" within **[506]** proper time; but in *Mussomut Bhugobutty's case* (1) it was held that this section read with the Section 301 relating to presentation of applications to sue as a pauper (which required the application to be presented in person) made it imperative that the application to appeal also should be presented in person.

Now the wording of the present Code is much more explicit. It in terms imports into the provisions of Chapter XLIV the rules contained in Chapter XXVI, and, moreover, expressly states in Section 404 in the latter chapter that Section 36 shall not apply in the case of suits *in forma pauperis*, which was not clearly expressed in the Code of 1859.

I must then hold, that this application cannot be admitted.

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8 M. 506.

APPELLATE CIVIL.

Before Mr. Justice Kernan, Officiating Chief Justice, and Mr. Justice Hutchins.

VELAYUTHAN (*Defendant No.* 1), *Appellant v.* LAKSMANA (*Plaintiff*), *Respondent.** [29th April and 6th July, 1885.]

Civil Procedure Code, 1859, *Section* 246—*Limitation Act*, 1871—*Estoppel.*

An order passed under Section 246 of the Code of Civil Procedure, 1859, rejecting a claim, after investigation, will, if not contested by suit by the claimant, estop him afterwards from pleading adverse possession at the date of the order in a suit brought to eject him by the decree-holder.

[F., 10 M. 357 (360); R., 22 B. 640 (645); 17 M. 17 (20).]

THIS was an appeal against the decree of A. J. Mangalam Pillai, Subordinate Judge of Madura (West), reversing the decree of A. Kuppusami Ayyangar, Additional District Munsif of Madura, in suit 11 of 1884.

The plaintiff, Laksmana Chetti, sued Velayuthan Servai and ten others to recover certain land and mesne profits. The plaintiff alleged that the owner of the land, Laksmana Servai, mortgaged it to Karuppanan in 1872; that in execution of a decree obtained by plaintiff's brother against Karuppanan in suit 259 of 1875 the land was attached and the mortgagee's title bought by plaintiff's brother and delivery made in execution of the **[507]** decree in 1877; that in 1878 the plaintiff's brother bought the equity of redemption from the owner, and that the defendants trespassed on the land in 1881-82 and carried off the crops. It was further

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* Second Appeal 86 of 1885.

(1) 21 W. R. 308.

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alleged that the father of defendant No. 1 had failed in suit 206 of 1876 to establish his title to the land, and that in suit 259 of 1875 aforesaid a claim made by the father of defendant No. 1 had been rejected under Section 246 of the Code of Civil Procedure, 1859. Defendant No. 1 denied the title of Laksmana Servai and the possession of Karuppanan, and alleged that he (defendant No. 1) and his ancestors had been in possession under a sale-deed since 1823.

The Munsif found that the title of plaintiff and possession of Karuppanan were not proved, and that the mortgage alleged to have been executed by Karuppanan was collusive.

The Munsif also found that the title by purchase in 1823, set up by defendant No. 1, was not proved, but that he and his ancestors had held possession for fifty years.

The suit was dismissed.

Plaintiff appealed.

The Subordinate Judge found that the plaintiff's title was proved, and ruled that the title of defendant No. 1 "must be held to be defunct" by reason of the decree in suit 206 of 1876, and by reason of the order rejecting the claim made by his father in suit* 295 of 1875, inasmuch as no suit had been brought to set aside that order (which was passed on the 30th January 1877) under Section 246 of the Code of Civil Procedure, 1859.

Defendant No. 1 appealed to the High Court on the following grounds:—

(1) Upon the findings of fact in the case, the plaintiff's suit is clearly barred by limitation.

(2) The Subordinate Judge is wrong in holding that the decision in original suit No. 206 of 1876 is, *res judicata*, in favour of plaintiff in the present suit.

(3) The defence of the defendants, so far as it is based upon limitation, is unaffected by original suit No. 206 of 1876 and the order passed under Section 246 of the former Code of Civil Procedure on a claim preferred by defendant in execution proceedings in original suit No. 275 of 1875.*

[508] (4) The said order under the former Code was passed when Act IX of 1871 was in force, and the defendants were not bound to bring a regular suit within one year from the date of such order, even assuming that such order was passed under Section 246.

(5) The said order was not passed under Section 246 after holding an investigation under the said section.

(6) The defendants being in possession, can rely upon their long possession as a bar to the plaintiff's suit, and it is not necessary for them to rely upon limitation, as a ground of positive title by extinguishment of plaintiff's title, if any.

(7) The Subordinate Judge has given no finding as to the alleged delivery of possession to plaintiff.

The facts necessary for the purpose of this report appear from the judgment of the Court (KERNAN, Officiating C.J., and HUTCHINS, J.).

Bhashyam Ayyangar, for appellant.

Hon. *Subramanya Ayyar*, for respondent.

* [Referred to in page 506 and para. 1 of this page also as No. "259 of 1875."]

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JUDGMENT.

The respondent was clearly entitled to recover, and the Subordinate Judge's decree is right, unless the appellant is entitled to set up his hostile possession for more than twelve years. If he can set up that plea, there will have to be a remand in order that the question whether he has so held possession may be determined.

The Subordinate Judge has found that the plea was precluded, first, by the former litigation of 1876, and secondly, by the order rejecting the appellant's claim in November 1876 which has not been contested by a regular suit within the statutory period.

On the first point, we think the Subordinate Judge is wrong. Original suit 206 of 1876 was brought by the appellant's father to obtain a declaration of his title to the lands in dispute. Two issues were framed, *viz.*, (1) whether the lands were the property of appellant's father; (2) in whose enjoyment were they, and for how long had they been so. As proof of title under the first issue, the appellant's father relied on a conveyance of 1823, but this was discredited by both the Courts. Upon the second issue the Munsif found that appellant's father had been in possession from 1823 to 1872, when he was dispossessed under a process **[509]** obtained in a collusive suit, but that his enjoyment had been as a mortgagee, and that, having been out of possession at the time he instituted the suit, he was not entitled to a declaration of title. In appeal, the District Court declined to go into the question whether the appellant's father was not still in possession, holding that, even if still in possession, he had failed to prove his title and was not entitled to have a declaration made of his absolute ownership. It is evident that there was no adjudication of the question of possession, and that, so far as those decrees go, the appellant is not debarred from now setting up that he was then, and still is, and has for half a century been, in hostile possession. The only effect of those decrees is to estop the appellant from setting up that he then had *title* to the lands.

The second point is more difficult to decide. Before the Munsif's decree in original suit 206 of 1876 was passed, the lands had been attached in the suit which the Munsif eventually found to be a collusive suit, and appellant had put forward a claim under Section 246 of the Code of 1859, stating that the lands belonged to himself and were in his possession and that, as the judgment-debtor (an alleged mortgagee) had no right whatever to them, the attachment should be removed. The Munsif held some inquiry into the matter, but eventually rejected the claim, finding, that by that time (13th January 1877) it had been disallowed by another Munsif in original suit 206 above mentioned. The appellant has made no attempt as yet to get that order set aside. The property was sold and purchased by the respondent in July 1877, and the appeal against the decree in original suit 206 was dismissed in the following September.

Now it has been held by this Court in *B. Krishna Rau* v. *Lakshmana Shanbhogue* (1) that an order passed under Section 246, disallowing an objector's claim, amounts to a summary declaration of a want of title in the objector, and that such declaration becomes equivalent to a final adjudication against his right, unless he brings a regular suit to supersede the order by establishing his right. The case of *Badri Prasad* v. *Muhammad Yusuf* (2) is another authority to the same effect and we were

(1) 4 M. 307. (2) 1 A. 381.

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also referred to *Krishnaji Vithal* v. *Bhaskar Rangnath* (1). The defendant has not brought any suit to establish his right since his objection was **[510]** disallowed, and if his appeal against the decree in original suit 206 can be regarded as such a suit, it failed. The order passed on his objection, not having been questioned by a regular suit, estops him now from setting up the same claim or objection in this suit, and it only becomes necessary to see what it was that he set up. He set up both a right and a present possession on his own account. He admits that he cannot now set up his right, but he contends that he can put forward his possession. His vakil contended that, if at the time his claim was dismissed he had been twelve years in adverse possession—or if he had been at that time some years, say, ten or eleven years, in possession, and if he continued in possession after the dismissal of the claim a sufficient time to make up with his prior possession twelve years, then he would have a title by possession notwithstanding the order of dismissal. But the order of dismissal was an adjudication against the claimant and he cannot make any case relying on any possession in whole or in part prior to that order. The terms of Section 246 here become material. The claim is to be disallowed, if it appear to the satisfaction of the Court that the property was in possession of the judgment-debtor as his own, or of his tenants. The order was therefore an adjudication that the land was not in the appellant's possession, as he had asserted it was, and we feel constrained to hold that it is not now open to him to assert, in direct opposition to that declaration, that he was in possession.

Whether it is still open to the respondent to bring a suit to establish his right is a question which need not now be considered. In *B. Krishna Rau's case*, the purchaser had brought his suit within the year allowed to the objector and defendant, but it was nevertheless held that the latter could not plead his right, though he might have brought a suit himself to establish it.

The result is that the appeal must be dismissed, and, though it seems a very hard case, we are not prepared to say that costs should not follow the result according to the usual rule.

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8 M. 511=10 Ind. Jur. 20.

[511] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

RAMAKRISHNAPPA (*Plaintiff*,) *Appellant v.* ADINARAYANA AND OTHERS (*Defendants*) *Respondents.** [6th July, 1885.]

Civil Procedure Code, Section 317—Benami purchaser—Stranger to the transaction not affected.

In a suit by A against B and C to recover land, A alleged that B bought the land at a Court sale on his behalf. B did not contest the suit. C, who did not claim under B, pleaded that A could not recover by reason of the provisions of Section 317 of the Code of Civil Procedure :

Held, that Section 317 only enabled the certified purchaser and those claiming under him to avoid arrangements made with him in the nature of a trust, and was no bar to the suit.

[F., 31 B. 61 (64)=8 Bom. L.R. 873 ; R., 17 M. 282 (285, 286) ; 20 M. 362 (364).]

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* Second Appeal 142 of 1885.

(1) 4 B. 611.

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THIS was an appeal against the decree of K. R. Krishna Menon Subordinate Judge of Tinnevelly, reversing the decree of K. Ramachandrayyar, District Munsif of Srivaikuntam, in suit 162 of 1882.

The plaintiff, Ramakrishnappa Nayak, sued the defendants, Adinarayana Pillai and seven others, to recover certain land and mesne profits.

The Munsif decreed the claim.

On appeal, the Subordinate Judge reversed this decree.

The plaintiff appealed to the High Court.

Bhashyam Ayyangar and *Kaliana Ramayyar*, for appellant.

Hon *Subramanya Ayyar*, for respondents.

For respondents it was contended, *inter alia*, that appellant could not recover by reason of Section 317 of the Code of Civil Procedure, inasmuch as in proving his title he had to rely on two purchases at Court sales which, he alleged, were made on his behalf by the certified purchasers therein, who were also defendants in the suit.

[512] The Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.) delivered the following

JUDGMENT.

This second appeal arises from a suit which was instituted by the appellant to recover possession of the land in dispute from the respondents. It was stated in the plaint that the land in question formed part of a one-third share which belonged to Dalavai Kumarasami Mudali and Abiramianni in the village of Ellanayakampatti; that their tenants purchased the third share for Rs. 12,000 on the 5th October 1870, but that only four of the chief men were the ostensible purchasers; that out of the purchase money, the tenants contributed but Rs. 9,000; and that the leading men mentioned above borrowed Rs. 3,000 from one Tinnappa Chetti on the security of some karisal punja, nanja, and sevval punja lands. It was further alleged that, on default being made in the repayment of Rs. 3,000, the creditor put up the mortgaged property to sale in execution of the decree in original suit 18 of 1873 on the file of the Subordinate Court of Tinnevelly; that defendant No. 6 bought it for himself and the appellant and obtained possession; and that subsequently both the appellant and defendant No. 6 held possession. It was also asserted that they borrowed Rs. 1,575 from one Murugappa Chetti in connection with this purchase at the Court sale; that Murugappa Chetti obtained decrees against the appellant and defendant No. 6 for the debt due to him in original suits 204 of 1878 and 310 of 1877 on the files of the District Munsifs of Tinnevelly and Srivaikuntam; that he transferred those decrees to the husband of defendant No. 7 and to defendant No. 8; that the land in suit together with some other land was sold in execution of the same; that in pursuance of an arrangement previously made with the appellant, the transferees of the decrees purchased the land at the Court sale, and made it over to the appellant on receipt from him of what was due to them under the decrees in their favour. After thus averring how he acquired an exclusive title to the land in dispute, the appellant alleged that respondents Nos. 1 and 2 prevented him in January 1881 from cutting the crop raised by him on a part of it; and that upon his application to the Magistracy for redress failing, the respondents illegally dispossessed him of the whole. It appears further that 110 chains of karisal punja, 6 and odd kottais of nanja, and 4 and odd chains of sevval punja were purchased from the Dalavai family; [513] that out of this, 34 chains of karisal punja, nanja, and sevval punja were mortgaged to Tinnappa Chetti; that the four ostensible purchasers

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executed sale-deeds conveying the remainder of the land to the several tenants who contributed Rs. 9,000; and that the contribution was made only by those tenants who held karisal punja in proportion to their several holdings. The appellant's case was that, according to the agreement under which the one-third share was purchased, the purchase money was to be apportioned only on 110 chains of karisal punja and the sevval punja and the nanja lands were not to be taken into account in assessing the price on the tenants, but they were to be distributed, on payment of the whole of purchase money, among such tenants as cultivated karisal punja and in proportion to their several holdings, and that consequently those tenants who had no karisal punja to cultivate had no interest in the purchase, and those who owned karisal punja lost their right to the land in suit by the auction sale which was the result of their default in payment of the balance of the purchase money. The defendants Nos. 6 and 8 disclaimed all interest in the land in dispute and acknowledged the appellant's claim to it. Defendant No. 7 did not appear in the Court of First Instance, nor did she appeal to the District Court from the decree of the District Munsif. These defendants are not, therefore, made parties to this second appeal.

The first five defendants, who are the respondents before us, resisted the claim. They contended that they had occupancy rights, and that the appellant was not entitled to eject them by virtue of his alleged right as purchaser. They alleged that the original agreement in regard to the nanja and sevval punja was that the prior holders were to continue in possession, though the purchase money was to be contributed solely by the tenants who owned karisal punja; that the tirva and swamibhogam due thereon were to be appropriated to the payment of the assessment or kattuguttagai due to Government on the one-third share to be purchased; and that the surplus or deficiency was to be divided among or contributed by the holders of karisal punja. As to the balance of purchase money, Rs. 3,000, their contention was that out of 110 chains of karisal punja, 22 chains were owned by the appellant and his people; that is it was agreed that Rs. 3,000 was to be a charge upon those chains of punja land only Rs. 9,000 [514] being contributed by those tenants who held 88 chains of karisal punja; and that the Court sales on which the appellant relied were not binding on them—first, because they were the result of the appellant's default, and secondly, because the mortgage to Tinnappa Chetti was not authorised by the terms of the original agreement between the tenants and the four ostensible purchasers. They denied also that the appellant was ever in possession. Issues were raised both as to the title and possession set up by the appellant. The District Munsif held that the appellant had no peaceful possession; and that the transfer to the appellant by process of Court was perhaps only symbolical. He decreed the claim however on the ground that the appellant was entitled to possession by virtue of his title as purchaser.

But on appeal, the Subordinate Judge considered that, whether the appellant had actual possession, and such possession was usurped by the respondents, was the only question he had to determine, and, concurring with the District Munsif that the appellant had failed to prove the alleged dispossession, he reversed the decree of the District Munsif and dismissed the suit with all costs.

The Subordinate Judge is clearly in error in supposing that the appellant chose to base his suit on an alleged wrongful dispossession. The appellant no doubt asserted that respondents unlawfully took possession in March 1881, but there is no ground for the inference that this was a

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possessory suit. Having regard to the averments in the plaint as to title, to the frame of the pleadings, and to the issues taken by the parties, we see no reason to doubt that the appellant relied also on his title in support of his claim to possession.

The learned pleader for the respondents themselves does not endeavour to support the decree under appeal on the ground suggested by the Subordinate Judge. But he contends first, that no ejectment will lie against the respondents who have an occupancy right, and secondly, that the appellant can acquire no valid title as a benami purchaser under Section 317 of the Code of Civil Procedure. As to the first contention there was no distinct issue raised in regard to occupancy right and the Subordinate Judge has not recorded any finding upon it. Though in paragraph 10 of his judgment, the District Munsif observes casually, while discussing the evidence of one Vadivelu Muruga Pillai, that in nineteen **[515]** suits the tenants in the village were declared liable to be evicted, it is not clear that the respondents had their attention sufficiently directed to the question by a specific issue, or that they had an opportunity of producing all the evidence in their possession to establish their allegation. We think that, even if the contention is well founded, it would still be necessary to remit the case in order that a specific issue might be framed, and a definite finding recorded after hearing such evidence as the parties to the appeal might adduce.

As to the second contention, Section 317 does not render a benami purchase at a Court sale void *ab initio*. It only provides that no suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person. It is true that, in the case before us, the appellant in making out his title has to rely on two benami purchases, *viz.*, the purchase alleged to have been made by defendant No. 6 for himself and the appellant in suit 18 of 1873, and the purchase alleged to have been made by defendant No. 8 and the husband of defendant No. 7 in pursuance of a previous arrangement made with the appellant. But it must be noted that defendants Nos. 6 and 8 disclaimed all interest in the land in suit and admitted the appellant's right, while defendant No. 7 did not appear and resist the claim in the Court of First Instance, and did not appeal from the decree of that Court in favour of the appellant. It must also be observed that the respondents do not claim under the defendants 6—8 or any of them. As we understand it, the effect of Section 317 can only be taken to be to enable certified purchasers and those claiming under them to avoid any arrangement made with them in regard to the purchase in the nature of a trust. We set aside the decree of the Subordinate Judge and remand the case for disposal with reference to the foregoing observations. The costs of the second appeal will be costs in the cause.

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APPELLATE CIVIL.

8 M. 516.

[516] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

SONACHALA (*Plaintiff*), *Appellant v.* MANIKA (*Defendant*), *Respondent.** [15th April and 6th July, 1885.]

Jurisdiction—Suit to eject trustee—Valuation—Specific Relief Act, Section 42.

By an agreement between S and M, members of the same Hindu family, it was arranged that certain immoveable property dedicated to charitable uses by the family should be managed by M, subject to the supervision of S, and that M should render accounts to S and observe certain other conditions. S sued M in the Court of the District Munsif and prayed for a decree for the removal of M as manager and for the appointing of himself as manager of the property.

M objected that the Court had no jurisdiction, because the property exceeded in value the pecuniary limits of the jurisdiction of the District Munsif's Court as fixed by Section 12 of the Madras Civil Courts Act, 1873 :

Held, that S was not entitled to sue for the removal of M without praying for his ejectment from the property, and that, as the property exceeded in value Rs. 2,500, the District Munsif had no jurisdiction.

[R., 19 A 104 (107) = 16 A.W.N. (1896) 187 ; 12 Ind. Cas. 449 (450) = 21 M.L.J. 952 = 10 M.L.T. 356 = (1911) 2 M.W.N. 387.]

THIS was an appeal from the decree of D. Buick, District Judge of North Arcot, confirming the decree of V. Subaramanya Sastri, District Munsif of Vellore, in suit 455 of 1883.

The facts necessary for the purpose of this report appear from the judgments of the Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.).

Sadagopacharyar, for appellant.

Mr. *Subramanyam*, for respondent.

JUDGMENTS.

MUTTUSAMI AYYAR, J.—The appellant is the son of the respondent's paternal uncle. Their ancestors founded a choultry at Vellore and left it under the management of their family. In 1874 there was litigation in regard to the management, but it terminated in a compromise. The special regulations established by this compromise were (i) that respondent should continue in management, but subject to appellant's supervision ; (ii) that respondent should keep up the choultry as it was without altering its form ; (iii) that he should apply the income to such charitable purposes as are connected with the institution ; **[517]** (iv) that he should render accounts every year to the appellant ; (v) that the surplus income, if any, should be allowed to accumulate and be invested in the joint names of the appellant and the respondent ; and (vi) that if the respondent was guilty of any breach of duty, he and the appellant should nominate certain arbitrators and abide by their decision. The plaint stated that respondent infringed those regulations by altering the western verandah, the western hall, and the southern verandah of the choultry so as to convert them into shops, by applying to his own use the rent received for those shops, by not managing the charity well and misappropriating its income for his own benefit. It next recited that the appellant intended to institute a fresh suit in regard to the income which had been misappropriated, and that respondent was called upon, but without success, to nominate arbitrators. It then prayed for a decree

* Second Appeal 42 of 1885.

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for the respondent's removal from management, for the appellant's appointment as manager, and for the removal of the new buildings by the respondent, or for the payment by him of Rs. 20 to enable the appellant to remove them. The respondent pleaded, *inter alia*, that the appellant was bound to obtain the relief asked for in this suit by executing the decree in original suit 404 of 1874 on the file of the District Munsif of Chittur, and that the suit was, therefore, barred by Section 244 of the Code of Civil Procedure, and that by the terms of the decree in original suit 404 of 1874 the appellant was not entitled to institute this suit, but was entitled only to compel the respondent to submit to arbitration. At the first hearing he pleaded orally to the jurisdiction of the District Munsif, and contended that the value of the choultry, and the endowment of which the appellant claimed to be appointed as manager, was over Rs. 3,000. He also traversed the averments in the plaint in so far as they imputed to him mismanagement, misappropriation and a dereliction of duty in violating the terms of the razinama.

As the appellant did not claim possession of the choultry and its endowment, another question raised for decision in this suit was, whether he was not debarred from asking for a declaration of his right to management. The District Munsif held that the appellant was not entitled to a declaratory decree under Section 42 of the Specific Relief Act, that under the terms of the razinama decree, the appellant was bound to demand specific performance of the [518] agreement to refer the matters in dispute to arbitration and that he (District Munsif) had no jurisdiction to entertain the suit inasmuch as the choultry and its endowment were over Rs. 2,500 in value. In appeal the Judge concurred with the District Munsif that the appellant had no right to a mere declaration of his right of management.

It is urged in second appeal that none of the objections taken to the suit are well founded, and that the appellant is entitled to a decision on the merits. Our attention was also drawn to *Govindan Nambiar* v. *Krishnan Nambiar* (1). The question referred in that case for the decision of the High Court was, whether a suit for deposing a karnavan from management and for appointing the plaintiff in his stead was governed, when the tarwad was possessed of moveable and immoveable property, by clause 5 of Section 7 of the Court Fees Act in the case of immoveable property, and by clause 3 of that section in the case of moveable property. The High Court decided that the claim for the removal of a karnavan was incapable of valuation and ought to be dealt with for purposes of Court Fees under Section 17, Clause 6 of the second schedule, and it observed that it would be erroneous to value such claim as if it were a claim for possession of land, for, the possession of the property is throughout in the tarwad and is not affected by a change in the person who fills the office of manager. In that case both the karnavan and the anandravan were beneficiaries, and in one sense, the possession of either was the possession of both, whereas in the case now before us neither the appellant nor the respondent is a beneficiary and the possession of the one cannot be treated as the possession of the other. Having regard to Section 3 of Act II of 1882, which is only declaratory of the prior state of the law as to the nature of a trust, a trustee must be taken in law to be the owner of trust property, but subject to an obligation annexed to his ownership and arising from a confidence reposed in him and accepted by

(1) 4 M. 146.

him as such owner for the benefit of the beneficiary. A suit, therefore, for removing a trustee in possession and for appointing the plaintiff in his stead and placing him in possession of the trust property must be treated, for purposes of Court Fees; in the absence of a special provision of law, as a suit falling under Section 7 of the Court Fees Act. It may be that the obligation annexed to the nominal ownership renders the **[519]** position of a trustee analogous to that of a manager or office-bearer, but it seems to me only to furnish a ground for assessing the appellant or the respondent personally with the costs of the litigation according as the suit is vexatious or well founded. In this view the appellant's omission to ask for possession, which he is bound to do if the respondent's misfeasance injures the interests of the charity as alleged by him, must be taken to be an attempt to evade the Stamp law and to eject the respondent by obtaining a declaration. The Judge is therefore right in refusing to make the declaration sought for in this suit in which possession of the trust property was not claimed, and in my judgment such refusal is in accordance with the views expressed by this Court in *Chockalingapeshana Naicker* v. *Achiyar* (1). It is true that in the plaint there is no prayer for a mere declaratory decree, but on the other hand there is a prayer for some consequential relief, if not for possession, and that this circumstance affords colour for the contention that Section 42 of the Specific Relief Act has no application. But still the suit must be treated as one undervalued for evading the Stamp law and instituted to recover property of which the value is in excess of the jurisdiction of the District Munsif. This second appeal must, therefore, fail and is dismissed with costs.

HUTCHINS, J.—The Courts below have erroneously described the suit as one for a mere declaration brought under Section 42 of the Specific Relief Act. It is a suit for the removal of a manager, for the appointment of plaintiff as manager, for the removal of new buildings and so forth. I agree, however, that the plaintiff was not entitled to ask for the removal of the defendant and his own recognition as manager without adding a prayer for the defendant's ejectment from the property, which was certainly in the defendant's possession as against and exclusive of the plaintiff under the terms of the agreement between them.

I am also of opinion for the same reason that the suit must be valued according to the value of the property, and as it is admitted that the value of the property exceeds Rs. 2,500, the suit was improperly brought in the Munsif's Court. The second appeal must, therefore, be dismissed with costs.

(1) 1 M. 40.

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PRIVY
COUNCIL.

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(P.C.)=
12 I.A. 116=
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638.

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[520] PRIVY COUNCIL.

PRESENT:

Lord Blackburn, Sir B. Peacock, Sir R. Collier, Sir R. Couch and Sir A. Hobhouse.

[*On appeal from the High Court at Madras.*]

PITTAPUR RAJA (*Defendant's Representative*), *Appellant v.* SURIYA ROW AND OTHERS (*Plaintiffs*), *Respondents.* [25th February, 1885.]

Civil Procedure Code, 1859, *Section* 7—*Separate causes of action.*

Section 7 of Act VIII of 1859 required that every suit should include the whole of the claim arising out of the cause of action, meaning the whole of the claim arising out of the cause of action upon which the suit was brought, not that every suit should include every cause of action, or every claim, which the plaintiff had against the defendant.

Accordingly, where a plaintiff had sued to obtain his share of an estate in land, in consequence of having been wrongfully dispossessed by the defendant, whom he afterwards in the present suit sued for his share of personal property, being entitled to both under a will, it was *held* that the subsequent suit was not barred by reason of the non-claim in the prior one. The claim in respect of the personalty had not arisen out of the cause of action which existed in consequence of the wrongful dispossession; the case was not like one of the conversion of several things; and the causes of action were distinct—*Moonshe Buzloor Ruheem* v. *Shumsoonnissa Begam* (1) referred to.

[**F.**, 21 C. 157 (163) (**P.C.**)=20 I.A. 155=6 Sar. P.C.J. 374; 26 M. 760=13 M.L.J. 448 (451); 7 C.L.J. 504 (510)=12 C.W.N. 292; **R.**, 19 A. 379 (383) (**F B.**); 20 B. 469 (475); 15 C. 800 (808) (**P C**)=15 I.A. 106=5 Sar. P.C.J. 214; 21 M 91 (95); 25 M. 736 (740); 26 M. 104 (107); 1 C.L.J. 337 (353); 8 M.L.J. 92 (94); **D.**, 34 M. 97 (107)=6 Ind. Cas. 233=20 M.L.J. 535=8 M.L.T. 60=(1910) M.W.N. 213 (220).]

APPEAL from a decree (19th March 1880) of the High Court, modifying a decree (26th February 1876) of the District Judge of Godavari.

The question raised by this appeal was whether a suit for a share in money, jewels and other personal property brought by the respondents in 1875 against a defendant (now represented by the appellant), against whom they had obtained a decree in 1874, in respect of a mitta, of which they alleged themselves to have been dispossessed by the defendant, was barred by the operation of Section 7 of Act VIII of 1859 (2), the plaintiffs' title to both having originated in the same way.

[521] Raja Niladri Rau of Pittapur died in the year 1828, leaving a widow, Bhavayyamma, and two sons, Raja Rau Venkata Surya and Raja Kumara Mahipati Venkata Rau, since deceased, leaving issue; he also left a daughter, Vellanki Lakshmi. The sons of the younger of the two brothers above-named were plaintiffs and respondents on this record; and their aunt, Vellanki Lakshmi, was originally the defendant. She, however, having died in June 1883, while this appeal was pending, was represented, on revivor, by Gangadhara Rama Rau, titular Raja of Pittapur, the son of Raja Venkata Surya, the elder of the above brothers.

(1) 11 M.I.A. 551.

(2) That section enacted as follows:—"Every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished, or omitted, shall not afterwards be entertained."

See the corresponding enactments in X of 1877, Section 43, and XIV of 1882, Section 43.

Bhavayyamma in 1835, after her husband's death, purchased a mitta named Palivela; and in 1841 another mitta named Viravaram. Before her death, which occurred in 1870, she made her will, leaving Viravaram to the present plaintiffs and Palivela to Vellanki Lakshmi. She also directed that her personal property should be divided into two parts, giving one share to the former and the other to the latter.

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After her death the plaintiff applied for the registration of the mitta of Viravaram in their names under Regulation XXV of 1802, but they failed, Vellanki Lakshmi obtaining registration in her name on the 8th July 1872. The plaintiffs in the same year instituted a suit to set aside the registration and to obtain possession of the mitta, obtaining a decree which was maintained by the High Court on 16th July 1874.

On the 14th May 1875, the plaintiffs instituted this suit, praying an account of money, jewels, and other property, which had belonged to Bhavayyamma.

The defence was that the suit was barred under Section 7 of Act VIII of 1859, by reason of the property being claimed under the same title as that which was the subject of the suit instituted in 1872, from which it had been omitted. It was also alleged that the property, with certain exceptions, belonged to the defendant.

The District Judge dismissed the suit as to so much of the claim as was brought for a specified share of property bequeathed by Bhavayyamma. He held that the whole foundation of the claim in respect of this property was the will, which took effect on her death in 1870; and that the claims, in the suit of 1872 for the mitta, and in the present suit, arose out of the same cause of action—infringement of title under the will. This claim, accord-**[522]**ingly, if tenable, ought to have been included in the former suit; and having been omitted was barred by the operation of Section 7 of Act VIII of 1859.

On appeal to the High Court, a decree was made on 31st July 1878, reversing the above decision and remanding the suit for trial, upon issues raising questions as to whether, under this will, the plaintiffs had a right to share in the personal property of Bhavayyamma; and, if so, what that property was.

The successor in office of the District Judge, who gave judgment in the first instance, found the first of the above in the affirmative; and also returned findings as to the property of Bhavayyamma.

The defendant having filed, on the 22nd March 1879, her memorandum of objections, the High Court (Innes and Kernan, JJ.) gave final judgment on the whole case, altering the decree of the District Judge and holding that the plaintiffs were entitled to a half share in such of the property claimed as was specified in their decree. So much of their judgment as related to their reasons for holding Section 7 to be inapplicable was as follows:—

"Plaintiffs had for some time been in quiet possession of the mitta of Viravaram under the will, when a tortious act of the defendant in respect of the Mitta drove them to a suit to set aside the effect of that tortious act, which operated as a constructive dispossession. No doubt, in consequence of the defence set up it became necessary for plaintiffs to give evidence of the will, the execution of which defendant denied. But the right and its infraction, not the ground of origin of the right and its infraction, constitute the cause of action, the cause, not the cause of the cause. In Suit No. 12 of 1872, possession under the will and wrongful

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invasion of that possession, not the will itself and wrongful challenge of the validity of the will, constituted the cause of action.

"This view is supported by the opinions of the Judges of the High Court of Judicature in England in *Vaughun* v. *Weldon* (1), which followed the carefully-considered decision in *Jackson* v. *Spittall* (2), in which, after consideration of all the previous authorities, it was held that the act on the part of the defendant, which gives the plaintiff his cause of complaint is the cause of **[523]** action within the meaning of the Common Law Procedure Acts. Several other cases were referred to by Mr. *Johnstone, viz., Mothoormohun Mundul* v. *Khemunkurre Dossee* (3), *Kooer Golab Singh* v. *Rao Kurun Singh* (4), *Narayan Babaji* v. *Pandurang Ramchandra* (5), *Rao Kurun Singh* v. *Nawab Mahomed Fyz Ali Khan* (6), the judgment in *DeSouza* v. *Coles* (7), which are all in accordance with this view. The cause of action in the former suit, therefore, was the wrongful registration of the mitta, and from the nature of the case is obviously not the same as the cause of action in the present suit as to the share in the personal property of Bhavayyamma."

On this appeal, Mr. *J. F. Leith*, Q.C., and Mr. *R. V. Doyne*, for the appellant, argued that the causes of action, as well as the title, in regard to both the real and personal estate bequeathed to the respondents had been correctly held by the first Court to be identical. The main question, as to both classes of property, was whether they passed by the will, and the possession of both had been withheld. Reference was made to *Subba Rau* v. *Rama Rau* (8), and to *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (9), where the test for determining whether Section 7 was applicable was explained in the judgment.

The following was referred to in the judgment, at page 605, in the latter case:—"Their Lordships think that the correct test in all cases of this kind is whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit, and they have accordingly considered whether the present suit can be maintained on that ground."

Mr. *J. D. Mayne* and Mr. *G. P. Johnstone*, for the respondents, were not called upon.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR B. PEACOCK.—Upon the several questions of fact which were raised in this suit, there are two concurrent findings. As to one portion of the claim there is the finding of the Court which tried the case in the first instance; and as to the other portion there is the finding of the Court which tried the case upon **[524]** remand. The High Court concurred with those respective findings. It is contended, however, that the High Court threw the onus of proof upon the defendant, whereas it ought not to have been so thrown. But the Court did not throw the onus upon the defendant as a matter of law, but merely in drawing their own conclusions from the evidence upon matters of fact.

Their Lordships see no reason to think that the High Court erred in point of law, or in point of fact, in arriving at conclusions similar to those which had been come to by the Courts below.

(1) L.R. 10 C.P. 47. (2) L.R. 5 C.P. 542. (3) 5 W.R. C.R. 182.
(4) 10 B.L.R. 1. (5) 12 B.H.C R. 148. (6) 14 M.I.A. 187.
(7) 3 M.H.C. R. 384 (414). (8) 3 M.H.C.R. 376. (9) 11 M.I.A. 551.

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The only remaining question then is whether, by reason of the non-claim in respect of the personal property in 1872, when the action was brought in respect of the estate called Viravaram, the plaintiffs were by Section 7, Act VIII of 1859, precluded in 1875 from bringing this action in respect of the personal property.

Their Lordships are of opinion that the claim in respect of the personalty was not a claim falling within Section 7 of Act VIII of 1859. That section does not say that every suit shall include every cause of action, or every claim which the party has, but "every suit shall include the whole of the claim arising out of the cause of action"—meaning the cause of action for which the suit is brought. The claim in respect of the personalty was not a claim arising out of the cause of action, which existed in consequence of the defendants having improperly turned the plaintiffs out of possession of Viravaram. It was a distinct cause of action altogether, and did not arise at all out of the other. It is not like the case of one conversion of several things. There the act of conversion of the several things is one cause of action, and you cannot bring an action for the conversion of one of the things, and a separate action for the conversion of another. The conversion of the whole is one claim and one cause of action.

The case which Mr. *Doyne* cited from the 11th Moore's Indian Appeals, page 553, decides: "That the correct test is, whether the claim in a new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit." Their Lordships are of opinion that the claim in respect of the personalty was founded on a cause of action distinct from that which was the foundation of the former suit.

For the above reasons, their Lordships are of opinion that the plaintiff was not barred by Section 7 from maintaining his present [525] suit, and they will, therefore, humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal. The appellant must pay the costs of this appeal.

Solicitors for the appellant: *Cobbold & Woolley.*

Solicitors for the respondent—*Burton, Yeates, Hart & Burton.*

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8 M. 525 (P.C.) = 12 I.A. 120 = 9 Ind. Jur. 275 = 4 Sar. P C.J. 644.

PRIVY COUNCIL.

PRESENT:

Lord Blackburn, Sir R. P. Collier, Sir R. Couch and Sir A. Hobhouse.

[*On appeal from the High Court at Madras.*]

VIZIARAMARAZU (*Plaintiff*) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*). [12th and 13th March, 1885.]

Limitation Act XV of 1877, *Section* 10—*Allegation of holding in trust.*

By Act XV of 1877, Section 10, where property has become vested in a person in trust for a specific purpose, a suit to follow such property in his hands is not barred by lapse of time.

Acting under Regulation V of 1804, the Court of Wards took charge of an impartible zamindari, on the death of the zamindar, leaving minor sons, of whom the eldest was afterwards recognized as heir and received possession on attaining full age. Upon a subsequent adjudication of forfeiture against him

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under Regulation VII of 1808, the Government obtained possession of the zamindari.

Held, that the Government was not placed in the position of a person in whom property had become vested for a specific purpose, and that the above section was not applicable to prevent the operation of the law of limitation under XV of 1877, which barred the suit brought by another of the sons, alleging title to the zamindari.

[F., 11 M. 309 (314) (F.B.); R., 24 B. 23 (28).]

APPEAL from a decree (31st March 1882) of the High Court in its original jurisdiction.

The suit out of which this appeal arose was brought in December 1879 against the Secretary of State for India in Council, in reference to the receipt by the Government of Madras of the revenues, as they had accrued, of the impartible zamindari of Palkonda, one of the hill zamindaris of the Vizagapatam district. This zamindari came into the possession of the Government in 1835, as the result of forfeiture, upon the conviction, under Regulation VII of 1808, of the last zamindar, the elder brother of the plaintiff.

[526] The zamindari being outside the local limits of the ordinary original jurisdiction, the plaintiff could not proceed therein for possession of the estate without an order which he failed to obtain. His suit was accordingly brought only for an account of the revenues received from the zamindari.

The plaint alleged that, on the death of Venkatapathirazu, the late zamindar, in 1828, leaving three sons, of whom the plaintiff was the only legitimate one, the latter became entitled to succeed him; that the zamindari coming under the management of the Court of Wards, a trust was created, and the plaintiff's title should have been recognized; Kurmarazu, however, the eldest of the three sons, was wrongly recognized as successor; that, on the conviction of the latter under Regulation VII of 1808, the Government assumed possession of the zamindari and had retained it, the plaintiff remaining a State prisoner since 1834. He claimed an account of the rents and profits from the 29th September 1828, with interest.

The defence on behalf of the Secretary of State was that Kurmarazu had been properly recognized as heir, whether of legitimate birth or not, either as being heir by law (the family being Sudra), or by family custom, or as having been selected as heir under a family arrangement; secondly, that the forfeiture by order of the Governor in Council, duly made under Regulation VII of 1808, deprived every member of the family of his right to succeed; and lastly, that the suit was barred by limitation under Act XV of 1877.

At the hearing another defence, which, at one time, had been made with the above, *viz.*, that the confiscation of the zamindari was an "Act of State," was abandoned. No oral evidence was taken, but both sides relied on admitted documents. The statements on the report made by Mr. Russell, who was deputed to enquire into the disturbances in the Northern Circars, were accepted by the parties. The facts, at length, are set forth in the judgment of the High Court delivered by Turner, C.J. (Innes and Muttusami Ayyar, JJ., concurring), printed in the report of the hearing of the case, before the settlement of issues, in the fifth volume of the Madras Series of the Indian Law Reports, p. 91.

Briefly, they were that Venkatapathirazu died in 1828, leaving Kurmarazu, Viziaramarazu, and Niladri Narendra, his three sons. **[527]** In

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consequence of the reports of the Collector, made in 1828 and again in 1829, Kurmarazu was recognized as heir, the Court of Wards in the same year having taken charge of the estate. Kurmarazu having come of age in 1832, was put into possession. Disturbances then occurring in the villages, amounting to rebellion, martial law was proclaimed under the provisions of Regulation VII of 1808, Kurmarazu having been tried by court-martial, was found guilty of complicity in the rebellion, and sentenced to death, which sentence was commuted to one of imprisonment. The zamindari of Palkonda was, under the same Regulation, declared to be forfeited to the Government, which took possession of it, making proclamation to that effect in 1835. Kurmarazu had died a prisoner of State in 1834. Niladri died many years before these proceedings.

The High Court observed, in its judgment (1), that possession had been taken by the Government as if the act so doing had been one authorized by municipal law. If, in so doing, it had acted unlawfully, it was in no worse position than any private trespasser would have been, rendering it liable to eviction by the rightful owner pursuing his remedy within the time allowed by law; but capable of acquiring, under the law of limitation, a prescriptive title. The orders of Government, which detained the plaintiff at Vellore, did not deprive him of the power of instituting proceedings to assert his claims; and if the Government had not acquired a title by the forfeiture, it had long since acquired one by prescription. As to the existence of fiduciary relation, it could not be maintained that the Government, by allowing the Court of Wards to take charge of the estate, had constituted itself a trustee for all the members of the family; nor could it be urged that, as a wrong-doer, the Government was, what was termed, a constructive trustee. The possession of the Court of Wards ceased, if it had not previously ceased when, in virtue of the forfeiture, the Government entered into possession of the zamindari as part of the public domain. And whether this possession was rightly taken or not needed not inquiry at this distance of time. The wrongful invasion, or possession, of a stranger, with or without knowledge of his want of title, would not make him a constructive **[528]** trustee; provided that, as here, there was nothing to affect him with notice of a trust. The suit was dismissed, but as costs were not asked for, without costs.

On this appeal, Mr. *H. Davey*, Q. C., and Mr. *J. H. A. Branson*, for the appellant, argued that the Court of Wards having entered upon the management of the zamindari of Palkonda, stood, at one time, in the relation of trustee for the one of the three sons of Venkatapathirazu, who might be the rightful heir; and of this trust it was not divested during the minority of the plaintiff. On coming of age, he found the Government in possession by a title derived through his elder, but illegitimate, brother, Kurmarazu. If the Government was identified with the trustee, the Court of Wards, in the previous possession (and it was submitted that it was), then, notwithstanding the forfeiture incurred by Kurmarazu, the Government remained in a fiduciary relation towards the plaintiff; and could not use the possession, thus acquired, during the plaintiff's minority, against him. Thus there was no possession adverse to him, and the law declared in Section 10 of Act XV of 1877 was applicable. It was no answer to this to show that the Government had treated Kurmarazu as the lawful successor of the former zamindar, inasmuch as the Government was trustee no less for the plaintiff than for him. The Court of Wards holding

(1) 5 M. 95.

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in trust on behalf of the rightful owner, let into possession one, who, whether entitled or not (and the plaintiff denied that he was entitled), did not represent all the interests involved. And a trustee was under no circumstances allowed to set up a title adverse to his *cestui que trust*, as decided in *Attorney-General* v. *Munro* (1). Moreover, it was part of the appellant's case that neither the Court of Wards, nor the Board of Revenue, were other than departments of the State. Through them the Governor in Council acted, also acting through the Collector. The same chief authority, before the appellant attained majority, obtained possession of the estate by getting it back from Kurmarazu. The argument was thus made good that the Government had not acquired a title. The possession, in fact, which the Government took, on the forfeiture of Kurmarazu, was not a possession derived from an absoulte *jus tertii*; and it was not permissible that a trustee, recognizing a title other than that of his *cestui que trust*, and then [529] taking a transfer of it, should set it up against that *cestui que trust*. For these reasons it was submitted that the judgment of the High Court was erroneous.

Reference was also made to part of the judgment in the *Secretary of State for India in Council* v. *Kamachee Boye Sahaba* (*Tanjore Case*) (2).

Mr. *E. Macnaghten*, Q C., and Mr. *J. D. Mayne*, for the respondent, were not called upon.

Their Lordships' judgment was delivered by--

JUDGMENT.

LORD BLACKBURN.—The present case, when understood, seems to be reduced to a very short point indeed. When the old zamindar, the father of the present plaintiff, died, he left three infant sons and some infant daughters. There was a dispute as to which of those three infant sons, by different mothers, was the heir to the zamindari. It is not necessary for their Lordships to express any opinion as to which was the right heir. Upon the father's death, the resident Magistrate went hastily to the spot in order to preserve the peace. He immediately reported what was the state of things that he found there, and that is the report which we have first got. That was in October 1828, and, at that time, nothing further was done than the Magistrate going there to protect the peace and reporting. He afterwards went further than that. In May, having made inquiries and found that there were plausible grounds for claims on each side, and that the general feeling of the country was in favour of Kurmarazu, the eldest of these boys, who was not born in wedlock, but who had been adopted by the principal wife, and who, there were plausible grounds for saying, really was the heir (their Lordships say no more than that there were plausible grounds for so saying), he recommended that he should be recognized as the heir to the zamindari. The Court of Wards Regulation Act, Regulation V of 1804, Section 6, provides as follows:—"The proceedings of the Court of Wards shall, in the first instance, be founded on the reports of the Collectors respectively to the end that no delay may occur in providing for the due security and management of the property of persons incapacitated by minority, sex, or natural infirmity; but Collectors making such reports upon insufficient authority, whereby inheritors of property [530] shall be deprived of the possession and management of the said property on their own behalf, shall be liable to prosecution." Before anything was done upon his report, he proceeded to appoint guardians of the

(1) 2 De G. & S. 163. (2) 7 M.I.A. 476.

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persons of each of these infants, not merely of the persons of the plaintiff and other sons, but also of the persons of the female children of the deceased zamindar. These, however, were mere personal guardians, and, in appointing them, nothing was done touching this estate at all. On the 17th July 1829, the Secretary to the Government writes to the Board of Revenue, acknowledging the reports. He says: "2. Upon the understanding that Kurmarazu, the person recognized by the Collector as the heir and successor to the zamindari is so acknowledged by all parties concerned in the succession, the Right Hon'ble the Governor in Council resolves to recognize him as zamindar of Palkonda; and as he is incapacitated by minority from administering his own affairs, authorizes you to take the estate under your charge as Court of Wards, and to exercise the powers conferred by Regulation V of 1804."

That is the first act of the Government upon the matter. What the Government has there done is this. They state that, upon the reports of the Collector, they will recognize Kurmarazu, and they authorize the Collector to take the estate under his charge, under the Regulation. Upon that the Court of Wards, undoubtedly, would become guardians of Kurmarazu, and, as such guardians, no doubt they took possession of the estate. It appears from a document, which is not printed, but which Mr. *Davey* read, that when Kurmarazu came of full age the property was given over to him, and he was proclaimed as zamindar. On the assumption, upon which it must not by any means be understood that their Lordships have formed an opinion, because they have not the materials, that Kurmarazu was a usurper and the plaintiff was entitled, the Court of Wards seem to have acted *bona fide* and upon very sufficient grounds, and, at the most, if the individuals acting as the Court of Wards were guilty of misconduct, that would not in any way affect the Government. Kurmarazu was then put into possession. Their Lordships see nothing which would have prevented the plaintiff, when he came of full age, bringing an action against Kurmarazu, saying: "I am the true heir, and you are the usurper," and trying to recover the estate. [531] Their Lordships know nothing what case he could have made, but there is nothing that would have hindered his doing so at that time. Whilst Kurmarazu was thus in possession of the property—for it seems clear that he was so—he was tried for high treason and rebellion, and convicted and sentenced to death.

That brings us to the next consideration, which perhaps hardly arises. It is under Regulation VII of 1808, Section 3: "It is hereby further declared that any person born or residing under the protection of the British Government within the territories aforesaid, and consequently owing allegiance to the said Government, who, in violation of the obligation of such allegiance, shall be guilty of any of the crimes specified in the preceding section"—which includes treason—and who shall be convicted thereof by the sentence of court-martial during the establishment of martial law, shall be liable to immediate punishment of death, and shall suffer the same accordingly by being hanged by the neck until he is dead. All persons who shall in such cases be adjudged by a court-martial, to be guilty of any of the crimes specified in this Regulation shall also forfeit to the British Government all property and effects, real and personal, which they shall have possessed within its territories at the time when the crime of which they may be convicted shall have been committed." Kurmarazu, therefore, at that time, being so convicted under the court-martial, forfeited all the right which he

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had to the zamindari. If the plaintiff had come forward at that time and said that he was the right heir, and that Kurmarazu was but a usurper, their Lordships do not see that the forfeiture of Kurmarazu would have affected the rights of the plaintiff to recover that land. As to that their Lordships say nothing, except that probably it would not. But at that time the Government came into possession, claiming by way of forfeiture from Kurmarazu, who had certainly been in possession in the manner which has been described. From the time the plaintiff came of full age, which is stated to have been in 1837, for more than the period mentioned in the Statute of Limitations has run. Now, the contention, and the only contention, is this—the Statute of Limitations, Act XV of 1877, Section 10, the only section cited, says: "Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or [532] against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, shall be barred by any length of time."[4] It is contended that, under the circumstances already stated, the Government coming into possession under a claim of forfeiture from Kurmarazu, who had been let into possession by the Court of Wards (we will for the present purpose assume by mistake), are a person in whom the property had become vested in trust for a specific purpose, and that this action is brought against such a person for the purpose of following, in his or their hands, such property. It does seem to their Lordships not possible to make it clearer that that section does not apply to this case than by simply stating what that section is and what the case is. That is the only point on which the appeal has been brought, and it is the only point which it is necessary to decide.

Their Lordships, therefore, have not the slightest hesitation in advising Her Majesty that this appeal should be dismissed. The appellant must pay the costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Keen, Rogers & Co.*

Solicitor for the respondent: *H. Treasure.*

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8 M. 532 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

REFERENCE FROM THE BOARD OF REVENUE UNDER SECTION 46 OF THE INDIAN STAMP ACT, 1879.* [24th April, 1885.]

Stamp Act, Section 3 (10)—*Unduly stamped—Rule* 5 (*e*) *of the Government of India*, 3rd *March* 1882 (*attestations of plain sheets subjoined to stamped documents*), ultra vires.

Of the rules, dated 3rd March 1882, issued by the Governor-General in Council, under Sections 9, 15, 17, 32, 51 and 56 of the Indian Stamp Act, 1879, rule 5 (*e*) requires that the part of an instrument which is written on plain sheets of paper attached to the stamped paper must be attested by the parties executing, and by the witnesses to, the document:

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* Referred Case 6 of 1884.

Held by KERNAN, MUTTUSAMI AYYAR, and BRANDT, JJ. (TURNER, C.J., dissenting) that the rule is *ultra vires* and inoperative for the purpose of declaring an [533] instrument, written contrary to the provisions thereof, unduly stamped within the meaning of Section 3 (10) of the Act. 1885 APRIL 24.

Per TURNER, C.J.—An instrument not written in accordance with the directions in rule 5 (*e*) is not duly stamped. FULL BENCH.

THIS was a reference by the Board of Revenue to the High Court under Section 46 of the Indian Stamp Act, 1879. 8 M. 532 (F.B.).

The case was stated, on the 17th July 1884, by the Board of Revenue in the following

RESOLUTION :—"The Registrar has impounded and forwarded to the Collector certain documents, because they contravene rule 5 (*e*) of the rules, dated 3rd March 1882, issued by the Government of India under Sections 9, 15, 17, 32, 51 and 56 of the Stamp Act.

"These documents are written on impressed sheets of sufficient value, but to these sheets plain papers are attached, and those portions of the documents are not attested by the witnesses, who attested the stamped sheets.

"As these rules have the force of law, the documents are not duly stamped, and the Collector must proceed under Section 37 (*b*) to levy the duty as if they were unstamped and a penalty in addition.

"But the Board resolve to refer to the High Court the question whether the rule thus contravened is not *ultra vires*. They can find no provision in the Stamp Act, which empowers the Government of India to issue this rule. If Section 56 is quoted to justify it, then, as remarked by Sir Michael Westropp at 5 Bombay Series, 197, it is for the High Court to consider whether the rule is consistent with the Act, the Act being fiscal in its character, and the rule adding provisions more stringent than the Act warrants."

The (Acting) Government Pleader (Mr. *Powell*), for the Board of Revenue, referred to Section 9 of Act I of 1879 and contended that rule 5 (*e*) was *ultra vires*.

The following judgments were delivered by the Full Bench (TURNER, C.J., KERNAN, MUTTUSAMI AYYAR, and BRANDT, JJ.) :—

JUDGMENTS.

TURNER, C.J.—It cannot be held that the document, in respect of which this reference is made, is an unstamped document. It is written on a stamped paper and therefore the term unstamped in its ordinary meaning cannot apply to it. It is written in such a manner that the stamp appears on the face of it, and cannot be used for, or applied to, any other instrument and it has not been written on a paper on which an instrument chargeable with duty [534] has been already written. It is not then to be deemed unstamped under Section 14. Is it an instrument not duly stamped? According to the definition given in the Act, duly stamped means stamped or written upon paper bearing an impressed stamp in accordance with the law in force in British India, when the instrument was made. The law required that it should be written on a stamp of a certain value and description, and it has been written on paper bearing a stamp of the value and description prescribed. It bears no more stamps than the number prescribed. The objection taken to it is that the plain sheets of paper, which have been used to supplement the sheet bearing the stamp, have not been attested in the manner required by rules 5 (*a*) and 5 (*e*).

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Rule 5 (*a*) prescribes that, except in the cases specified, where any instrument is to be written on a single stamp, a single sheet shall be used, and rule 5 (*e*) that where a single sheet is found insufficient to admit of the entire instrument being written on the side of the paper, which bears the stamp, so much plain paper may be subjoined thereto as may be necessary for the complete writing of the instrument. * * * Provided * that the part of the instrument made on plain paper must be attested by the signature or marks of all the persons executing the document and of the witnesses to the same.

Are these rules consistent with the Act and do they carry out the purpose of the Act? The object of so much of the rules, as we have quoted, is to secure the observation of the provisions of Section 27, which require that the consideration and all the other facts and circumstances affecting the chargeability of the instrument with duty or the amount of the duty with which it is chargeable shall be fully and truly set forth therein. The rules then, it must be admitted, do carry out a purpose of the Act, but are they consistent with the Act? It cannot be said they are not. They contravene no provision of the Act.

The instrument then being an instrument not duly stamped, is it ineffectual?

It is clear that with the exception of certain instruments which are specified, the Legislature intended that no document should thereafter be ineffectual for want of a stamp, whether it were an unstamped document or a document not duly stamped, but that on payment of the value of the proper stamp, or of the deficiency [535] between the proper stamps borne by it and the full stamp with a penalty, the defect should no longer operate to invalidate the instrument. The instrument, we are considering, bears a stamp of the proper character and to the full value, but not being written in accordance with the rule it is not duly stamped and can be admitted in evidence only under the proviso to Section 34. That that proviso did not contemplate the case, I fully admit. Possibly it is liable only to the penalty, and the argument that the payment of the penalty will not remedy the inherent defect is answered by the observation that neither will the payment of the duty and penalty remedy the defects in instruments which under Section 14 are to be deemed unstamped, but nevertheless such payment effects all that the parties to them require—it relieves them from the operation of the first paragraph of Section 34.

In answer to the question addressed to us, I have only to say that I am of opinion that the rule is not *ultra vires*.

KERNAN, J.—The Stamp Act, 1879, in Section 56, authorizes the Governor-General in Council to make rules consistent with the Act to carry out generally the purposes of the Act. Section 57 provides that all such rules published as thereby directed shall on publication have the force of law.

On the 3rd of March 1882, rules were made by the Governor-General in Council, referring to Section 56 of the Act. Amongst others, rule 4 requires impressed stamps to be used. Rule 5 (*e*) is "When a single sheet used under this rule is found insufficient to admit of the entire instrument being written on the side of the paper which bears the stamp, so much plain paper may be subjoined thereto as may be necessary for the complete writing of the instrument. Provided further that the part of the instrument written on plain paper must be attested by the signature

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or marks of the person executing the document and the witnesses to the same."

In the case before us, a single sheet was insufficient and four sheets of plain paper were subjoined to the impressed sheets. The instrument was executed by the parties on the several sheets, and the signatures of the witnesses were made on the stamped sheet. Either through error, accident or inadvertence the four plain sheets were not attested by the signature or marks on it of the witnesses to the same. The instrument is stamped with the proper amount of duty required by the schedules to the Act.

[536] The question is whether, by reason of the four plain sheets not bearing the attestation of the witnesses, the instrument is to be held to be not duly stamped within the meaning of Sub-Section 10 of Section 3 of the Act —the Stamp Act. My view is that the instrument in question is duly stamped under the Act, notwithstanding the rule.

Sub-Section 10 is: "Duly stamped," as applied to an instrument, means stamped, or written upon paper bearing an impressed stamp, in accordance with the law in force in British India, when such instrument was executed, or first executed.

Section 12 provides that every instrument written on paper, stamped with an impressed stamp, shall be written in such manner that the stamp shall appear on the face of the instrument and cannot be used for, or applied to, any other instrument.

Section 13 provides: "No second instrument chargeable with duty shall be written upon a piece of unstamped paper, upon which an instrument chargeable with duty has already been written" subject to an exception thereby provided not material to this case.

Section 14 provides: "Every instrument written in contravention of Section 12 or Section 13 shall be deemed not duly stamped." The chargeability of any instrument with duty, or the amount of the duty with which it is chargeable, shall be fully and truly set forth.

Section 28 provides for many circumstances relating to the consideration which must be set forth and which affects the amount of duty chargeable. Chapter III relates to "Adjudications as to stamps." Section 30 provides that if any instrument, whether executed or not, and whether stamped or not, is brought to the Collector to have his opinion as to the duty, if any, chargeable, the Collector shall determine the duty, if any, with which, in his opinion, the instrument is chargeable, and he may require an abstract of the document and evidence as to the facts and circumstances affecting chargeability. Section 31 provides that, when the Collector determines such an instrument is chargeable with duty and (*a*) that it is fully stamped, or (*b*) that the duty be determined under Section 30, or a certain sum has been paid, he shall certify by endorsement that the duty has been paid, and the instrument may then be read in evidence and acted on as if it had been originally duly stamped.

[537] Chapter IV relates to "Instruments not duly stamped."

Section 33 enables certain officers to impound instruments, which appear to be not duly stamped.

Section 34 provides: "No instrument chargeable with duty shall be admitted in evidence for any purpose or acted on," unless such instrument shall be duly stamped.

Provided that—

1. Any such instrument (not being an instrument chargeable with one anna only or a bill of exchange or pro-note) shall, subject to just exceptions,

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be admitted in evidence on payment of the duty with which the same is chargeable, or (in case of an instrument insufficiently stamped) of the amount required to make up such duty, together with a penalty of five rupees, or when ten times the amount of the proper duty or deficient portion thereof exceeds Rs. 5, of a sum equal to ten times such duty or portion.

Section 35 provides that, when the officer impounding an instrument admits it in evidence, on payment of the penalty, as provided by Section 34, he shall send a copy of it to the Collector with a certificate, stating the amount of the duty and penalty levied and shall send such amount to the Collector, or such person as he shall appoint, and (second clause) in all other cases the officer is to send the original instrument to the Collector.

Section 36 relates to refund of penalty in proper cases.

Section 37 provides that when the Collector impounds an instrument under Section 33, or receives an instrument under the second clause of Section 35, he shall adopt the procedure thereby directed.

Section 38 provides that, if any instrument chargeable with duty, and which is not duly stamped, is produced by any person of his own motion before the Collector within one year from the date of its execution or first execution, and if such person brings to the notice of the Collector the fact that it is not duly stamped and offers to pay the Collector the amount of the proper duty or the amount required to make up the same, and the Collector is satisfied that the omission to duly stamp such instrument has been occasioned by accident, mistake or urgent necessity, he may, instead of proceeding under Sections 33 and 37, receive such amount and proceed as next prescribed.

Section 39 provides when duty and penalty, if any, leviable in respect of any instrument, have been paid under Sections 34, **[538]** 37 or 38, the person admitting such instrument in evidence, or the Collector as the case may be, shall certify by endorsement thereon that the proper duty or (as the case may be) the proper duty and penalty (stating the amount in each case) have been levied in respect thereof. Every instrument so endorsed shall thereupon be admissible in evidence and acted on and authenticated as if it had been duly stamped and shall be delivered to the person, from whose possession it came or as he may direct.

Section 56 enables the Governor-General in Council to make rules consistent with the Act to carry out generally the purposes of the Act.

Section 57 provides that all rules published as required shall, upon such publication, have the force of law.

The purpose and object of the Act is to raise revenue by means of money to be paid by the public for stamps issued by Government, under the authority of the Act.

Under the Act, every instrument, thereby made chargeable with duty, must be duly stamped, that is, stamped or written on paper bearing an impressed stamp in accordance with the law in force in British India where the instrument was executed or first executed.

From the synopsis above set out, it is clear that the intention expressed by the Act is that, if by error, accident or inadvertence, an instrument, except one anna instruments, when executed or first executed did not bear a stamp of the proper amount or description, required by the Act, and if within the period of time limited by the Act after execution or first execution, when time is referred to, the person claiming to put the deed in execution or to have it acted on, paid the proper amount of duty, or sufficient to

make up the proper amount, then such person should be entitled to do so, on payment of penalty, which penalty might in certain cases be remitted. 1885 APRIL 24.

The object of the Act, as every section of it shows, was to secure payment of the proper *amount* of duty, and to prevent instruments not so bearing the proper amount of duty from being of any avail until the proper amount of duty was paid. For this purpose, Section 34 prevents such an instrument being received in evidence or acted on. But by the proviso of that section the instrument may be received in evidence if the duty or the proper [539] portion of duty in case of an insufficiently stamped instrument is paid together with a penalty thereby prescribed. In like manner when an instrument not duly stamped is brought to the Collector for his opinion under Section 30 or Section 38 and on payment of the duty specially leviable under Sections 34, 37, 38 as the case may be, endorsement is to be made by the person admitting the instruments in evidence or by the Collector, as the case may be, that proper duty and penalty have been levied, and every instrument so endorsed shall be admissible in evidence and acted on.

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Then the Act provides that on payment of proper amount of duty and penalty, if penalty is required, any instrument not duly stamped with the proper *amount* of duty when executed or first executed, may be received in evidence and acted on, with the exception of instruments subject only to one anna duty, and bills of exchange, notes and cheques.

There is no doubt that the proper amount of duty has in this case been paid. There are only two cases mentioned in the Act in which though the proper amount of duty has been paid, yet that the instruments are to be held not duly stamped and those cases are mentioned in Sections 12 and 13. But even for those cases a remedy is provided. Section 12 directs that every instrument written on impressed paper shall be written in such manner that the stamp may appear on the face of the instrument and not be used for, or applied to, any other instrument, and Section 13 provides that no second instrument shall be written on stamped paper, on which an instrument, chargeable with duty, has been already written. It is possible that the instruments in these cases might have borne, when executed or first executed, the proper amount of duty, yet the Act provides, Section 14, that every such instrument written in contravention of Section 12 or Section 13 shall be deemed to be unstamped. In these cases it was not unreasonable to treat the instruments written in contravention of the sections as unstamped, though the proper amount of duty might have been already paid, but even in such cases under Sections 12 and 13, the party had a remedy by paying duty and penalty, if any, and, under Sections 36 and 37, the Collector might remit the whole penalty.

The Act provides a penalty for every infraction of its provisions, and also provides a means whereby all instruments (except as already mentioned) not duly stamped, and therefore inadmissi-[540] ble in evidence, may be duly stamped and made admissible in evidence.

In this case, can it be held that by reason of the last clause in rule 5 of 1882, the instrument is unstamped? The rule does not provide that instruments in contravention of the rule shall be deemed unstamped, as Section 14 of the Act does in respect of Sections 12 and 13. If it did so provide, probably it would not be inconsistent with the Act as the parties could pay the duty and the penalty. But as it now stands, there is no provision to enable the parties to have the instrument properly stamped and the instrument made admissible in evidence. Take the rule

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as part of the Act and Section 34 would not apply to the rule. It may be very reasonably doubted whether the rule is consistent with the Act to carry out its provisions.

Such rule appears to me to go beyond the provisions by enacting penalties in respect of a matter not relating to the securing of proper amount of stamp duty. The effect of the rule, if held to be authorized by the Act, would not, in such a case as this, prevent the party claiming under the instrument from giving it in evidence at any time, inasmuch as the rule or the Act provides no means of making the instrument properly stamped, even though the omission as to the witnesses was the result of mere error, accident, or ignorance.

The result would be probable loss of considerable property to one party and gain by another party.

I think the rule is more stringent than the Act warrants, and is therefore *ultra vires.*

MUTTUSAMI AYYAR, J.—The instrument which forms the subject of this reference is written upon a paper bearing an impressed stamp of the value prescribed by Act I of 1879. It is, therefore, stamped with a stamp of the value and description required by the law in force in British India when it was executed.

In addition to the paper bearing the impressed stamp, several sheets of plain paper are used for completing the document, but instead of each of such sheets being signed and attested as required by the rule made by the Government of India on the 3rd March 1882, the first sheet is alone signed and attested, while the other papers are not attested though signed by the executants. The question referred, for our opinion, is whether the instrument is on **[541]** this ground to be treated as not duly stamped within the meaning of Clause 10, Section 3, of the Stamp Act.

This section declares that the words duly stamped mean "stamped or written upon paper bearing an impressed stamp, in accordance with the law in force in British India when such instrument was executed or first executed." The rule referred to is to the following effect:—"When a single sheet (impressed) used is insufficient to admit of the entire instrument being written on the side of the paper which bears the stamp, so much plain paper may be subjoined thereto as may be necessary for the complete writing of such instrument, provided that in every such case the side of the sheet which bears the stamp must be covered by a substantial part of the instrument before any part of the latter can be written on the plain paper joined to such sheet. Provided, further, that the part of the instrument written on the plain paper must be attested by the signatures or marks of all the persons executing the document and the witnesses to the same. Does Clause 10 refer only to the instrument in so far as it is written upon paper bearing the impressed stamp, or does it also include the authentication of each sheet of plain paper, which is added to the paper bearing the impressed stamp?

I may refer to Section 33 and Section 34 which throw light on Section 3, Clause 10.

The former confers a power on every person in charge of a public office to impound all instruments which appear to him to be "not duly stamped," and directs him for the purpose of exercising that power, to examine the instrument in order to ascertain whether "it is stamped with a stamp of the value and description required by the law in force when it was executed." It will be seen that no reference is made to the mode in which each sheet of plain paper is authenticated as one of the

matters to be considered for the purpose of impounding the document. Again Section 34 prescribes the conditions subject to which certain classes of instruments *not* duly stamped may be received in evidence or acted upon by a public officer. The conditions are (1) the payment of the duty with which the instrument is chargeable or (in the case of an insufficiently stamped instrument) of the amount required to make up such duty, together with a penalty of Rs. 5, or when ten times the amount of the proper duty or deficient portion thereof exceeds Rs. 5, of a sum equal to ten times such duty **[542]** or portion. It must be observed here that no power is given to admit an instrument not duly stamped in evidence except on the payment of the duty with which the instrument is chargeable when it is not stamped at all, or of deficient stamp duty when it is insufficiently stamped. It is conceded that the instrument before us cannot be treated as unstamped, or insufficiently stamped, and the section does not contemplate a case in which a penalty alone is payable without some stamp duty. The inference is to be drawn that the expression "not duly stamped" does not refer to the mode in which the plain papers are authenticated. Further, the Stamp Act is framed with the primary intention of protecting the stamp revenue and when the proper duty is therefore paid and when the payment is denoted by the proper stamp and when the paper bearing the impressed stamp is written upon in the prescribed mode, the omission to authenticate each subjoined plain paper cannot affect the duty and must be considered to lie outside the purview of the Act as to the value and description of the stamp.

It was suggested that the rule was framed under Section 56 to prevent the subsequent interpolation of plain sheets of paper in order to understate the value of the property to which the instrument may relate. Taking it then that such was the intention, how does such interpolation differ in principle from a fraudulent mis-statement of the value in the substantial part of the instrument written on the paper bearing the impressed stamp or from the case in which the signature and the attestations on the additional sheets of plain paper are forged? Such collateral frauds are punishable either under the general law or under Section 63. But it seems to me that they do not render the document *unduly stamped* any more than the forgery of a document on proper stamp renders it unduly stamped. The rule was intended, I think, in so far as it relates to the authentication of each sheet of plain paper, to create a facility in regard to the working of Section 63. If it is taken that the intention was to add to the requirements of Section 3, Clause 10, the authentication of each additional sheet of plain paper. I must then say that the rule goes beyond the intention of the law and that the instrument cannot be treated as not duly stamped. My answer to the question is that the rule is not intended to add the authentication of each sheet of plain paper **[543]** to the requirements of Section 3, Clause 10, and if it is, it goes beyond the intention of the law and is inoperative for the purpose of declaring the instrument unduly stamped.

BRANDT, J.—The instrument before us is duly stamped within the meaning of Section 3 (10) of the Stamp Act, in so far as it is "written upon paper bearing an impressed stamp, in accordance with the law in force in British India at the time when it was executed.". It is not duly stamped by reason of its being written in a manner which fails to meet all the requirements of rule 5 (*e*) contained in the Notification of the Governor-General in Council published in the Gazette of India, and dated the 3rd March 1882? The question stated in another form is whether

1885 APRIL 24. — FULL BENCH. — 8 M. 532 (F.B.).

that rule "is consistent with the Act for carrying out generally the purposes of the Act?"

If the instrument can be deemed to be unstamped within the meaning of Section 14 of the Act, it can be validated and admitted on payment of the full stamp duty and penalty. If it cannot be taken to be unstamped within the meaning of that section, there does not appear to me to be any means whereby the instrument can be made good at all. And, if it cannot be, this would seem to constitute strong ground for doubting whether a rule having such an effect can be held to be consistent with the general purposes of the Act.

The Act provides for the making good, for the admission, on payment of full or deficient stamp duty (as the case may be) and penalty (which in some cases may be remitted) of all instruments not duly stamped, such instruments not being chargeable with a duty of one anna only, or bills of exchange, or promissory notes.

Instruments not duly stamped or those which are not so

(*a*) by reason of their being unstamped in fact;

(*b*) those which, though stamped, whether sufficiently or insufficiently, are to be deemed to be unstamped for the purposes of the Act;

(*c*) by reason of their being insufficiently stamped;

(*d*) by reason of their not being stamped with a stamp or stamps, or written on paper not impressed with a stamp or stamps of the character, description or number prescribed by the Act and rules made in accordance therewith.

Instruments not written in the manner prescribed by Section 12 **[544]** or 13 are to be, under Section 14, deemed to be unstamped. But no provision is made in the Act for validating an instrument like that before us which is sufficiently stamped and stamped in accordance with the law in force, in so far as the description and character of the stamped papers used is concerned and is not written in a manner prohibited by the Act.

The rule was, I think, we may assume, framed with a view to prevent the substitution of other papers not stamped, or bearing impressed stamps, on which a consideration not fully set forth in the instrument as appearing when presented (*e.g.*, before a Collector for adjudication under Section 30, or before a Registration officer) in the place of one or more of the plain papers allowed under the rule to be used.

But Section 63 provides a very heavy penalty for neglect to comply with the requirements of Section 27; and though it would be the duty of any of the persons described in Section 33 to impound any instrument appearing to be not duly stamped by reason of the full consideration not being fully set forth as required by Section 27, it could hardly be contended that a Registration officer would be justified in refusing to register a document on the ground that one or more papers might in future be substituted in the place of the additional plain papers used.

After the best consideration which I can give to the subject, I can come to no other conclusion than that the Rule 5 (*e*) in so far as it requires each additional piece of plain paper used to be signed or marked by all the executants and attesting witnesses is not consistent with the Act for carrying out the purposes of the Act.

The object of the enactment is the realization of stamp revenue by the State.

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There are in it two sections only containing instructions and directions as to the manner in which instruments are to be written on stamped papers, or on papers bearing impressed stamps.

Instruments written in contravention of those requirements are to be deemed to be unstamped and as such can be stamped on certain terms.

The rule under our consideration imports a stringent provision as to the manner of writing instruments, while there is no provision in the Act under which instruments written in contravention of that rule can be treated as or deemed to be unstamped.

[545] The Act contains special provision for the punishment of the offence against which the rule in question is, it has been suggested, directed.

If the rule, which appears to relate rather to what would be required in proof of due execution of the document than to the duly stamping of the document, is to have any effect beyond being merely directory, it must, as it appears to me, be held to be a rule, which, having regard to what is and what is not enacted in the Stamp Act itself, is not consistent with the provisions of that Act for the purpose of carrying out the same. I am of opinion that the instrument is duly stamped in accordance with the law in force in British India at the time when it was executed.

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8 M. 545.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Hutchins.

VENKATALAKSMAMMA AND OTHERS (*Defendants*), *Appellants v.* NARASAYYA AND OTHERS (*Plaintiffs*), *Respondents.**
[28th April, 1885.]

Hindu law—Adoption—Authority—Consent of sapinda.

V, one of the nearest male sapindas of S, gave his son in adoption to the widow of S in 1878. Both the giver and receiver professed to have been carrying out the directions of S. In 1883 a suit was brought by N, another sapinda, to set aside this adoption, and it was found that S had not authorized the adoption as alleged by the defendants:

Held, that, under the circumstances, V's assent to the adoption did not render it valid.

[Appl., 26 M. 627 (630); D., 6 M.L.J. 35 (38).]

THIS was an appeal from the decree of L. A. Campbell, District Judge of Nellore, reversing the decree of G. Ramachandra Rau, District Munsif of Nellore, in suit No. 877 of 1883.

The father of plaintiffs, Dhurgati Narasayya and his four brothers, the father of Venkayya, defendant No. 2, and the father of Sundararamayyar, deceased husband of defendant No. 1 (Venkatalaksmamma), were divided brothers.

On the 5th March 1878, Sundararamayyar died without issue.

[546] A year after his death, his widow adopted Subbayyar, defendant No. 3, a son of defendant No. 2.

This suit was brought in 1883 to set aside the adoption and for a declaration of plaintiffs' rights as reversioners to a moiety of certain property alienated by defendant No. 1 to defendants Nos. 4 and 5.

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* Second Appeal 767 of 1884.

1885 APRIL 28. — APPEL-LATE CIVIL. — 8 M. 545.

The Munsif found that Sundararamayyar, on his death-bed, authorized the adoption and dismissed the suit.

On appeal, the District Judge disbelieved the evidence as to the authority given by Sundararamayyar on his death-bed, and held that a gift made to defendant No. 4 by defendant No. 1 was not binding on the plaintiffs.

Defendants Nos. 1—3 appealed.

Mr. *Wedderburn*, for the appellants.

For the appellants it was argued that, as the adoption was admitted, plaintiffs were bound to prove its invalidity (*per* Sir R. Collier in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*).(1)

The authority alleged was negatived by the District Court, but the adoption was not therefore *necessarily* invalid. For five years, defendants had assented to the adoption and plaintiff No. 1 had been present at the annual ceremony of Sundararamayyar, which was performed by Venkayya.

The evidence of Venkayya, which was not discredited by the Judge, showed that Sundararamayyar shortly before his death had asked Venkayya to give his son in adoption and that Venkayya had refused, because he thought there was no probability of Sundararamayyar dying prematurely. Venkayya thus, when asked after Sundararamayyar's death by the widow to give his son, knew that her request was in accord with the wishes of the deceased. There could be no object in exercising any discretion or judgment in the matter, as required in ordinary cases (see I.L.R., 1 Mad. 82). Venkayya by giving his son, lost his right as a reversioner and there was no suggestion that he acted with any sinister motive. The consent of the sapinda, under such circumstances, was enough. The conduct of the plaintiffs also shows that they assented—*Parasara Bhattar* v. *Ranga Bhattar*.(2)

Mr. *Subramanyam*, for respondents relied on the decisions of **[547]** Privy Council in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo* (1), *Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar* (3).

The Court (TURNER, C.J., and HUTCHINS, J.) delivered the following

JUDGMENT.

This is an appeal against so much of the decree of the District Court of Nellore as declares invalid the adoption by the appellant No. 1 of the appellant No. 3, the son of appellant No. 2.

In the plaint, the respondents asserted that the adoption had been collusively set up by the appellants Nos. 1 and 2 and was invalid. The ground upon which the appellants, in their written statement, rested their case was that the adoption had been made with the consent, or in pursuance of the direction of the deceased husband of appellant No. 1, Sundararamayyar. The Lower Appellate Court has found, on the evidence, that Sundararamayyar gave no such consent or direction.

It is now contended in second appeal that, at all events, the appellant No. 2 consented to the adoption and that his consent is sufficient since he is the eldest male sapinda and one of the nearest.

In *Parasara Bhattar* v. *Ranga Bhattar* (2), it has been held by this Court that, where all the branches of the family are divided from the deceased husband and from one another, and equally distant from the

(1) 1 M. 69 (73). (2) 2 M. 202. (2) 2 M. 270.

deceased, the *bona fide* consent of one such divided member is sufficient, provided the assent of the others has been withheld from improper motives. Here the respondents, like appellant No. 2, are first cousins of Sundararamayyar. It is not alleged that they have withheld their assent from improper motives; what is asserted is that they have tacitly acquiesced in the adoption, and the circumstance that the respondent No. 1 took food at the deceased's annual ceremonies, which were performed by the respondent No. 2, is relied on. But the respondent No. 2, as the eldest male sapinda, would have been the proper person to perform these ceremonies, even if there had been no adoption. If does not appear that he performed them in the name of his natural son, the alleged adopted son.

There is, however, another ground upon which this second [548] appeal may be determined, and which renders it unnecessary for us to consider the respondents' motives or conduct. Not only did the appellants rest their case on the assent of the deceased Sundararamayyar and abstain from setting up any authorization by the appellant No. 3, but no evidence has been mentioned to us which would go to show any such authorization. As stated by the Judicial Committee in *Sri Raghunada* v. *Sri Brozo Kishoro* (1) "to authorize an act implies the exercise of some discretion, whether the act ought or ought not to be done; in the present case there is no trace of such an exercise of discretion." Appellant No. 3, as well as No. 1, professes to have been simply carrying out the direction of Sundararamayyar, and it has been found that Sundararamayyar did not give the directions alleged. The so-called authorization by the appellant No. 3, to be implied from his having given his son, seems only to have been put forward as an after-thought to supplement the very weak evidence of an authorization by the husband. Though referred to at the conclusion of the case before the Munsif, it does not seem to have been put forward in the District Court.

See also *Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar* (2), another case before the Privy Council and referred to by the Munsif in his judgment.

The second appeal fails and must be dismissed with costs.

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8 M. 548 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

SITHALAKSHMI (*Defendant's Representative*), *Appellant v.* VYTHILINGA (*Plaintiff*), *Respondent.**
[1st October and 25th November, 1884.]

Civil Procedure Code, Section 331—*Civil Courts Act, Madras*, 1873, *Section* 12—*Jurisdiction—Claim below ordinary pecuniary limit.*

A Court executing a decree obtains, by virtue of Section 331 of the Code of Civil Procedure, a special jurisdiction which enables it to try a claim of which the value of the subject-matter falls below the pecuniary limit of its ordinary jurisdiction.

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* Appeal against Order 10 of 1884.

(1) 3 I.A. 154. (2) 2 M. 270.

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8 M. 548 (F.B.).

[549] By virtue of Section 647 of the Code of Civil Procedure, a superior Court may, for sufficient cause, transfer a claim, registered under Section 331, to a Subordinate Court for trial.

[Diss., 11 C.L.J. 478 (481) = 5 Ind. Cas. 573 ; R., 14 B. 627 (631) ; 13 M. 520 (521-523); 6 Bom. L.R. 301 (302).]

THIS was an appeal from an order of C. W. W. Martin, Acting District Judge of South Tanjore, dated the 26th of October 1883, reversing an order of the Subordinate Judge of Tanjore.

In execution of a decree, passed in suit 98 of 1882 on the file of the Subordinate Court of Tanjore, directing the delivery to the decree-holder (by some of the judgment-debtors) of certain immoveable property, a claim was made to a portion of such property. The officer charged with the execution of the warrant for the delivery of the property comprised in the decree was resisted and obstructed by the claimant. The claim was numbered and registered, under the provisions of Section 331 of the Code of Civil Procedure, as a suit between the decree-holder as plaintiff and the claimant as defendant. The value of the property, which was the subject of the claim, was below Rs. 2,500. The Subordinate Judge held that he had no jurisdiction to try the claim, as being within the jurisdiction of the Court of a District Munsif. An appeal was preferred by the decree-holder to the District Court of Tanjore against the order of the Subordinate Judge. The District Judge held that the Subordinate Judge had jurisdiction to try the claim, and that the decision of the High Court in *Muttammal* v. *Chinnana Gounden* (1) was not applicable to the case; but he directed the transfer of the suit to the Court of the District Munsif of Trivadi.

From this order an appeal was preferred to the High Court by the claimant, and the Division Bench (TURNER, C.J., and HUTCHINS, J.), before whom the appeal came on for hearing, made the following order :—

"As we feel some doubt whether *Muttammal* v. *Chinnana Gounden* (1) was rightly decided, we consider that the question as to the competency of the Subordinate Judge to dispose of the claim as a suit should be referred to the Full Bench."

Bhashyam Ayyangar, for claimant (appellant).

Mr. *Shaw*, for decree-holder (respondent).

The following judgments were delivered :—

JUDGMENTS.

TURNER, C.J. (KERNAN, HUTCHINS, and BRANDT JJ., concurring):— We are of opinion that the Court executing the decree [550] obtains, in virtue of the provisions of Section 331, jurisdiction to try a claim, although in value its subject-matter falls below the pecuniary limits of its ordinary jurisdiction. The object of the Legislature, in enacting these and other similar provisions, was, so far as possible, to prevent the originating of a succession of suits. It desired that a right should be determined finally in continuation of an original proceeding and not by the institution of fresh proceedings. Having this object in view, it thought fit, where a Court has issued a warrant for possession, to impose on that Court the duty of investigating any *bona fide* claim on the part of a person resisting execution of the warrant. Its language is imperative. Where a duty is imposed on a Court there is impliedly conferred jurisdiction. The words "with the like power," on which reliance was placed in the

(1) 4 M. 220.

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argument of *Muttammal* v. *Chinnana Gounden* (1), receive their full meaning if they be taken to express that the Court has the same powers for enforcing the attendance of parties and witnesses, &c.,as it has in a suit. We, therefore, hold that the Subordinate Judge had jurisdiction to entertain the claim and this is in accordance with the decision in *Ravloji Tamaji* v. *Dholapa Raghu* (2)

We also hold that, under the provisions of Section 647 of the Code of Civil Procedure, the Judge had power to transfer the claim to the Munsif for decision. This is a power which should not be exercised without sufficient cause, and inasmuch as the parties desire it and we find no sufficient reason for directing the transfer of the claim to the Munsif's file, the order of the Judge transferring it is set aside, and the Subordinate Judge is directed to proceed to determine it.

The appellant must bear the costs of the appeal and the respondent of the objection.

MUTTUSAMI AYYAR, J.—The question for decision in this case is as to the effect of Section 331 of the Code of Civil Procedure. I am also of opinion that the Subordinate Judge is competent to try as a regular suit a claim under that section, though its value is below the inferior limit of his pecuniary jurisdiction. It creates a special jurisdiction as an exception to the general rule of prohibition prescribed by Section 15 of the Procedure Code. The reason for **[551]** such jurisdiction is probably the special facility arising from the fact that the object-matter of the claim is a part of the object-matter of a suit already decreed by the superior Court. It was argued further that a District Munsif may also, under this section, try as a regular suit a claim, of which the value is in excess of the superior limit of his pecuniary jurisdiction. It was alleged that, if there is a special jurisdiction conferred upon a Subordinate Judge or a superior Court, it must also exist in the converse case, that is to say, in favour of an inferior Court. Section 15 embodied in it a rule of prohibition in the case of Courts superior to that of the District Munsif, and, as the special jurisdiction was created as an exception and in relation to it, it seemed to me that the special jurisdiction could not in principle be extended to the inferior tribunal. It may be that the one case may be the converse of the other, but it is not difficult to conceive a reason for the rule of special jurisdiction not being intended to apply to both classes of cases, A Superior Court is forbidden from trying a suit cognizable by an inferior Court, not on account of its inherent incompetency to try it, but on grounds of public convenience and economy; and there may be nothing radically incongruous in a Subordinate Judge trying a suit below Rs. 2,500, whilst it would certainly be incongruous in a District Munsif trying a suit, the value of which is over Rs. 2,500.

I think, therefore, that we must read Section 331 together with Section 15 and construe the special jurisdiction created as an exception to a rule of prohibition promulgated by Section 15 for the guidance of superior tribunals. This view receives, it seems to me, additional strength from the fact that, in cases of property attached, or purchased in execution of money decrees, and the value of which may exceed the pecuniary jurisdiction of the Court executing the decree, the right to revise by a suit the summary order which such Court is authorized to pass is preserved by Sections 283 and 335.

(1) 4 M. 220. (2) 4 B. 123.

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It should also be remembered that, until the Civil Courts Act came into operation and the jurisdiction of the District Munsif and the mode of valuing suits cognizable by him were revised by it, the special jurisdiction section had no application to District Munsifs. For, the value of claim tried under sections analogous to Section 331 could never exceed the value of the suit, of which it was a continuation. The Civil Courts Act dealt with the general [552] jurisdiction and limited it in the case of other proceedings as well as in suits to Rs. 2,500. It never intended to give them jurisdiction in any case over Rs. 2,500. But if the contention as to the same rule being applicable to the converse case is to be upheld, we must hold that a District Munsif may try a claim in excess of Rs. 2,500 contrary to paragraph 2, Section 12, of Act III of 1873. The fact is (and we are not bound to ignore it for the purpose of determining what is the correct rule of decision) that, whilst this Act was framed, the case raised by the contention was not foreseen and provided for. As to the view that the language of Section 331 is wide enough to include it, I do not see my way to adopt it, first, because we must place a reasonable construction upon Section 331 so as to obviate an incongruous result; secondly, we must read it as correlated to Section 15, which embodies a rule of prohibition applicable only to Superior Courts; thirdly, because the claim is both a claim and regular suit at the date of its presentation, and, in the absence of a special provision, the general rule as to the competent *forum* should be our guide. I, therefore, think that the case, *Muttammal* v. *Chinnana Gounden* (1), was correctly decided.

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8 M. 552=9 Ind. Jur. 383.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

RAMA AND OTHERS (*Defendants*), *Appellants v.* RANGA (*Plaintiff*), *Respondent.** [6th August, 1885.]

Hindu law—Widow—Alienation—Pious purposes—Spiritual necessities.

Although pilgrimages and sacrifices performed by a Hindu widow may be indirectly beneficial to her deceased husband, they are not ceremonies indispensable for his spiritual benefit. A sale by a Hindu widow to raise money for pious acts, not in the nature of spiritual necessities, unless such sale is reasonable in the circumstances of the family and the property sold is but a small portion of the property inherited from her husband, is invalid.

[F., 11 M. 288(290); 19 P.W.R. 1907; R., 22 C. 506 (508); 34 M. 288 (290)=6 Ind. Cas. 240=20 M.L.J. 798 (802)=8 M.L.T. 74=(1910) M.W.N. 222; A.W.N. (1908) 202.]

THIS was an appeal from the decree of C. Venkoba Rau, Subordinate Judge of South Canara, reversing the decree of U. Subba Rau, District Munsif of Karkal, in Suit 113 of 1883.

[553] Ranga Bhatta sued as reversioner of Rama Bhatta to recover certain land sold by his widow, Yamuni, to her father.

The defendants were the brothers of Yamuni.

The District Munsif held that the sale was valid, having been made for the maintenance of the widow and for religious purposes.

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* Second Appeal 228 of 1885.

(1) 4 M. 220.

On appeal the Subordinate Judge reversed this decree.

Defendants appealed.

Ramachandra Rau Saheb, for appellants.

Srinivasa Rau, for respondent.

The facts appear sufficiently, for the purpose of this report, from the judgment of the Court (MUTTUSAMI AYYAR, and PARKER, JJ.).

JUDGMENT.

The land in suit originally belonged to one Rama Bhatta, and, on his death, it devolved on his widow in 1856. In the same year she sold it, together with the other property which she inherited from her husband, to her father for Rs. 201. It is recited in the sale-deed that, of this amount, Rs. 55 was paid on account of Rama Bhatta's funeral obsequies and Rs. 146 was raised for her own spiritual benefit. The Subordinate Judge found that, shortly after the sale, the lady performed several pilgrimages and sacrifices. Seeing, however, that she sold all her husband's property to her own father in the same year in which she succeeded to it, he held that the sale was a fraudulent transaction. As to the advance of Rs. 55, he did not consider the evidence which the appellants adduced to be satisfactory. As to the pilgrimages and sacrifices performed by the lady, he observed that they were not such as justified the sale. Though the appellants alleged, in their written statement, that the purchase-money was applied also to the maintenance of the vendor, their pleader is unable to refer us to any evidence showing that such was really the case. It appears further from the sale-deed that the spiritual benefit contemplated by the lady when it was executed was her own. We are willing to admit that the pilgrimages and sacrifices performed by her are no doubt pious acts which might indirectly be beneficial to her husband, but they were not ceremonies which were indispensable for his spiritual benefit, such as his funeral obsequies and the periodical ceremonies incidental to those obsequies. We cannot recognize a sale by a Hindu widow as valid against her husband's reversioner, when it is made in view to raise money for doing pious acts which are not in the nature of spiritual necessities, unless such **[554]** sale is reasonable in the circumstances of the family, and the property alienated is but a small portion of the property inherited from her husband. It is not contended that the income which the land in dispute yielded was more than Rs. 28 a year and that the whole of Rama Bhatta's property was not included in the sale. We see no reason to doubt that the Subordinate Judge properly held that there was no necessity for the sale, such as would render it binding upon the respondent, and dismiss this second appeal with costs.

1885
MAY 2.

APPELLATE CIVIL.

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8 M. 554.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

SADAYAPPA AND ANOTHER (*Plaintiffs in No.* 7863 *of* 1884) *v.* PONNAMA AND ANOTHER (*Defendants*).* [2nd May, 1885.]

Insolvency Act, 11 & 12 *Vic.*, *c.* 21, *Section* 7—*Vesting order*—*Civil Procedure Code, Section* 276—*Attachment before judgment*—*Official Assignee's title.*

Where a vesting order has been made under 11 & 12 Vic., c. 21, Section 7, after attachment and before decree, the title of the Official Assignee takes effect and prevents the attaching creditor from obtaining satisfaction of his decree by a sale—*Shib Kristo Shaha Chowdhry* v. *Miller* (1) and *Gamble* v. *Bholagir* (2) followed.

[F., 20 B. 403 (406) ; 17 M. 144 (145) ; 26 M. 673 (679).]

THIS was a case referred to the High Court, under Section 617 of the Code of Civil Procedure, by J. W. Handley, Chief Judge of the Court of Small Causes, Madras.

The case was stated as follows :—

"*Suits Nos.* 7863 *and* 9244 *of* 1884.

"These were suits by different plaintiffs against the same defendants for money due for goods sold and delivered. In both cases attachments before judgment had been made of certain bags of rice.

"After the date of these attachments but before decree, defendants were adjudicated insolvents and a vesting order was made.

[555] "Plaintiffs in both cases having obtained decrees proceeded to the sale of the bags of rice attached.

"After sale, the Official Assignee applied to have the proceeds of sale paid out to him.

"Notice was given to the parties to the suits, and after hearing the arguments on both sides I allowed the claim of the Official Assignee and directed the money to be paid out to him, but at the request of the plaintiffs' counsel I made my order contingent on the opinion of the High Court.

"The question is whether the rights of the Official Assignee under a vesting order, issued after an attachment before judgment but before decree, override the right which the creditor attaching before judgment would have upon his obtaining a decree to have the decree satisfied out of the property attached. The precise point was decided in favour of the Official Assignee's rights by a Full Bench of the Calcutta High Court in a case reported in the Indian Law Reports, 10 Calcutta series, page 150, the Chief Justice and Mr. Justice Mitter dissenting. I have followed the judgment of the majority of the Calcutta High Court, the reasoning of which commends itself to my mind. I cannot see that the difference between the wording of the sections in the Codes of 1877 and 1882 relating to attachment before judgment and that of the corresponding sections of Act VIII of 1859 has the effect, attributed to it by the Chief Justice and Mr. Justice Mitter, of altering the law upon this point, which admittedly under the old Code had been clearly settled in favour of the Official Assignee. On the contrary, it seems to me that the words of the present Code, and particularly the provision in Section 489 that attachment before judgment shall not bar

* Special Case 80 of 1884.

(1) 10 C. 150. (2) 2 B. H. C. R. 146 (150).

any person holding a decree from having his decree satisfied out of the property attached, show that attachment before judgment is not intended to transfer the property at all, or to give the attaching creditor any lien over it as against other creditors, but merely to transfer the possession to the Court so as to defeat fraudulent transfers by the debtor.

"Considering, however, the difference of opinion between the learned Judges of the Calcutta Court and that the question is one of great importance and has not, as far as I am aware, come before the High Court for decision, I think it right to refer the case for the opinion of the High Court.

[556] "The question, I would submit in these cases, is—Has the Official Assignee, under the circumstances detailed above, a right to receive the proceeds of sale of the property attached before judgment and sold in execution of the decrees."

Krishnayyar (Solicitor), for plaintiffs,

King (Solicitor), for the Official Assignee.

The Court (TURNER, C. J., and MUTTUSAMI AYYAR, J.) delivered the following

JUDGMENT.

We understand the question referred to us to be whether, when a vesting order has been passed after attachment and before decree, the title created by the Insolvent Act in the Official Assignee takes effect and prevents the attaching creditor from obtaining the satisfaction of his decree by a sale.

We conceive that it would be dangerous to guide our decision by reference to the processes in execution under other systems of procedure. There appears to us material difference between the order of attachment issued under the Code of Civil Procedure and a writ of *fieri facias* in that the latter is an order for sale, the former is a step which may or may not be accompanied by an order for sale. It may be conceded that it is ordinarily the duty of the Court, which has issued an order for sale, to proceed to execute the decree, when passed, by the issue of a warrant for sale when application is made for that purpose ; but it is also the duty of the Court to take notice of anything that may have occurred in the interim affecting the right of the defendant in the property which the Court, at the instance of the plaintiff, had attached with a view to prevent the alienation of it by the defendant. The effect of an attachment is declared in Section 276, after it has been duly effected—" Any private alienation of the property attached, whether by sale, mortgage, gift or otherwise, and any payment to the judgment-debtor, is void." The alienations against which the plaintiff is secured are private alienations by the defendant. Where the alienation is effected by operation of law, as in the case of a vesting order, the attachment cannot, in our judgment, prevent the operation of the Statute, and a Court executing a decree would be bound to take notice of it. Were we to hold otherwise, every creditor would be bound to bring a suit, and, if possible, he might apply for execution before the proceeds are realized so as to share in the distribution. The result of our ruling is to give effect to **[557]** the policy of the Code, and we, therefore, hold in accordance with the views of a majority of the learned Judges of the High Court of Calcutta in *Shib Kristo Shaha Chowdhry* v. *Miller* (1), and with *Gamble* v. *Bholagir* (2).

The Chief Judge will be informed accordingly.

(1) 10 C. 150. (2) 2 B. H.C.R. 146 (150).

1885
MAY 2.

APPELLATE CIVIL.

8 M. 557.

8 M. 557.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

RANOJI AND OTHERS (*Defendants*), *Appellants v.* KANDOJI (*Plaintiff*), *Respondent.** [18th November, 1884 and 2nd May, 1885.]

Hindu law—Sudras—Illegitimate son, Status and rights of—Suit for partition by illegitimate son of undivided brother against sons of other brothers.

In a joint Hindu family of the Sudra caste, consisting of three brothers, two died leaving legitimate sons and the third an illegitimate son.

In a suit brought by the latter for partition of the family estate against his father's brothers' sons;

Held, that he was not entitled to a share but only to maintenance.

[F., 10 M. 334 (343); 15 M. 307 (314); R., 23 B. 257 (265); 25 M. 429 (430); 27 M. 33 (35); 33 M. 226 (227) = 4 Ind. Cas. 299 = 20 M.L.J. 359 = 7 M.L.T. 26; 34 M. 68 (69) = 5 Ind. Cas. 919 = 20 M.L.J. 350 = 7 M.L.T. 161 = (1910) M W.N. 138; 24 M.L J. 271 (285); Expl., 12 M. 401 (403); 25 M. 519 (522) = 11 M.L.J. 399 (401).]

THIS was an appeal from the decree of W. E. Clarke, Subordinate Judge, Nilgiris, dated 11th June 1884.

The plaintiff, Kandoji Rau, sued the defendants, Ranoji Rau and eight others, whom he alleged to be his father's brothers' sons, for possession of one-third of the family property and obtained a decree.

The defendants appealed to the High Court on the grounds *inter alia*, that the plaintiff was not the son of his alleged father and that, if he was, his mother was a concubine, and therefore, plaintiff was not entitled to sue defendants for partition of the estate.

Mr. *Grant*, for appellants.

Anandacharlu, for respondent.

The facts necessary for the purpose of this report appear from the judgment of the Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.).

JUDGMENT.

[558] One Nimboji Rau, a Mahratta Sudra of Mysore, had three sons, named Gudubhai, Mukubhai, and Hirmanji. About thirty years ago they migrated from Mysore to Ootacamund, where they established themselves as mutton-butchers. It was conceded that Gudubhai and Hirmanji worked together and the appellants (defendants) are their sons and grandsons. Further, it is found by the Subordinate Judge that Mukubhai also lived with his brothers and carried on business with them jointly as a mutton-butcher, and that the property, of which a third share was claimed by the respondent (plaintiff), was jointly acquired by them. The evidence on this point is conflicting, and we see no sufficient ground for the contention that the Subordinate Judge has not arrived at a correct finding. The respondent asserted that he was the legitimate son of Mukubhai and claimed one-third share of the family property and an account of the profits of the business for the three years ending 31st October 1882, and a further account of the same until actual partition. It was alleged by the appellants that Mukubhai kept the respondent's mother Nunni, but

* Appeal 77 of 1884.

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they contended that, after Mukubhai's death, Nunni became the concubine of one Esuf Sahib and subsequently gave birth to respondent. The Subordinate Judge has, however, found that the respondent was Mukubbai's son by Nunni, but that Nunni was not married to him. From this finding the respondent has preferred no appeal, and although it is impugned by the appellants, the weight of testimony is in favour of the conclusion at which the Subordinate Judge has arrived. We have then to determine whether the illegitimate son of a Sudra, who has died in co-parcenary with his brothers, is entitled to demand from the surviving brothers any, and if any what, share in the family property, and the burden of proof is on the respondent to show that he is entitled under such circumstances to a share and to a share of the extent claimed by him.

We may premise the observations we have to make in the matter directly in issue by expressing our inability to concur in the opinion, which has been sometimes expressed that, among Sudras, marriage is no more than concubinage. Although what the Hindu law regards as the higher forms of marriage was not permitted to the Sudra, and although the wife of a Sudra does not acquire the right of assisting in sacrifices which can only be **[559]** offered by a regenerate householder, Hindu law regarded the union as conferring a status on the wife distinctly superior to that of a concubine and entitling her and her offspring, to rights of succession, and, in the case of her offspring, of co-parcenary which are refused to the concubine and her offspring.

It may no doubt be true that Hindu law has not been accepted by all the tribes who would fall within the general term Sudra, but among many classes of Sudras, who have accepted the Hindu law, we find a customary law which prohibits marriage with other classes or within certain degrees, and such rules imply a conception of marriage as something higher than a mere sexual union. All that we understand Baudhayana to mean in the text cited by West and Buhler, 376, is, a marriage may be contracted by Vaisyas and Sudras with but little regard to ceremonial, not that if a marriage is contracted with how little ceremony soever it will not create the rights attaching to relation of husband and wife. But while the Hindu law did not view the marriage relation of Sudras as mere concubinage, it conceded to the married Sudra many liberties, which would have been inconsistent with the religious life enjoined on the regenerate classes.

Thus in the collection of rules attributed to Manu, we find it declared that "a son begotten through lust on a Sudra by a man of the priestly class is even as a corpse: but a son begotten by a man of the servile class on his female slave or the female slave of his male slave may take a share of the inheritance, if permitted." Manu, Chapter IX, Sections 178, 179. The translator adds "by the other sons," it may have meant, by the father. The illegitimate son then was at that time denied any right or even competency to take a share in his father's property, if he was the offspring of a man of the priestly caste begotten through lust on a Sudra; he was only declared competent to take a portion of the father's wealth, if he was begotten by a Sudra and he could not claim any portion as a matter of right. In course of time his position was more favourably regarded by the law. "A son begotten on a dasi by a Sudra becomes even the partaker of a share by (the father's) choice; after the death of the father the brothers should make him a half sharer. An illegitimate son of a Sudra can take

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the whole unless there is a son to (any of) the daughters (of the Sudra). Yajnavalkya, II, slokas 133, 134.

These texts are declared by Vijnaneswara to be a special rule [560] concerning the partition of a Sudra's goods, who declares that the son begotten by a Sudra on a slave girl obtains a share by the father's choice; that after the father's death, if there are sons of a wedded wife, they must give him half as much as the amount of one brother's allotment, and that if there are no such sons, he will take the whole estate unless there be daughters of a wife or sons of daughters, in which case he will participate for half a share only. Mitakshara, I, Section 12. The author of the Madhaviya refers to the texts of Yajnavalkya, and he too adds the qualification that the illegitimate son of the Sudra takes the whole wealth only if there are neither sons nor daughters by a wedded wife nor the children of sons or daughters. (Burnell's Translation, page 24.) The rule is stated in the Dayabhaga, ch. IX, Section 31, as follows:—"Even a son begotten by Sudra on a female slave may take a share by the choice of the father, but if the father be dead, the brother should make him partaker of half a share. Begotten on an unmarried woman and having no brother he may take the whole property, provided there be not a daughter's son......... But if there be a daughter's son, he shall share equally with him, for no special provision occurs; and it is fit that the allotment should be equal, since the one, though born of an unmarried woman, is son of the owner, and the other, though sprung from a married woman, is only his daughter's son."

It appears in the following terms in the Dayakrama Sangraha, ch. VI, Section 33:—" The son of a Sudra by a female slave may, at the will of his father, be rendered an equal share with the son born of his wedded wife; on the decease of his father he is entitled to half a share;—in default of such a brother and of a daughter's son, he is entitled to the whole of his father's wealth: but if there be a daughter's son he must be an equal sharer with him." (Stokes, p. 513.) Nilakanta Bhatta quotes the text of Yajnavalkya and observes that by " specifying by a Sudra, it is clear that a son begotten by a twice-born man on a female slave does not obtain a share even by the father's choice. Neither after the death of the father will he get half, nor in the absence of sons or other (heirs) will he get the whole." Vyavahara Mayukha, ch. IV, Section IV, p. 32.

He thus inferentially recognizes the right of the son of a Sudra to a half share, though sons or some other heirs exist, but he does not specify who the other heirs are. (Stokes, p. 55.)

Devanna Bhatta quoting the texts of Manu and Yajnavalkya [561] proceeds: " If, according to authority, where there may be no son of the wife and the rest, but there may be a wife and a daughter, the daughter's son be entitled to share (with the son by a female slave), the rule for the succession of the daughter or other proper heir would be infringed, therefore, if any dower to the daughter's son exist, the son by a female slave does not take the whole estate, but on the contrary shares equally with such heir. Dattaka Chandrika, Section V, § 31. (Stokes, p. 660.) In the learned work by Messrs. West and Buhler, it is suggested that by the earlier writers the wife and the daughter were intentionally omitted: that the rule securing a provision for the illegitimate son begotten by a Sudra on a slave was established at a time when the daughter's son and even the daughter was made equal to a man's own son, while the widow was still unprovided for or reduced to a lower place. (West and Buhler, 84.)

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We hesitate to accept the view that Vijnaneswara intended to postpone the widow to the illegitimate son. He had already provided that the legitimate sons were to give shares to the widow and had recognized the right of the widow as superior to that of a daughter or daughter's son, though doubtless in virtue of expressed texts. In treating of the rule we are discussing he brings in daughters who were not mentioned by Yajnavalkya, and it is possible that he may here, as he has done in a well-known passage, not have intended to state completely the sons of superior heirs, or that the case of the survival of a widow may have escaped his attention. Nilakanta Bhatta appears to have understood that all heirs down to the daughter's son, who, under the ordinary law, are recognized as entitled to inherit, would not be altogether superseded by an illegitimate son and the language of Devanna Bhatta is explicit.

Such are the rules which we can collect from the commentators as to the succession of the illegitimate son of a Sudra (not being a son born in adultery), and, where his father has died "vibhakta" or separated, there can be no question that the right of the illegitimate son extends not only to his father's acquisitions, but to ancestral property which may have come to the father's hands.

All the texts we have cited are found in those portions of the several works which relate to the partition of the estate of separated householders. Do the same rights accrue to a son of a Sudra [562] when his father is unseparated? We can find no Hindu authority on this subject, and Messrs. West and Buhler are the only English writers who affirm that they do, but when we look at the authorities cited in support of their opinion, we find they do not support the view.

In the case cited in Bk. I, ch. II, Section 1, Q. 4, a Kumbi had transferred to a son described as a foster son his immoveable property. The Kumbi was presumably the sole owner and separated from his brother. In the case cited in Bk. I, ch. II, Section 3, Q. 1, the question put to the pandit was simply "can a son of a Sudra female slave be his heir," which the pandit answered in the affirmative and quoted the passage in the Mitakshara, to which we have referred. The case cited in Bk. I, ch. II, Section 3, Q. 3, is similarly inconclusive. On the other hand at Bk. I, ch. II. Section 3, Q. 6, when the pandit was asked if a kept woman's son would be preferred to a cousin, he replied that "as the deceased was separate from his relatives and as he was of the Sudra caste, his illegitimate son would be his heir.

So also in the following case, Q. 7, where a man of the Mali caste left an illegitimte son and a nephew, the pundit declared that the claim of the illegitimate son was valid as it appeared that the man lived separate from his brothers. The case cited in Q. 8, where it was held that the illegitimate son of a Sudra would take the whole estate in preference to the widow, is founded on the strict construction of the text of the Mitakshara, which, for reasons we have already given, we consider should not be accepted in this Presidency. We may observe that Varadaraja declares the rule in terms that might include the widow and daugthers, "in every case it must be understood that the succession of a dasi's son to the property is in default of ordinary or excellent sons, sons' sons, daughters' sons, &c. (Burnell, p. 22.)

If, in the absence of any rule, we are to be guided by analogy, it does not appear that the claims of the illegitimate son to half a son's share can be sustained against the undivided brothers of his father. We cannot accede to the arguments that an inference can be drawn from the place in

1885 MAY 2. — APPELLATE CIVIL. — 8 M. 557.

which the author of the Mitakshara deals with the rights of an illegitimate son. The passage is introduced as a special rule. The illegitimate son of a separated man of the regenerate classes has a right only to maintenance; the illegitimate son of a Sudra has no right in his father's lifetime, [563] but if there be no heirs, within certain degrees, he may take the whole estate after his father's death. There is nothing in the context to show that the preceding rules regarding legitimate sons were to apply to the illegitimate sons of the Sudra. The special rule is introduced in the place which it would occupy with equal propriety if the preceding rules had no application to him. The illegitimate son, it will be observed, does not by birth become a coparcener. He is ordinarily entitled only to maintenance, and in the case of Sudras this right to maintenance is in certain cases to be satisfied by the allocation not of a share but of a portion of the estate equal to half a share. The widow at one time enjoyed a similar right. It is difficult to see on what ground the claims of the illegitimate son upon the coparcenary estate of the father and the father's brothers can be placed above those of the widow, the daughter and the daughter's son. If the daughter and widow can claim only maintenance, because the coparcenary property remains a unit in the hands of the surviving brothers, it is to be assumed that the result would be the same in the case of illegitimate sons. The only arguments adduced against this view is that the illegitimate son would occupy a worse position where the father left an undivided brother or nephew than where being separated from collaterals he left an undivided son. The answer appears to be that the property of a father separated from his brothers may well be subject to discharge an obligation to which it would not have been subject in the hands of unseparated brothers. The family estate could not be made liable for the private debts of a deceased coparcener. When the deceased has left a son, there attach to the son personally and to the estate taken by him obligations which he must meet out of all he received as his father's representative. If two brothers were undivided and one died leaving a son, who remained in coparcenary with his uncle, and the other died leaving a widow, the widow would have only a claim for maintenance on the nephew, whereas if her husband had been separated and had left a son, she would under the older law have been entitled to a portion equal to a share.

On these grounds, in accordance with a previous decision of this Court in *Krishnayyan* v. *Muttusami* (1), we arrive at the conclusion [564] that the claim of the respondent is limited to maintenance. The decree of the Court of First Instance is reversed and the claim dismissed, but under the circumstances we shall direct each party to bear his own costs.

(1) 7 M. 407.

8 M. 564 (F.B.).

1885
JULY 13.
FULL BENCH.
8 M. 564 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kernan (Officiating Chief Justice), Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

REFERENCE FROM THE BOARD OF REVENUE UNDER SECTION 46 OF THE INDIAN STAMP ACT, 1879.* [2nd May and 13th July, 1885.]

Stamp Act, Sections 34, 50.

Where a document has been admitted in evidence as duly stamped, such admission can only be called in question by the Appellate Court under Section 50 of the Indian Stamp Act.

[F., 13 B. 449 (457) (F.B.); U.B.R. (1897—1901) 559 (560).]

THIS was a reference made under Section 46 of the Indian Stamp Act, 1879, by the Board of Revenue.

The resolution of the Board, dated 27th February 1885, was as follows:—

"The Board resolve, under the provisions of Section 46, Act I of 1879, to refer the following case, which has come to its notice, for the orders of the High Court:—

"In the course of certain civil proceedings, the District Judge of Chingleput admitted in evidence an instrument after assessing the stamp duty payable thereon and levying a penalty under Clause 1, Section 34, but failed to send the Collector an authenticated copy of the instrument duly certified as to payment of duty and penalty as provided in Section 35.

"Eight days thereafter the Court, in revision of its own proceedings, recorded a declaration under Section 50 setting forth, under a repealed enactment of 1816, the liability of the deed to a stamp duty of Rs. 50 and levied a penalty of Rs. 500, in default of payment of which the Court impounded the document and sent it to the Collector, in original, for disposal according to law.

"Subsequently, the case was re-opened on application of the parties, when the Judge formally repudiated his own revisional proceedings.

[565] "These proceedings are distinctly in violation of the provisions of Clause 3, Section 34 of the Act, and it is equally clear that the Judge was powerless to pass a declaratory order under Section 50, as that section limits interference to the Appellate Court which is at liberty to take action either of its own motion or at the instance of the Collector.

"The Judge's statement that the document was admitted provisionally is not understood, as the law admits of no such provisional admission.

"The Board are unable to remit the penalty under Section 42, as that section has reference only to penalties levied under Sections 34 and 37, whereas the penalty in question was, on the face of it, levied in pursuance of a declaration under Section 50.

"Under these circumstances, the Board resolve to forward the case for the orders of the High Court, with the request that they will pass such revisional orders on the proceedings of the District Judge as may be deemed advisable."

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* Referred Case 2 of 1885.

1885 JULY 13. — FULL BENCH. — 8 M. 564 (F.B.).

Mr. *Powell* (Acting Government Pleader) appeared on behalf of the Board of Revenue.

The Court (KERNAN, Officiating C. J., MUTTUSAMI AYYAR and HUTCHINS, JJ.) delivered the following

JUDGMENT.

The Judge's order of the 26th September cannot be supported and it must be set aside. The document was in tendered evidence on the 18th September. The Judge considered it together with the other evidence before him and made an order allowing the claim which the document was produced to support. The document was then received in evidence and acted upon, and the claim was disposed of on the 18th September.

We do not understand clearly what the Judge means when he states that the document was not read in evidence and that little or no use was made of it. In the order which he made on the claim petition, it is stated that "the claimants put in old deeds A and B which prove *prima facie* that these immoveables in fact have been set apart and reserved for some purpose and cannot be treated as belonging solely to the defendant."

When A was tendered in evidence, the pleader undertook to pay Rs. 11 for the duty and the penalty and he paid them accordingly on the same day, as appears from the order of the 20th October.

[566] Then, on the 26th September, the District Judge came to the conclusion that the proper amount payable on the document was Rs. 550 and he endorsed on it an order requiring the payment of Rs. 539 within fourteen days. The section under which this order or declaration was made is not stated in the order itself, but the copy transmitted to the Collector is headed "Declaration under Section 50 of Act I of 1879," and in his proceedings of 20th October, with which he forwarded the document to the Collector, the District Judge himself described it as a declaration made under Section 50 of the Stamp Act and referred to the document as one which had been impounded and was transmitted under that section. As an order under that section it was manifestly illegal, since Section 50 only applies to a Court of Appeal or Reference reviewing and adjudication by an inferior Court.

But the Judge wishes his order of the 26th September to be treated as itself an adjudication under Section 34 of the stamp duty and penalty leviable. It seems to us that this is impossible. He had admitted the document in evidence and proceeded to judgment on the 18th September, and he was *functus officio*. When an instrument has been admitted in evidence and judgment delivered, its admission can only be called in question in a proceeding under Section 50.

We accordingly quash the order of the 26th September.

We desire to inform the Judge that he is misinformed as to the practice of the High Court, and that, if in any case the stamp is examined by an officer of the Court and a question raised as to its sufficiency, the Court adjudicates on it before admitting the document in evidence and acting upon it.

We are unable to say that, having regard to the distinct statements on the face of the proceedings signed by the Judge, the Board of Revenue and the Collector were not justified in making this reference.

The late Chief Justice and Mr. Justice BRANDT heard this case with us and assented to this judgment.

8 M. 567.

1885 APRIL 17.

APPELLATE CIVIL.

8 M. 567.

[567] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

SARANGAPANI (*Plaintiff No.* 1), *Appellant v.* NARAYANASAMI (*Defendant No.* 1), *Respondent.** [17th April, 1885.]

Civil Procedure Code, Sections 623, 624—*Review of judgment - Abolition of Court—Business transferred to another Court.*

Section 624 of the Code of Civil Procedure must be read as a proviso to Section 623

Held, therefore, that, when a Court had been abolished and its business transferred to a Court presided over by another Judge, such Judge should not entertain an application for review of judgment except in the case provided for by Section 624.

[Appr., 16 B. 603 (605)]

THIS was an appeal from an order of J. Hope, District Judge of South Arcot, setting aside the decree of Adiappa Chettyar, Subordinate Judge at Cuddalore, in suit 43 of 1883, on review of judgment.

The application for review of judgment was made by defendant No.1, Narayanasami Gramini, to the District Court, because the Subordinate Court had been abolished and its records transferred to the District Court. The chief ground for review alleged in the application was that the decree had been passed on a compromise extorted from defendant No. 1.

The District Judge found that the grounds set forth in the application were not deserving of much weight, but set aside the decree on the ground that the Subordinate Judge had not decided (1) whether the suit was maintainable, (2) or whether the plaint had been filed on a proper stamp.

Issues had been raised on both of these questions and the Judge was of opinion that both of these issues should have been found in the affirmative before the suit could be proceeded with.

Plaintiff No. 1 appealed to the High Court on the grounds, *inter alia*—

[568] (1) That the District Judge had no power to entertain or grant a review of judgment under the circumstances.

(2) That the suit was properly brought.

(3) That it was open to the parties to compromise the suit in spite of the technical objections taken by defendant No. 1.

Bhashyam Ayyangar, for appellant.

Hon. *Rama Rau*, for respondent.

The Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.) delivered the following

JUDGMENT.

The first contention is that the Judge's order is bad, because the application on which he acted was one for review on another ground than those mentioned in Section 624, and he is not the Judge who passed the decree.

In our opinion this objection must prevail. It has been argued on the other side that the 5th Clause in Section 623 permits an application to the Court to which the business of an abolished Court has been transferred upon any of the grounds on which reviews are allowable. But the very same clause speaks of the Court, not the Judge, which passed the decree.

* Appeal against order 13 of 1885.

1885 APRIL 17. — APPELLATE CIVIL. — 8 M. 567.

Section 624 must be read as a proviso to both parts of the clause: when there has been a change of the presiding Judge, no application can be made to the new Judge, whether of the Court which passed the decree or of that substituted for it, except on the grounds stated.

The District Judge, however, has set aside the decree on a ground not taken by the party, *viz.*, that before the decree was passed it should have been determined whether it was a proper case to grant a declaration and whether the stamp was correct. If these objections are tenable at all, they should be raised by an appeal; but there can be no doubt that the declaration asked for might properly have been granted, and it is not clear that the stamp is insufficient, for it appears to have been paid both for the declaration and on the property actually with the defendants and sought to be recovered.

The District Judge's order must be reversed and the respondent will pay the costs of his application for review as well as of this appeal.

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8 M. 569.

[569] APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

CHIKATI ZAMINDAR AND OTHERS (*Defendants*), *Appellants v.* PEDDAKIMEDI ZAMINDAR (*Plaintiff*), *Respondent.**
[12th November, 1884, and 24th February, 1885.]

Regulation XII of 1816—*District panchayat—Regulation VII of* 1816—*Act III of* 1873.

Neither the total repeal of Regulation VII of 1816 by Act III of 1873 (Madras Civil Courts' Act) nor the partial repeal of Regulation XII of 1816, so far as it contained words of reference to Regulation VII of 1816, abolished the jurisdiction of district panchayats.

A Collector cannot order a reference to a district panchayat under Regulation XII of 1816 unless there has been (1) an enquiry as to whether the parties will submit to the jurisdiction of a village panchayat; (2) an objection from either party to such reference, and a request in writing by one of the parties that the matter be referred to a district panchayat.

[R., 15 M. 1 (3).]

THIS was an appeal from the decree of J. R. Daniel, District Judge of Ganjam, in suit No. 3 of 1884.

The plaintiff, Sri Vira Sri Viradhi Vira Pratapa Sri Laksmi Narayana Ananga Bhima Deo Kesari Maharazulu Garu, zamindar of Peddakimedi, sued Visvambara Rajendra Deo, zamindar of Chikati, and seven others to set aside a decree of a district panchayat, dated 6th January 1883†, and to recover certain villages taken possession of by defendant No. 1 on the strength of the said decree. A dispute having arisen regarding the boundary between portions of the zamindaries of Peddakimedi and Chikati, the Chikati zamindar (defendant No. 1) presented to the Collector (defendant No. 2) a plaint under Section 4 of Regulation XII of 1816, and the Collector forwarded the plaint under Section 5, Clause 7 of the said Regulation to the District Munsif of Berhampur (defendant No. 3), with an order to assemble a district panchayat under Regulation VII of 1816 to settle the dispute.

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* Appeal 47 of 1884.
† [For 6th January 1883, there is 5th January 1883 in some other editions.—ED.]

1885 FEB. 24. APPELLATE CIVIL 8 M. 569.

[570] The District Munsif accordingly convened a panchayat of defendants 4—8, who passed a decree under that Regulation.

The District Judge held that the decree of the panchayat was illegal because Regulation VII of 1816 having been repealed by the Madras Civil Courts' Act, 1873, the Collector had no power to make the reference.

The suits were dismissed with costs against defendant No. 1; the other defendants to bear their own costs.

Defendants appealed on the following grounds:—

(1) Regulation XII of 1816 has not been repealed.

(2) The decision of the panchayatdars was a good, valid, binding and final decision.

(3) The plaintiff's suit was not maintainable.

Mr. *Branson*, for appellants.

Mr. *Michell*, for respondent.

The Court (TURNER, C. J., and MUTTUSAMI AYYAR, J.) delivered the following

JUDGMENT.

Two questions are raised for decision in this appeal, *viz.*, (1) whether Regulation XII of 1816 is still in force so far as it relates to district panchayats, and (2) whether the conditions necessary to give them jurisdiction exist in this case. As to the first, the Judge has come to the conclusion that district panchayats have ceased to exist as a legal tribunal for all purposes, but in this opinion we are unable to concur. Neither the total repeal of Regulation VII of 1816 nor the partial repeal of Regulation XII of 1816, so far as it contained words of reference to Regulation VII of 1816, warrants the inference that the jurisdiction created by the later enactment has been abolished. The one created a general jurisdiction and the other a special jurisdiction, and we see nothing incongruous in the Legislature abolishing the one and retaining the other, and thereby converting a tribunal which had a general and a special jurisdiction into a tribunal which has a special or limited jurisdiction only. Regulation VII of 1816 was in part incorporated with Regulation XII of 1816, but it should be remembered that, when the one is repealed and the other is allowed to stand, the rule of construction is that the portion of the repealed enactment which has been incorporated is to be read as part of the enactment with [571] which it has been incorporated and which is still in force—see *The Queen* v. *Inhabitants of Merionethshire* (1), *The Queen* v. *Stock* (2).

Again, it was not within the purview of Act III of 1873 to enumerate all judicial tribunals, and it is not to be inferred that because district panchayats are not expressly named by it as a judicial tribunal, they have ceased to exist. Village Munsifs and village panchayats are similarly not enumerated, but it is not denied that they still exist as special tribunals for certain purposes. The substantial question, then, is one of intention to be ascertained from the language of Regulation XII of 1816 as modified by its partial repeal. The sections which conferred jurisdiction on district panchayats in the cases mentioned in Regulation XII of 1816 have not at all been modified or repealed. Section 2, Regulation XII of 1816, still authorizes district panchayats to hear and determine such suits as may be referred to them by Collectors under that Regulation through District Munsifs; Section 4, Clause 1, enumerates

(1) 6 Q.B. 346. (2) 2 A. & E. 407.

1885 FEB. 24. — APPELLATE CIVIL. — 8 M. 569.

among the claims which the parties may prefer to the Collector under this Regulation claims to lands, the validity of which may, as in the case before us, depend on the determination of an uncertain and disputed boundary or landmark; and Section 5, Clauses 6, 7 and 8 prescribe the conditions subject to which the Collector is to refer the claim to village and district panchayats respectively. These provisions are left to stand, and the partial repeal does not touch them. Again, the retention of the word 'district' in Section 6, Clauses 1 and 4, Section 10, and Section 12 shows that it was the intention to retain district panchayats as a judicial tribunal. Moreover, Section 10, which provided for the execution of decrees of district panchayats in cases referred to them under Regulation XII of 1816, is left to stand, and the inference appears irresistible that district panchayats are intended to retain their jurisdiction under the Regulation. This being so, the construction which ought to be placed on the other sections must be such as will execute and not defeat that intention. The modifications of Regulation XII, which were relied on at the hearing as material to the question under consideration, are those of Section 6, Clauses 1 and 2, and of Section 11. Act XII of 1876 repeals the first clasue of Section 6 in so far as it relates to Regulation VII of 1816. Giving effect to [572] the modification and omitting from the clause all that it contains relating to Regulation VII of 1816—for it is to be noticed that it is not only the words "Regulation VII of 1816" which are to be omitted—the result will be that the panchayats are to be assembled and their proceedings are to be conducted according to the general rules enacted in Regulation V of 1816. Act XII of 1876 also repealed the words in Clause 2, Section 6, "Without requiring the agreement specified in Clause 2, Section 4, Regulation VII of 1816." Those words had no other effect in the Regulation as it originally stood than repeating in substance what is enacted by Clause 7, Section 5, and explaining it by reference to a provision of Regulation VII of 1816 which rendered mutual consent a prerequisite of the general jurisdiction which vested in district panchayats under that Regulation. The other modifications of the Regulation are immaterial for our present purpose. We therefore hold that district panchayats have still jurisdiction under Regulation XII of 1816, and that the procedure to be followd is that prescribed in regard to village panchayats by Regulation V of 1816, except in so far as it is expressly modified by Regulation XII of 1816 as it now stands.

As to the second point, we have come to the conclusion that the award cannot be upheld, for the procedure prescribed by Section 5, Clauses 6 and 7, has not been followed. According to Clause 6, the Collector was bound to have enquired, when the defendant denied the claim, whether the parties would mutually consent to have the cause investigated and decided by a village panchayat, and Clause 7 declares that, if either the plaintiff or defendant shall object to the reference of the cause to be tried and determined by a village panchayat, and either of them shall desire in writing that it may be referred to be tried and decided by a district panchayat, the Collector, whether the other party agrees to such reference or not, shall forward the plaint to the competent District Munsif to assemble a district panchayat to investigate and determine the suit. An enquiry as to whether the parties will submit to the jurisdiction of a village panchayat, an objection from either party to such reference, and a request then made by one of the parties in writing that the matter in dispute be referred to a district panchayat, are conditions precedent to the exercise by the Collector of his power to order a compulsory reference to a district panchayat. In the

[573] case before us there was no mutual submission to a district panchayat, nor was any enquiry made as to whether the contending parties would consent to have the matter heard and determined by a village panchayat. Under these circumstances, the Collector had no power to direct the District Munsif to assemble a district panchayat and his order is *ultra vires*, and moreover the panchayat was not assembled and did not proceed according to the rules prescribed by Regulation V of 1816.

For these reasons we must affirm the decree and dismiss the appeal with costs.

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8 M. 573 = 10 Ind. Jur. 60.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

SUBRAMANYA (*Defendant No.* 1), *Appellant v.* RAJARAM (*Plaintiff*), *Respondent.** [22nd and 30th July, 1885.]

Rent Recovery Act, Section 38—*Civil Procedure Code, Sections* 276, 295—*Sale of tenant's interest by landlord pending attachment by Civil Court.*

The interest of a tenant in certain land having been attached by his creditor in execution of a decree for money, the landlord attached the same land for arrears of rent, brought it to sale, and purchased it under the provisions of the Rent Recovery Act.

The creditor subsequently purchased the interest of the tenant, which was sold in execution of his decree. In a suit by the landlord to have the sale to the creditor declared invalid:

Held, that the landlord's purchase was subject to the creditor's attachment.

[F., 16 M. 479 (480).]

THIS was an appeal from the decree of T. Weir, Acting District Judge of Madura, confirming the decree of A. Kuppusami Ayyangar, District Munsif of Paramagudi, in suit 98 of 1884.

The plaintiff, T. Rajaram Rau, manager of the Ramnad zamindari, sued for a declaration that a sale of certain land made in execution of a money-decree obtained by defendant No. 1 (Subramanya Chetti) against defendant No. 2 (Sami Tevan) was invalid, and that the land belonged to the zamindari. The land which had been in the possession of defendant No. 2, a tenant of the zamindari, was attached for arrears of rent and sold on the 9th of December [574] 1881 and bought by the plaintiff. Defendant No. 1 pleaded that the sale to plaintiff was invalid, because in February 1880 he had attached the land in execution of a decree against defendant No. 2, and had brought it to sale and purchased it in 1882.

The plaintiff contended that the attachment gave defendant No. 1 no lien and only prevented private alienations by the judgment-debtor from taking effect. He relied on Section 276 of the Code of Civil Procedure. The Munsif decreed for plaintiff, citing Section 295 of the Code as showing that no lien could be created by attachment as against other creditors.

On appeal the District Judge also held that no charge was created on the land by Section 276 beyond forbidding private alienation.

Defendant No. 1 appealed on the ground that at the date of the purchase by plaintiff under Act VIII of 1865, Section 38, the tenant had

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* Second Appeal 155 of 1885.

1885 JULY 30. — APPELLATE CIVIL. — M. 573 = 10 Ind. Jur. 60.

no saleable interest in the land, inasmuch as the land was then under attachment by a Civil Court.

Bhashyam Ayyangar, for appellant.

Mr. *Powell* (Acting Government Pleader), for respondent.

The Court (MUTTUSAMI AYYAR and PARKER, JJ.) delivered the following

JUDGMENT.

The respondent (plaintiff) is the manager of the Ramnad zamindari, and defendant No. 2, who is not a party to this appeal, is a tenant in that estate.

Defendant No. 1 (appellant) obtained a money-decree against the defendant No. 2 in original suit 291 of 1877 on the file of the Sivaganga Munsif, and in execution of the same attached his interest in the land in dispute in March 1880 and purchased it sometime subsequent to October 1882. During the interval, the respondent attached the same land for arrears of rent due for Fasli 1278, and bought it in December 1881 under Act VIII of 1865. Thus the respondent's attachment and purchase were prior to the appellant's purchase, but subsequent to his attachment. The Courts below held that this attachment created no lien in his favour, and that the whole interest of the tenant in the land passed to the respondent by the sale under Act VIII of 1865. We are unable to concur in this opinion. The power conferred upon the landlord by Section 38 of Act VIII of 1865 is a power to sell for arrears of rent the tenant's saleable interest, that is to say, the interest which the tenant could convey by private alienation either by express contract [575] with the landlord or by the usage of the country. But in our judgment there is nothing in this section to show that the sale authorized by it is a sale free of prior incumbrances and disabilities, as in the case of a sale for arrears of revenue due to Government under Act II of 1864. Section 2 of that Act declares that the land on which arrears of revenue are due shall be regarded as the security of the public revenue, and Section 42 enacts that lands brought to sale for arrears of revenue shall be free of all prior incumbrances, but Act VIII of 1865 contains no such provisions. The words "when by express contract or by the usage of the district, the defaulter may have a saleable interest in the land" only prescribe a condition precedent, *viz.*, that the defaulter must have a disposing power in order that the landlord might proceed against him under that section. In *Virappa* v. *Kathana* (1) it was held by this Court that the landlord had no lien for rent on the tenant's holding. It was also decided by a Full Bench of this Court in *Rajagopal* v. *Subbaraya* (2) that the sale under Act VIII of 1865 was not free of prior incumbrances. It follows then that the landlord could only sell the tenant's interest, such as it was at the date of his attachment and sale, and that his power under Section 38 is nothing more than the power which an execution-creditor ordinarily has over his debtor's property. It is then said that Section 276 of the Code of Civil Procedure creates no lien or charge in favour of an attaching creditor, but that it creates only a disability as against the judgment-debtor. In the view which we take of the landlord's power under Section 38 of Act VIII of 1865, he could only stand in the place of the tenant, and bring to sale for arrears of rent such interest as the tenant had power to sell at the date of the attachment and sale. This interest the tenant had no power to alienate to the prejudice of any claim enforceable under

(1) 6 M. 428. (2) 7 M. 31.

the attachment, and the landlord could not do more. It is therefore immaterial for purposes of this appeal whether Section 276 of the Code of Civil Procedure creates a lien or charge on the property under attachment or only a disability as against the judgment-debtor. We must therefore hold that the respondent's purchase was subject to the appellant's attachment. It may be that the interest which remained in the tenant, if any, after satisfying the appellant's decree passed to the respondent by his prior purchase. But the suit from which this [576] second appeal arises was not instituted to redeem the property from the appellant.

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We set aside the decrees of the Courts below and direct that the suit be dismissed with costs throughout.

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8 M. 576 = 9 Ind. Jur. 460.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

RAMA (*Plaintiff*), *Appellant v.* VENKATACHALAM AND ANOTHER (*Defendants*), *Respondents.** [22nd and 27th July, 1885.]

Rent Recovery Act, Sections 3, 4, 9—*Landlord and tenant—Right to enforce acceptance of patta.*

The renter of a zamindari, to whom the right to collect the kattubadi or quit-rent on inam lands and the road-cess payable to Government was delegated, sued to compel the inamdars to accept pattas and execute muchalkas for the amounts due:

Held, that the inamdars, not being cultivating tenants, were not bound, under Act VIII of 1865 (Madras), to accept a patta.

Ramasami v. *The Collector of Madura* (I.L.R. 2 Mad., 67) referred to.

[R., 10 M. 229 (231) 11 Ind. Jur. 331; 21 M. 116 (119, 123) (F.B.); D., 16 M. 40 (42).]

THIS was an appeal from the decree of E. C. Johnson, Acting District Judge of Vizagapatam, confirming the decree of V. Appala Narasimha Razu, District Munsif of Parvatipur, in suit 144 of 1884.

Mr. *Branson*, for appellant.

Anandacharlu, for respondents.

The facts necessary for the purpose of this report appear from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.).

JUDGMENT.

The appellant is the renter of the Merangi zamindari in the district of Vizagapatam and the respondents are agraharamdars holding inams in that estate. The zamindar is a minor and the estate is under the management of the Court of Wards. The jiraiti or assessed lands in the zamindari were leased to the appellant and he was also authorized to collect the kattubadi and the road-cess payable to Government on the inam lands, some deduction being allowed to be made from the amount due to Government as a remuneration for his trouble. It is conceded, at the hearing, that the respondents are not cultivating tenants. The [577] appellant brought the suit, from which this appeal arises, partly to compel the respondents to accept a patta and to execute a muchalka under Act VIII of 1865. The question raised for decision was whether this claim could be maintained.

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* Second Appeal 156 of 1885.

1885 JULY 27. — APPELLATE CIVIL. — 8 M. 576 = 19 Ind. Jur. 460.

Both the lower Courts held that it could not. The District Munsif observed that the appellant's position was that of a person deputed to make collections for a stipulated remuneration and not that of a landlord within the meaning of Section 3 of Act VIII of 1865. In advertence to the fact that the respondents were not cultivating tenants, the Judge observed that the provisions of the Act did not extend to superior tenancies, such as that of the respondents, and relied on the decision of the Privy Council in *Ramasami* v. *The Collector of Madura* (1). In that case the contention was that a favorable lease granted by a former zamindar of Ramnad to his creditor for a period of forty years was a patta as defined by Section 3 of Act VIII of 1865, and, therefore, not a subject of compulsory registration under Act XX of 1866. In overruling this contention, the Judicial Committee observed that Section 3 contained a description and not a definition, that it seemed to be confined to the relation of tenants who are cultivating the land and their immediate landlords, and that Sections 3, 4 and 9 were framed upon the assumption that there was an existing relation which would warrant the application by either party for a written patta. This decision was followed by this Court in Appeal 8 of 1881.

In the case before us, the respondents are not cultivating tenants, and, therefore, they are under no obligation to accept a patta. Again, the appellant asserts a claim to the kattubadi and the roadcess, not in virtue of his position as a farmer, but on the ground that the power to collect them was specially delegated to him, and it is not urged that the relation of landlord and tenant exists between the parties within the meaning of Section 3. The learned counsel for the appellant suggests that the remarks of the Privy Council amount to a mere *obiter dictum*. But a reference to the facts of the case in which those remarks were made shows that they were necessary for the disposal of the contention before the Judicial Committee. This appeal must fail and we dismiss it with costs.

(1) 2 M. 67.

9 M. 1 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

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MAY 2.
FULL BENCH.
9 M. 1 (F.B.).

LAKSHMI (*Defendant No.* 6), *Appellant v.* SRI DEVI AND OTHERS (*Defendants*), *Respondents.** [24th April, and 2nd May, 1885.]

Civil Procedure Code, Section 582—*Limitation Act, Schedule II, Articles* 171, *A, B, C* ; 178—*Period for bringing in representative of deceased respondent.*

Per Curiam (Kernan, J., dissenting).

An application by an appellant to make the representative of a deceased respondent party to the appeal does not fall under Art. 171B, but under Art. 178 of sch. II of the Indian Limitation Act, 1871.

[Diss., 34 C. 1020=6 C.L.J. 715=11 C.W.N. 1100 (1102) ; 10 Bom. L.R. 509 (511) ; **F.**, 29 M. 529 (530)=16 M.L.J. 475=1 M.L.T. 348; **Appr.**, 12 C. 590 (593) (F.B.).]

THIS was an appeal against an order of K. Kunjan Menon, Subordinate Judge of North Malabar, in appeal suit No. 92 of 1884.

Lakshmi, the appellant in the Subordinate Court, was defendant No. 6 in the suit, against whom a decree for rent and possession of land had been passed.

The respondents to the appeal were the plaintiff, Mahadevi, and the other defendants in the suit.

Pending the appeal Mahadevi died, and an application was made six months after the date of her death by Lakshmi, under Sections 368 and 582 of the Code of Civil Procedure, to make Sri Devi, her representative, a party to the appeal. Sri Devi was placed on the record as respondent No. 1.

[2] Sri Devi, on the hearing of the appeal, objected that it was barred by limitation as against her, inasmuch as the application to make her a respondent was not made within sixty days from the death of Mahadevi.

This plea was allowed, and the appeal was ordered to abate.

Lakshmi appealed to the High Court.

The question was referred to a Full Bench for decision.

Srinivasa Rau, for appellant.

Respondents were not represented.

The following judgments were delivered by the Full Bench (TURNER, C.J., KERNAN, MUTTUSAMI AYYAR, HUTCHINS, and BRANDT, JJ.) :—

JUDGMENTS.

HUTCHINS, J.—The question before us is whether an application by an appellant to have the representative of a deceased respondent made a

* Appeal against Order 129 of 1884.

1885 MAY 2. — FULL BENCH. — 9 M. 1 (F.B.).

respondent falls under art. 171B of the Limitation Act, or under the general article for all applications not otherwise provided for.

In its terms, art. 171B refers only to the representatives of deceased defendants, but it is contended that a defendant includes a respondent, and Section 582 of the Code is relied on. This section runs as follows:—"The Appellate Court shall have . . . the same powers . . . as are conferred by this Code on Courts of original jurisdiction in respect of suits instituted under chap. V"—the paragraph ended here in the Code of 1877, but now goes on—"and in chap. XXI, so far as may be, the words 'plaintiff,' 'defendant' and 'suit' shall be held to include an appellant, a respondent and an appeal, respectively, in proceedings arising out of the death, marriage or insolvency of parties to an appeal." The argument is that since a defendant in Section 368, which is part of chap. XXI, is to be held to include a respondent, the article in the Limitation Act, which deals with applications under Section 368 to bring in the representative of a deceased defendant, must be held to provide for similar applications in regard to deceased respondents.

On the other hand, it is contended that the provisions of Limitation Acts are always construed most strictly, that the effect of Section 582 is to regulate only the procedure in appeal where a party has died but not the limitation, that except in a question of procedure a defendant does not include a respondent.

It will be observed that three things are spoken of in Section [3] 582 —a plaintiff, a defendant and an appeal. A suit cannot include an appeal in respect of limitation, for the Limitation Act deals with suits and appeals in distinct schedules. A plaintiff cannot have been intended to include an appellant with regard to limitation, for, if it did, the Legislature would not have spoken of a plaintiff or appellant in the art. 171, almost immediately preceding that now in question. Why then should a defendant be held to include a respondent?

It has already been mentioned that Section 582 has been altered and enlarged, and art. 171B is itself a new provision. It is therefore desirable to examine the course of legislation in view to elucidate the intention of the Legislature.

The Limitation Act now in force was passed in 1877 in close connection with the Code of that year. In that Code, as already noticed, the first paragraph of Section 582 terminated at the words "chap. V." In the Limitation Act, there was nothing corresponding with arts. 171A, 171B or 171C, and art. 171 spoke of a deceased plaintiff only, not of a plaintiff or appellant.

The words "or appellant" were introduced into art. 171 by the Amendment Act XII of 1879, and the same Act added the supplementary arts. 171A, B and C in the very same form in which they still stand, except in one particular, not now material. And this same Amendment Act also modified Section 582 of the Code by adding, after the words, Chap. V, "and in Sections 363 and 365 the word plaintiff shall be held to include an appellant."

This seems to negative a possible suggestion that the words "or appellant" were added to art. 171 out of excessive caution. Very slight caution would have shown that, if it was still doubtful after the amendment of Section 582 whether a plaintiff included an appellant in regard to limitation in art. 171, a defendant could not possibly include a respondent in arts. 171A, B and C, since the Section 582 had not been amended with regard to defendants. Under the law, as it stood after the Amendment

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Act, there could, I think, be no doubt that art. 171B did not apply to deceased respondents.

Then, in 1882, there was a further amendment of Section 582, and it now stands as set out in the beginning of this judgment. It is possible that the Legislature intended to make a corresponding change in the limitation, but they have not done so, and an appellant is, in my opinion, entitled to take advantage of the oversight.

[4] It has been suggested that the appellant in this case is a defendant seeking to bring in the representative of the plaintiff (respondent), and that he is governed by art. 171A, but this is an application under Section 368 and not one under Section 366, to which alone art. 171A would apply.

BRANDT, J.—I agree. I should have been glad, if I could, to have held that it was open to take it to be a case of defective description rather than a case in which respondents were intentionally omitted, or through oversight not provided for, but the arguments stated by my learned colleague leave us no option, I think, and art. 171B must be held not to apply to the case of a deceased respondent.

The order of the Subordinate Judge must be set aside and the appellant's application must be disposed of on the merits, but I would not allow costs as it was an open question.

MUTTUSAMI AYYAR, J.—I agree with Mr. Justice Hutchins for the following reasons:—First, his conclusion is in accordance with the view on which the learned Chief Justice and myself decided several cases; secondly, the Limitation Act must be construed in cases of doubt so as to preserve the remedy; thirdly, the case before us is not one of real omission, for it is conceded that, if it is not governed by art. 171B, it must be governed by art. 178; fourthly, according to the language used in the Limitation Act, and to the course of legislation, there is neither ambiguity nor inaccurate description as pointed out by our learned colleague, and, in such a case, it is not permitted to us to vary the construction on the ground that, in our opinion, there is an oversight on the part of the Legislature.

TURNER, C.J.—I am of opinion that the absence of the term respondent was inadvertent, but I do not see how we can so construe the article as to hold that it applies to respondents. The Limitation Act draws a distinction, as Mr. Justice Hutchins has pointed out, between suits and appeals and between plaintiffs and appellants, and while I should have been prepared to hold that we might have got over the use of the term defendant only in the description of the application as a matter of imperfect description, we cannot so deal with the date from which the limitation is to run. I, therefore, assent to the proposed order.

KERNAN, J.—I am still of the same opinion as I expressed in Second Appeal 242 of 1880, *Karuthedath Narayanan Unni* [5] *v. Kamprath Korunni Panikkar* (1), that is, that where a deceased respondent was plaintiff on the original record, the terms of arts. 171 and 171B apply to her. As plaintiff she came under art. 171; she was still plaintiff, though respondent in the appeal. The arts. 171, 171A, and 171B of the Limitation Act ought to be construed with the Sections of the Civil Procedure Code therein referred to and with Section 582 of the Code. By so doing "defendant" includes "respondent." No reason is suggested why

(1) Not reported.

1885 MAY 2 — FULL BENCH. — 9 M. 1 (F.B.).

the legislature should omit to provide for the case of a deceased respondent.

The intention of the legislature was clearly to provide in the Limitation Act for all the cases referred to in the Section of the Code to which reference is made by arts. 171, 171A and 171B.

NOTE.—*See Narain Das* v. *Lajja Ram*, I.L.R., 7 All., 693.
Soshi Bushan Chand v. *Grish Chunder*, I.L.R., 11 Cal., 694.

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9 M. 5.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, and Mr. Justice Hutchins.

APPASAMI (*Petitioner*), *Appellant v.* SCOTT (*Respondent*), *Respondent.**
[14th November, 1884 and 25th & 28th April, 1885.]

Civil Procedure Code—Decree—Execution—Sale—Immoveable property—Hypothecation bond—Interest of obligee sold—General Clauses Act, 1868, *Section* 2 (5)*—Interest arising out of land.*

Where a judgment debtor is entitled to a debt secured by a collateral hypothecation of land and the decree-holder attaches and sells the judgment-debtor's interest in the bond, such interest is immoveable property for the purpose of attachment and sale under the Code of Civil Procedure, 1882.

Per Turner, C.J.—*Quære.*—Whether the decree-holder could not sell the debt apart from the security as moveable property?

[**N.F.**, 26 B. 305; 1 Ind. Cas. 450=18 P R. 1909=22 P.W.R. 1909; 13 Ind. Cas. 91 (92)=22 M.L.J. 105 (107)=10 M.L T. 503=(1911) 2 M.W.N. 590; **Appr.**, 19 B. 121 (123); **R.**, 25 C. 222 (225); 10 M. 169 (171); 14 C.P.L.R. 5 (8); **D.**, 35 B. 288=13 Bom. L.R. 233 (237)=10 Ind. Cas. 812.]

THIS was an appeal from the order of C. Purushotam Ayyar, Subordinate Judge of Madura, West, dated 13th February 1883, in execution of the decree in suit 56 of 1881.

The facts necessary, for the purpose of this report, appear from the judgments of the Court (TURNER, C.J., KERNAN and HUTCHINS, JJ.).

[6] *Ramachandra Rau Saheb*, for appellant.

Respondent was not represented.

JUDGMENTS.

TURNER, C.J.—The zamindar of Sivaganga had executed a bond to Venkatasami Nayudu for Rs. 3,00,000 and hypothecated as collateral security the zamindari.

Venkatasami Nayudu died leaving three sons. In original suit 56 of 1881, Varadaya, on the 2nd December 1881, obtained a decree against Appasami, one of the sons of Venkatasami. This decree Varadaya transferred to Scott on 4th July 1882. On 10th August 1882, Scott attached the debt in the manner prescribed by the Code for the attachment of debts. The Subordinate Judge at first declined to order a sale, but in October 1882 the judgment-debtor presented a petition No. 500 of 1882, consenting to a sale. The Court, thereupon, ordered a proclamation of sale to issue, but the sale was postponed as the judgment-debtor expressed his intention to present an application to be declared an insolvent, and he was granted time to the 26th December 1882 to enable him to do so. No application

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* Appeal against Order 41 of 1883.

1885 APRIL 28. — APPELLATE CIVIL. — 9 M. 5.

having been made by him, Scott on the 18th January presented an application No. 25 of 1883, praying for the issue of an order for sale and obtained an order, in pursuance of which, on 26th January 1883, a proclamation of sale was issued in the following terms:—

"It is notified that, on a petition presented for execution of the decree in the said suit, the following moveable property of the defendant has been attached; unless the undermentioned amount is sooner paid into Court or the decree is otherwise satisfied, the said property will be sold by public auction . . . . on 13th February 1883. In so doing, the right of the defendant as hereinbelow set forth will be sold."

The amount to be collected was then stated and the property was described as follows:—"One-third share due to this defendant in the three lakhs of rupees due under a bond executed for Rs. 3,00,000 on the 12th September 1878 by Dorasinga Tevar *alias* Gauri Vallabha Tevar, zamindar of Sivaganga, in favour of Venkatasami Nayudu, defendant's father." On the 10th February the judgment-debtor again applied for a postponement of the sale on the ground that a suit had been instituted on the bond, and that the debt was included in his insolvent application. He did not then take any objection that proper notice of the sale had not [7] been given. His application was refused for the reasons stated in the Subordinate Judge's order on the 13th February.

On the 13th February the sale commenced; the judgment debtor asked that the sale might be kept open for seven days and the Subordinate Judge allowed it to be kept open to, and to be closed on, the 14th February. On the 14th February it was accordingly concluded. On the 14th February when the sale was proceeding, the judgment-debtor applied to the Court either to postpone the sale or to observe the rules relating to the sale of immoveable property. The Subordinate Judge observed that the objection was then taken for the first time, that it was taken in the absence of the decree-holder, and that what was being sold was the judgment-debtor's one-third share in a debt, which was attached under Section 268 of the Civil Procedure Code, and that the debt was moveable property.

It is contended on appeal that the proclamation should have been made in the manner directed for the sale of immoveable property. Where the judgment-debtor is entitled to a debt secured by a collateral hypothecation of land and the decree-holder desires to make the debt available for the satisfaction of his decree, I hesitate to say that he may not effectually do so by attaching and bringing the debt to sale in the manner in which other debts are attached and brought to sale. Of course, if he desires to bring to sale the security, he must, I allow, proceed to bring it to sale as immoveable property. In this case it appears to me the judgment-debtor is entitled to contend that all he desired to sell and all that has been sold is moveable property; but there are cases in which the security may be worthless. I am, however, persuaded that the sale of a debt apart from the security which may alone give it value, is contrary to the policy of thelaw in this country, which aims to secure the judgment-debtor from loss on the occasion of an auction sale in execution of decree, and I therefore cannot regret that my learned colleagues have come to a contrary conclusion. Had I been able to agree with them on the first point, I should have considered that, inasmuch as a sale has taken place, further inquiry was necessary to prove substantial injury. The security may be worthless. It is notorious that the zamindari has been attached in execution of a number of decrees passed on mortgages, and that after fruitless

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postponements to enable the judgment-debtor to obtain a loan from Government or elsewhere, proceedings are now being taken to bring it to sale.

[8] But, as the sale has been for other reasons declared invalid, it is unnecessary that I should express a decided opinion.

HUTCHINS, J., (KERNAN, J., concurring).—In this case the Subordinate Judge of Madura ordered the sale of the appellant's one-third interest in a bond, upon a proclamation of sale which treated such interest as moveable property, and gave only fifteen days' notice. The only question raised for our determination is whether the appellant's interest in the bond was moveable or immoveable property. The Code of Civil Procedure does not define immoveable property and consequently the definition to be considered is that contained in the General Clauses Act, which declares that "Immoveable property shall include land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth."

The bond is one for three lakhs of rupees charged on the zamindari of Sivaganga.

Regarded as a debt, it is undoubtedly moveable property, but seeing that the debt is made a charge on land we cannot say that it is not a "benefit to arise out of land," and we are constrained to hold that it is immoveable property. It is the appellant's interest in the bond, including the immoveable security, which was ordered to be put in auction and not a mere interest in the debt. We do not understand that the Subordinate Judge, by his order of the 14th February, denied that he was selling the security as well as the debt, and, even if he had so expressed himself, anything that he may have said without the knowledge of the decree-holder and intending purchasers could not have affected the question. It is not, therefore, necessary to consider whether we could have interfered if the debt alone had been ordered to be sold, but, if the application has been to sell the debt apart from the security, we think that the debtor might reasonably have objected, and that upon his objection the Court might reasonably and ought to have refused to sever the debt from its security.

Our decision is in strict accord with that of the High Court of Calcutta in *Srinath Dutt* v. *Gopal Chundra Mitra* (1) and also with that of the High Court of Allahabad in *Buddoo Mull* v. *Maharoop* (2). It has also been held, both in Bombay and Allahabad, that decrees for money charged on land are themselves [9] immoveable property—*Musammat Bhawani Kuar* v. *Gulab Rai* (3) and *Hari G. Joshi* v. *Ramchandra*.(4)

If, however, this had been the only ground for setting aside the order for sale, and consequently the sale, we should have felt bound to remit for inquiry the issue whether the irregularity had caused substantial injury. The appeal has come before us as against the order for sale because the Subordinate Judge has treated the property as moveable, and it is for that reason only that we have admitted it. The more correct course would have been for the appellant to have moved the Subordinate Judge to set aside the sale and to have appealed against his refusal. He is not entitled to have the sale cancelled for a mere irregularity unless he is able to show that substantial loss has resulted.

But there is another ground on which, as held by the District Judge, the sale to, and purchase by, the respondent are absolutely bad. The

(1) 9 C. 511. (2) 6 N.W.P. 129. (3) 1 A. 348. (4) 9 B.H.C.R. 64.

respondent is a pleader practising in the District Court and his purchase is opposed to Section 136 of the Transfer of Property Act. 1885 APRIL 28.

We set aside the order directing the sale to proceed and declare the sale null and void. We make no order as to costs as the appellant did not take the first objection, upon which he has now succeeded, in the Court below, although he threw every obstacle he could think of in the way of the decree-holder, and because he has not applied, as he should have done, to the Subordinate Judge to set aside the sale.

APPELLATE CIVIL.

9 M. 5.

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9 M. 9 = 9 Ind. Jur. 464 = 1 Weir 572.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

QUEEN EMPRESS v. SUBBARAYAN AND ANOTHER.* [25th August, 1885.]

Penal Code, Section 498—*Marriage—Proof.*

S and G having been convicted of enticing away the wife of the complainant, the conviction was quashed on appeal, on the ground that strict proof of marriage being necessary for a conviction under Section 498 of the Indian Penal Code, the evidence [10] adduced (*viz.*, of the complainant, the woman, and her mother, who swore to the fact of the marriage) was not sufficient to enable the Court to form an opinion whether the marriage took place as a fact, and if it did take place, whether it was according to law. The accused did not cross-examine the witnesses as to the fact or validity of the marriage or otherwise impugn it:

Held, that the marriage was sufficiently proved—*Empress* v. *Pitambar Singh* (I.L.R. 5 Cal, 566) discussed.

[R., 5 P.R. 1894 (Cr.); D., 13 Cr. L.J. 541 (542) = 15 Ind. Cas. 813 = 5 S.L.R. 270.]

THIS was a case referred to the High Court by G. A. Parker, Sessions Judge of Tanjore, on the 16th June 1885.

The facts of the case appear from the judgment of the High Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.)

Counsel were not instructed.

JUDGMENT.

HUTCHINS, J.—The charge in this case was an offence, punishable under Section 498 of the Indian Penal Code, *viz.*, enticing away a married woman. The Second-class Magistrate convicted, but the Head Assistant Magistrate (Manavedan Raja) on appeal has reversed the conviction on the ground that "the Bengal High Court have ruled that strict proof of marriage is necessary for convictions under Sections 497 and 498," and that, in view of that ruling, the evidence adduced was not "sufficient to enable the Lower Court to form an opinion whether the alleged marriage actually took place, or, if it did take place, whether it was according to law."

The authority referred to appears to be the *Empress* v. *Pitambar Singh* (1). In delivering the judgment of the Full Bench in that case the Chief Justice observed: "The marriage of the woman is as essential an element of the crime charged as the fact of the illicit intercourse, and the provisions of the Evidence Act (Section 50) seem to point out very plainly that, where the marriage is an ingredient in the offence, the fact of the marriage must be proved in the regular way."

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* Criminal Revision Case 289 of 1885.

(1) 5 C. 566.

1885 AUG. 25. — APPELLATE CRIMINAL. — 9 M. 9= 9 Ind. Jur. 464=1 Weir 572.

We of course agree both that the fact of the marriage must be proved, and that it must be proved in the ordinary way, *i.e.*, by other and more reliable evidence than that of the mere "opinion—*expressed by conduct*—of a person who, as a member of the family or otherwise, has special means of knowledge." It is such an opinion which Section 50 of the Evidence Act makes admissible evidence of a relationship, such as marriage, except in certain cases of which one is a prosecution under Section 498 of the Indian [11] Penal Code. That proof of the opinion, as expressed by conduct, may be given, seems to imply that the person himself is not to be called to state his own opinion, but that, when he is dead or cannot be called, his conduct may be proved by others. The section appears to us to afford an exceptional way of proving a relationship, but by no means to prevent any person from stating a fact of which he or she has special means of knowledge. The Calcutta case has been followed by Straight, J., in *Empress* v. *Kallu*, (1) but if the learned Judges meant to decide that a husband or wife is precluded from proving his or her marriage, we must, with great deference to their opinion, express our dissent.

In the English Courts a marriage is usually proved by the production of the parish or other register, or a certified extract therefrom; but, if celebrated abroad, it may be proved by any person who was present at it, though circumstances should also be proved, from which the jury may presume that it was a valid marriage according to the law of the country in which it was celebrated. "Proof that the ceremony was performed by a person appearing and officiating as a priest, and that it was understood by the parties to be the marriage ceremony according to the rites and customs of the foreign country, would be sufficient presumptive evidence of it—see *R.* v. *Inhabitants of Brampton*, (2) so as to throw on the defendant the onus of impugning its validity" (Archbold, p. 925, Bigamy). And even a marriage in England may be proved by any person who was actually present and saw the ceremony performed: it is not necessary to prove its registration or the license or publication of the banns (*Ibid.*, quoting *R.* v. *Allison*, (3) *R.* v. *Manwaring*. (4)

In this country there is no statutory marriage law for natives, and the validity of any particular marriage depends chiefly on the usages of the caste to which the parties belong. In the case before us the parties to the marriage are Maravas—a class not over-exact or nice as to religious observances or ceremonies. The wife, as witness No. 1, deposed: "The complainant is my married husband only" (the Tamil word rendered 'only' implies he is just my *married* husband and nothing more or less): it was four years ago that the marriage was performed; upon my attaining [12] puberty, we cohabited." Similarly the husband said: "I married Velayi five years ago: she is 18, the *nuptial ceremony* was performed soon after the (first ceremony of) marriage (or betrothal)." Witness No. 4 is the mother of the wife Velayi. She swore that she had her daughter married to the prosecutor. None of these witnesses were cross-examined as to the factum or validity of the marriage, and the accused persons in no way impugned its validity.

We entertain no doubt that the marriage has been sufficiently established. We accordingly set aside the First-class Magistrate's judgment of acquittal and direct him to restore the appeal to his file and pass fresh orders upon it.

(1) 3 A. 60.
(2) 10 East 282.
(3) R. & R. 109.
(4) Dears & B. 132=26 L.J. (M.C.) 10.

9 M. 12.

1885 Sep. 22.

ORIGINAL CIVIL.

ORIGINAL CIVIL.

9 M. 12.

Before Mr. Justice Handley.

NATAL v. NATAL.* [22nd September, 1885.]

Divorce suit—Costs of wife—Indian Succession Act, 1865, *Section* 4—*Married Woman's Property Act,* 1874.

A wife without property of her own seeking a divorce is entitled to have provision made by her husband for the payment of her costs in the suit.

Proby v. *Proby* (I.L.R., 5 Cal., 357) distinguished and observed upon.

[**Appr.**, 19 B. 293 (296); **D.**, 21 B. 77 (82).]

THE facts of this case appear sufficiently for the purpose of this report from the judgment of the Court (HANDLEY, J.)

Mr. *Branson*, for plaintiff.

Biligiri Ayyangar (Solicitor), for defendant.

JUDGMENT.

Application by petitioner (the wife) for an order that her costs up to date be taxed and paid by respondent, and that her costs up to, and of, and incidental to, the hearing may be taxed *de die in diem.* and that respondent be ordered to pay into Court a sufficient sum to cover such costs, out of which sum the costs when so taxed *de die in diem* be paid to petitioner.

I think petitioner is entitled to the order prayed for. I took time to consider this matter because I thought at first there was some difference in principle between giving this relief to a woman **[13]** seeking a divorce, and doing so in the case where the woman is the defending party. Upon consideration I see there is no reason for any such distinction. The English Divorce Courts have always given it in both cases, and the reason, *viz.*, that otherwise the wife will, as a rule, be unable to continue the proceedings, applies equally to both cases. The rules passed by the Courts for divorce and matrimonial causes in England under the English Divorce Act provide for the taxation of costs of a wife, who is petitioner or respondent, before the hearing as a matter of course, and for the registrar's ordering the husband to pay or give security for the costs of, and incidental to the hearing. The decision of the Calcutta High Court in *Proby* v. *Proby*, (1) quoted by the respondent's attorney, does not lay down that in no case can the Indian Divorce Courts properly give such relief to the wife, but only that the main reason for the practice of the English Courts having been removed by the Indian Succession Act, which makes the wife's property independent of her husband, the relief will not be granted by the Indian Courts unless special circumstances are shown calling for it. With great deference to the learned Judges who decided that case, it seems to me that they have over-estimated the effect of the Indian Succession Act upon the status of the wife as entitling her to this relief. If she has property, that property of course will be available for her costs, and in that case the Courts here would probably refuse to make any order that the husband pay her costs until the suit has been decided, as is done by the English Courts when the wife has separate property. But when

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* Matrimonial Suit No. 2 of 1885.

(1) 5 C. 357.

1885 SEP. 22. — ORIGINAL CIVIL. — 9 M. 12.

the wife has no property, the same reason for the practice requiring her husband to provide for her costs, *viz.*, her inability otherwise to continue the proceedings, still remains. That inability is principally caused by her disability to contract, which is untouched by the Indian Succession Act, and is only removed by the Married Woman's Property Act, 1874, so far as relates to her separate property. It is not clear that the Courts here will, in a suit by her Solicitor against the husband after she has been unsuccessful, give a decree against the husband for her costs, and she will therefore find it very difficult to induce any respectable practitioner to undertake her case. She is not certainly, unless she has property, in a position to meet her husband on equal terms, and is therefore [14] likely to be at a disadvantage, and this inequality between the contending parties is, as I understand it, the reason for the practice in question. In the present case it is alleged by the petitioner, and not denied, that she has no property, and I consider therefore that she is entitled to have some provision made for her costs. The order will be that petitioner's costs up to and including taxation and including the costs of this application be taxed as between attorney and client, and that respondent do pay the amount of such costs when so taxed to petitioner or her Solicitor, and further that the respondent do pay into Court the sum of Rs. 200 to meet the costs of the petitioner of and incidental to the hearing, and that such costs be taxed *de die in diem*, and when so taxed be paid to petitioner or her Solicitor out of such sum to be paid into Court by the respondent as aforesaid.

Solicitor for plaintiff: *P. B. Gordon.*

Solicitor for defendant: *Biligiri Ayyangar.*

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9 M. 14 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

VEDANTA AND OTHERS (*Plaintiffs*), *Appellants v.* KANNIYAPPA AND OTHERS (*Defendants in the several cases*), *Respondents.**
[24th April, 1885.]

Muhtarafa—Trade-tax, Zamindar's right to collect—Regulation XXV of 1802, *Section* 4 *—Regulation XXV of* 1832.

The right of collecting the muhtarafa or trade-tax from artisans in his zemindari has not been delegated by Government to the zemindar of Karvaitnagar and cannot be legally exercised by his assignees.

Quære: Whether it was competent for Government to delegate the collection of the muhtarafa to zemindars for their own use.

[R., 16 M. 34 (38).]

APPEALS from the decrees of D. Buick, District Judge of North Arcot, reversing the decrees of C. Ranga Rau, District Munsif of Tirupati, in suits Nos. 725—734 of 1881.

[15] These cases were referred to a Full Bench by Turner, C. J., and Muttusami Ayyar, J., in November 1883, and were adjourned from time to time to enable the zamindar of Karvaitnagar and the Government of Madras to apply, if they should think fit, to be made parties, so that the

* Second Appeals 587—596 of 1883.

question at issue might be finally decided. Neither the zemindar nor the Government were made parties.

The facts and arguments appear from the judgment of the Court (TURNER, C.J., KERNAN, MUTTUSAMI AYYAR, HUTCHINS, and BRANDT JJ.).

Hon. *Rama Rau*, for appellants.

Mr. *Branson*, for respondents.

JUDGMENT.

The appellants (Vedantacharyalu and four others) are inamdars of Yekambara-kuppam, a village in the zamindari of Karvaitnagar: they brought this suit to recover from the respondents (Kanniyappa Mudali and nine others), weavers, the muhtarafa tax claimed as due on their looms for Faslis 1285 to 1290 (1875-76 to 1880-81).

The respondents, in their written statements, pleaded that the appellants were not entitled to collect the tax from them; that the suit was barred by limitation; and that they had not held the number of looms on which the tax was assessed.

The Court of First Instance held that the appellants were entitled to collect the tax, inasmuch as they were inamdars under the zemindar, and the tax had been always collected in the village; and held the suit was not barred by limitation because, although the appellants had not enforced their right of collecting the tax for twelve years prior to suit, this inaction was due to an order of the Collector, who had prohibited its collection.

On appeal, the District Judge adverted to the judgment of this Court in Special Appeal 747 of 1873, (1) wherein two learned Judges (Innes and Holloway, JJ.) had held the zamindar entitled to collect the muhtarafa tax, the Chief Justice, Sir Walter Morgan, dissenting; and by reason of this dissent the District Judge appears to have considered himself at liberty to regard the question as still an open one. We may observe that the judgment of this Court by a majority is binding on the Courts until it is overruled by the Court itself: at the same time it is quite within the **[16]** province of a Judge who sees reason to doubt the propriety of a judgment of this Court, while accepting and applying it, to indicate the grounds on which, if the matter were *res integra*, he would have formed a different opinion.

The Judge rightly apprehends the nature of the tax or toll which the appellants assert their right to levy: it was a tax on artificers, in this case weavers, which under native rule was collected on behalf of the sovereign power, although, where the revenues of a district were farmed by a zamindar, it was collected by him.

The Judge doubted the opinion expressed by Mr. Justice Innes that the right to collect the muhtarafa tax was enjoyed by the zamindar as a common-law right: he held that if it was legal, it was legal by virtue of the delegated authority of the State, such delegation being manifested by the omission in the sanad to prohibit the collection of this tax. He, however, points out that under the Regulation XXV of 1802 the Government was entitled at any time to exercise its discretion and to withdraw from its deputy, the zamindar, the privilege of collecting the tax, and that it was competent to it to do so by a mere order of Government, without resorting to legislation: he then goes on to inquire whether, although the

(1) Not reported.

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Government has not finally and definitely issued such an order, the privilege has been cancelled by the Legislature in any other way. The Judge observes that the muhtarafa tax was collected, as sanctioned by law and custom, up to 1832: he regards the effect of Regulation V of that year as abrogating the authority derived from custom and substituting an authority derived from legislation; the sanction of custom, he says, was superseded by the sanction of the Legislature.

Act XVIII of 1861, the first License Tax Act, repealed Regulation V of 1832, and the Judge considers its effect was to abolish the muhtarafa tax wherever it was collected in the provinces directly administered by the Government of India, and that it could have had no other effect in the zamindaris; and whereas Act II of 1862 simply repealed Act XVIII of 1861, without reviving Regulation V of 1832, the Judge considers that the right to collect the muhtarafa tax was not revived in the Karvaitnagar zamindari any more than it was in any raiyatwari district in the Presidency: he admits that the repeal of Act XVIII of 1861 may have had the effect of reviving the common-law liability of [17] subjects to pay the tax to the Government, and of reviving in the Government the common-law right of imposing it; but he considers that to entitle the zamindar to collect it there must have been a fresh delegation of authority, and that an order of the Government, dated 26th November 1865, did not amount to such a delegation: the portion of the order quoted by the District Judge (paragraph 26) is in the following terms: "It appears to Government that they are not called upon to insist on the resumption of this item of revenue from the zamindars of Venkatagiri, Karvaitanagar or Kalastri, and the Collectors will accordingly understand that the prohibition against their collecting muhtarafa according to custom is withdrawn so far as Government are concerned: the zamindars will be responsible for keeping within the law." But whether or not this order operated as a delegation, the Judge considers that since 1862 there had been at best nothing but a liability at common-law on the part of the raiyats of the zamindari to pay the muhtarafa tax, and he expresses his belief that the British Government has never revived a fiscal liability, which has been in abeyance for the shortest period, without having recourse to the Legislature: in the result he holds that in the absence of any such legistation the common-law right, which was abrogated by Act XVIII of 1861, has not been revived.

Again, adverting to the fact that the sanad of the zamindar of Karvaitnagar, while it expressly prohibited the collection of the other sources of revenue mentioned in Section 4 of Regulation XXV of 1802, omitted mention of the muhtarafa (which the Judge considers tantamount to an exclusion of the prohibition), and adverting also to the Section 3 of the Regulation above quoted, which declares that "Sanads and kabuliats are to contain the conditions and articles of tenure on which the lands should be held," and required the Courts "In all cases of disputed assessment to give judgment in conformity with the conditions in the particular case," the Judge considers that, so long as the muhtarafa tax continued a legal exaction, and the Government had abstained from exercising its power to abolish it, the zamindar enjoyed the right to levy it; but that in 1861 the Legislature interposed and deprived him of that right.

On these grounds, the Judge reversed the decrees of the Court of of First Instance and dismissed the suits; but he also expresses a doubt whether it is competent to the zamindar to delegate the [18] power of collection to others, as to the plaintiffs in this suit, inamdars, and holds

that no more than three years' arrears of taxes could in any case have been decreed.

We must recognize the care and ability with which the Judge, Mr. Buick, has dealt with the very difficult question on which he felt it his duty to enter.

The Hon. Mr. *Rama Rau*, for the appellants, naturally relied upon the previous ruling of this Court, and supported the reasons recorded by the learned Judges who in the appeals of 1873 upheld the legality of the collection of the tax ; and it is not without protracted and anxious consideration that we arrive at a different conclusion.

Mr. *Branson* in a very exhaustive address supported the decree of the Lower Appellate Court, as well on the grounds mentioned by the District Judge as on other grounds which we proceed to consider.

His argument, which he supported by copious references to authorities, was as follows. He relied on the decision of the Sadr Court in Case No. 6 of 1807 (M.S.D., Vol. I, page 9) ; in that case the Raja of Vizianagaram sued the Collector to recover 50,000 rupees as compensation for the loss sustained by him in consequence of his having been prevented by an order of that officer from collecting muhtarafa tax. The Sadr Court held that not only was the zamindar not entitled to levy the tax, but that in conformity with the conditions of his tenure, the privilege in question was held entirely at the discretion of Government, expressly to his exclusion ; that the custom owed its existence to the arbitrary will of the zamindar at a time when the Government did not exercise its right of restraint over him, and that " It was evident from the very nature of the tax that the custom of collecting it could not have been continued (continuous), but that its regular realization had been prevented by frequent interruptions ; that it had not been acquiesced in by the parties from whom it was taken, but had been the subject of contention and dispute as well on account of its unreasonableness in itself and in its consequences as on account of its variableness and uncertainty ;" that " The custom was therefore wanting in all the requisites necessary to make a custom good, and on this ground alone might have been relieved against, apart from a distinct reservation" in the Regulation " which showed that the intention of Government [19] was expressly to protect the subject against the imposition of any tax not originating from the land, the propriety of which had not been previously investigated and discussed." The learned Counsel also called our attention to passages in the Fifth Report, vol. 2, pp. 10, 54, 76, 162 and 356, which supported the opinion of the Sadr Court as to the origin and nature of the tax, and as to the reasons which induced the Government to prohibit by legislation its collection by subjects and to retain it under its immediate management.

It was further contended that, assuming that the muhtarafa was such a tax as could legally be collected by Government, when the Government converted its tax-gatherers into landowners, it expressly, by Section 4 of Regulation XXV of 1802, deprived itself of the power of conferring on them the right to collect it. Adverting to the sanad, it was contended that, even if the Government had the power to delegate the right of collection, the omission of reference to the muhtarafa could not be construed as an authority to collect it ; that no pecuniary burden can be imposed upon the subject except upon clear and distinct legal authority established by those who seek to impose it ; and that the Courts must always lean against a construction which imposes a burden on the subject. He cited in support

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of his arguments *Gosling* v. *Veley* (1), *Partington* v. *The Attorney-General* (2) and *Holloway* v. *Smith* (3).

The right of the sovereign power to collect taxes on trades and professions is of extreme antiquity in India. In the Code ascribed to Manu an enumeration of the king's duties is followed by an enumeration of the revenues he is entitled to collect: among these we find taxes on goods, on income, and on labour—Ch. VII, Sections 127, 130, 132, 137 and 138. There can be little doubt that these taxes were collected under Hindu sovereigns, though not perhaps continuously or universally; the Muhammadans availed themselves of the system of revenue they found established, and their collectors or farmers exacted dues which had long been customary, or revived dues which, though obsolete, were not unwarranted by Hindu law.

It will be seen, however, that these dues were not exigible by the owners of land as such, but by the sovereign. The zamindaris [20] of Southern India are, it may be admitted, in some cases held by families who enjoyed at one time more or less completely the rights of sovereignty; in other instances the present zamindars represent military commanders on whom jagirs were conferred: again in other instances collectors or farmers of revenue have been recognized as zamindars. But whatever the origin of their title, there can be no question that the Government intended to treat the zamindars with whom it effected a permanent settlement of the land revenue as landed proprietors, and to ignore any rights which conflicted with its own sovereignty, except in rare instances, in which it still conceded to a royal house, by express treaty or other engagement, some of its ancient privileges.

Such a large proportion of the Crown revenues of India was derived from the land, directly or indirectly, that it was difficult for the early British administrators to separate with precision the revenue which could conveniently be collected by the Crown from that the collection of which could more conveniently be left to those subjects who had exercised the functions of collection under native rule. There were, however, some sources of revenue which could, it seemed, be collected directly, and which it was considered desirable to retain under the immediate management of the administration. The double functions of the East India Company rendered its servants particularly jealous of all taxes "Which might clog the beneficial operations of commerce," nor were they without solicitude for the comforts of the people at large.

The Committee in the Fifth Report observe "That under the head of 'Sayar' revenue was included a variety of taxes, indefinite in their amount and vexatious in their nature, called motarfa; these consisted in imposts on houses, on the implements of agriculture, on looms, on merchants, on artificers and on other professions and castes" (vol. 2, p. 10): and it appears that it was considered that Government had fixed the assessment on each zamindari exclusively of these items, except in a few instances, where these taxes were included among the assets on which the assessment was calculated (*ibid*, p. 54).

Madras Regulation XXV of 1802 was enacted to carry out the policy we have indicated. The primary object was to settle in perpetuity the land revenue, but the Regulation went on to deal with the other sources of revenue which, though arising in some cases indirectly from land, Government had before resolved to [21] keep entirely under its own control. The fourth section of Regulation XXV of 1802 is as follows:—

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(1) 12 Q.B. 407. (2) L.R. 4 H.L. 122. (3) 2 Strange 1171.

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"The Government having reserved to itself the entire exercise of its discretion in continuing or abolishing, temporarily or permanently, the articles of revenue included according to the custom and practice of the country under the several heads of salt and saltpetre, of the sayar or duties by sea or land, of the abkari or tax on the sale of spirituous liquors and intoxicating drugs, of the excise on articles of consumption, of all taxes personal and professional, as well as those derived from markets, fairs, or bazars, of lakhiraj lands (or lands exempt from the payment of public revenue), and of all other lands paying only favourable quit-rents, the permanent assessment of the land tax shall be made exclusively of the said articles now recited."

Two questions are raised on the construction of this section: firstly, whether the Government, in declaring that it had reserved to itself the entire exercise of its discretion to continue or abolish temporarily or permanently the "articles of revenue" mentioned in the section, intended to declare that it reserved the right as a right to be exercised by itself, or whether it reserved the right as a right it might concede to or withdraw from those with whom the permanent settlement was made; and secondly, whether if the settlement officers disobeyed the injunction and included these articles of revenue in the land assessment, the landowner with whom the settlement was made thereby acquired a legal title to collect them.

It is desirable to consider what the Government was engaged in doing. It was dealing with its revenues. It had theretofore farmed them in block for a term of years. It now determined to make in perpetuity a farm of the revenue arising from land. To enable it to do so the Regulation XXV of 1802 was passed.

Except where it had granted its revenues for an unexpired term or in perpetuity, it was clearly open to the Executive Government to deal with them as it pleased; and it was competent to the Legislature to authorize the Executive Government to resume even the revenues which had been granted for an unexpired term or in perpetuity. Of course justice suggests that in such cases compensation should be paid, but the omission to provide for compensation would not affect the operation of an enactment abrogating, or authorizing the Government to abrogate, the rights [22] of private persons—*Nasarvanji Pestanji* v. *The Deputy Commissioner of Customs* (1).

Looking to the legislation which had taken place in Bengal, there are strong grounds for concluding that the Government of Madras intended to reserve the right to continue the collection of the articles of revenue other than the land revenue as a right to be exercised by itself.

On 11th June 1790 the Governor-General had published a rule that in Bengal no landowner or other person of whatever description should be allowed thereafter to collect any tax or duty of any denomination, but that all taxes and duties should thereafter be levied on the part of Government by officers duly appointed for that purpose. On 11th July 1790 the Governor-General announced that the privilege of imposing and collecting internal duties had been resumed from the landholders and taken exclusively into the hands of Government for the purpose of reforming abuses in these collections, and thereby affording benefit to the commerce of the country as well as general case to its inhabitants. These rules were in-corporated in Regulation XXVII of 1793. In the Proclamation of the

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(1) 2 B.H.C.R. 75.

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permanent settlement in Bengal, Behar and Orissa, which was enacted in Regulation I of 1793, the Governor-General, adverting to the resumption of the "sayar" under the rules mentioned, declared that, if he should thereafter think it proper to re-establish the "sayar" collections or any other internal duties, and to appoint officers on the part of Government to collect them, no proprietor of land would be entitled to any participation, or be entitled to make any claims for remission of settlement on that account—Bengal Regulation I of 1793, Section 8.

Similarly, on re-enacting the rules for the decennial settlement of the public revenue payable from the lands of the zamindars and others in Bengal, Behar and Orissa, it was enacted that the assessment should be fixed "exclusive and independent of all duties, taxes and other collections known under the general denomination of 'sayar.'"—Bengal Regulation VIII of 1793, Section 33.

In 1789, in contemplation of the introduction of a permanent settlement in the province of Benares, the Resident arranged that the "article," spirituous liquors, and the tax upon shopkeepers, [23] dealers and weavers, should be separated from the collections of the renters, and realized by the amils of the respective districts—Bengal Regulation II of 1795, Section 13—and took engagements from the renters stipulating *inter alia* that they should not levy or receive any of the articles of the abolished 'sayar'—*ibid*, Section 14. These arrangements were made under order of the Governor-General, dated 26th December 1787, and by Bengal Regulation XXVII of 1795, Section 5. Referring to those orders, the Governor-General made a declaration reserving the right to re-impose the 'sayar' and collect it for the Government in the province of Benares similar to that which he had made on the introduction of the permanent settlement in Bengal.

In like manner it was ordered that engagements for the land revenue in the Ceded Provinces should be exclusive of 'sayar' duties—Bengal Regulation XXVII of 1803, Section 53, Clause 13—and the Governor-General declared the reservation by the Government of its right to re-impose them in those districts and to appoint officers on behalf of Government to collect them for its own exclusive benefit—Bengal Regulation XXV of 1803, Section 35. To the same effect are the provisions of Bengal Regulation IX of 1805, Section 25, which was passed for the settlement of the conquered provinces.

Looking then to the legislation in Bengal which preceded, was contemporaneous with, or immediately followed the legislation in Madras respecting the introduction in this Presidency of a permanent settlement of the land revenue, there are at least strong grounds for believing that the provision we are considering was intended to declare that the Madras Government had resolved to retain the right to impose or discontinue the collection of the articles of revenue which it excepted from the permanent settlement of the land revenue, and that it contemplated their collection, when imposed, for its own exclusive benefit and through its own officers.

It is true that neither the declaration nor the Regulation in terms prohibited the collection of the 'sayar' by the landholders, but the Government was at the time re-arranging the collection of its revenues with them, and it was sufficient that the Regulation should declare that the settlement it then effected had relation only to the land revenue, and that it should enjoin the settlement officers to exclude the other articles of revenue from the assessment of that revenue.

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[24] Indeed, as has been well observed by Mr. Justice Brandt, inasmuch as the Government expressly declared that the continuance or withdrawal of the tax was left to its discretion, the tax could hardly have, with any propriety, been made the subject of a permanent assessment; there was no provision that the peshkash should be increased or diminished according as the collection of the 'sayar' was permitted or prohibited; indeed such a provision would have been hardly compatible with a permanent settlement; and this is a strong argument that it was not the intention of the Government that its collection should be left to the zamindars. It is at least clear that it was the intention of the Government of Madras to adopt the policy that had been pursued by the Government of Bengal, and to separate the other articles of revenue from the land revenue; such a separation does not necessitate the conclusion that it was the intention of the Government that the collection of the 'sayar' should be retained in its own hands, but it makes it highly probable that this was the intention of the Government.

The provisions of Regulation V of 1832 point to the same conclusion. That enactment recites that, whereas persons exercising certain arts, trades and professions were by the law and custom of the country liable to the muhtarafa tax, and that doubts had arisen whether certain persons liable to the tax who had up to that time or for some period not been charged with it, might not plead that fact *in bar to the right of the Government to levy it*, it was declared that the tax was payable by all persons who exercised professions which by the custom of the country rendered them liable to the tax, and that they could not plead its discontinuance in bar of the collection; and it was directed that the collection should be made in the same manner as the collection of the land revenue, and that the Collector should have power to employ the same coercive processes for its recovery as he had for the collection of land revenue. It will be observed that the right to collect the tax is described as inherent only in the Government, that the processes authorized for its collection are only such as are authorized for the collection of land revenue, and that the Collector is the only person who is empowered to employ them.

But, assuming that it was competent to the Government to commit the collection of this branch of the revenue to the zamindars and for their own benefit—and we need not hold that it was [25] not competent to the Government to do so—the question is, did the Government delegate the right of collecting it to the zamindar of Karvaitnagar?

The Regulation XXV of 1802 was passed in July 1802. The sanad was issued to the zamindar in August 1802, and the zamindar must rely on the Regulation as giving him a title to that permanency of assessment which it may be assumed he would be reluctant to abandon. It has not been argued in this Court that the zamindar had a right to collect the tax independently of his sanad.

If that argument had been advanced, it appears a sufficient answer to it that the Government was re-arranging its fiscal relations with the zamindar, and that we must look to that document only to ascertain whether it made a composition with him in respect of all sources of revenue or only in respect of some.

It cannot be denied that in sanads issued in virtue of the Permanent Settlement Regulation the Government dealt ordinarily only with the land revenue.

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The insertion in sanads issued by the Government of Madras of a clause repeating the declaration contained in the Regulation as to the exclusion of items of revenue other than the land revenue was surplusage. The Regulation declared that the assessment was to be confined exclusively to the land revenue. Had the clause been omitted, it could not have been contended that the zamindar was entitled to collect revenue other than the land revenue, because of its omission. The Regulation declared the law in terms which are unambiguous. The omission of any mention of the muhtarafa in the sanad granted to the zamindar of Karvaitnagar may or may not have been intentional. There is nothing to show that was so. But, however this may be, the Legislature had declared that the assessment should not include the muhtarafa, and if the Government had power and intended to sanction the continuance of, or to authorize the collection of, the tax by the zamindar, it should have done so as a separate arrangement and in express terms.

It could not have been the intention of the Government that the collection of the tax should be partial; that only persons resident in certain areas should be subject to it. It was a tax payable to the State, and, if justly leviable at all, was to be levied from all persons under liability to pay it in all parts of the terri-[26]tory, and this is recognized in Regulation V of 1832, and is implied in the declaration in Regulation XXV of 1802. It may be admitted that up to that time its collection might not have been universal, but if it had been the intention of the Government that the collection of the tax should be sanctioned in particular places only, the persons liable to the tax were entitled to clear notice of the intention of the Government that it should be so collected.

It must then be held that the tax was not, because it could not legally have been dealt with as, a recognized source of income to the zamindar in the future, when fixing the peshkash payable under the sanad of permanent settlement; and that the sanad confers on the zamindar no right to collect the tax.

But if the Government was still at liberty to depute to the zamindar the collection of the tax, it remains to be considered whether by any subsequent order it has done so, and here again we must observe the well-known rules of law on which the learned counsel has insisted, and hold the persons from whom the tax is claimed liable only if the right has been granted to the zamindar in express terms. The proceedings of the Board of Revenue of the 8th July 1816, to which reference is made in the judgment of Innes, J., in S. A. 747 of 1873, do not appear to us to have any direct bearing upon the question immediately before us, and, even if they were in terms sufficient to do so, could convey no sanction.

The order of the Government of 25th November 1865, No. 2906, Revenue Department, certainly has not the effect of a sanction. It is desirable to quote other passages from that order in addition to that given in the judgment of the District Court.

After giving a summary of the history of this and three other zamindaris and of certain official correspondence connected therewith, it is observed in paragraph 15 that "What may be the legal rights of the zamindars in the matter of muhtarafa in the present condition of the law on the subject, is a question on which the Government is not competent to pass an authoritative decision."

In paragraph 17 it is said: "If under the present condition of the law the demand on the part of the zamindars is not legal, it will be for their

sub-tenants to resist it. The question may then be judicially considered and authoritatively decided."

The Government may have deemed it unnecessary to "insist on the resumption" of a right which it had not deputed, but they warned the zamindars that the legality of the collection of this tax [27] by them was more than doubtful, and that if they determined to collect it, they must beware that they should do nothing which they were not legally entitled to do, and were careful to express that the prohibition against the collection of the tax by the zamindars named was withdrawn only "so far as Government are concerned."

The notification published by the Collector of North Arcot in the District Gazette of the 21st April 1866, purporting to set forth briefly the intention of the order of Government quoted, was worded in terms which went beyond the spirit and intention of that order, and cannot have the effect which in argument it was sought to attach to it.

It has not been shown how the amount of the peshkash was settled in the case of the Karvaitnagar zamindari. It is stated, and probably correctly, that the zamindari was held under an obligation to supply troops and that the peshkash was not fixed in reference to the former assets of the estate, but to the assumed cost of the performance of the service attached to the tenure. It may be said that thus indirectly all items of revenue were taken into account in fixing the assessment; and if the result of our decision be to deprive the zamindar of a source of income on which his peshkash was, though indirectly, calculated, that may give him an equitable ground to ask compensation from the Government, but it cannot justify the Court in imposing a burden on the weavers in the zamindari which is not shown to be legally binding on them.

In the resultthe appeals must be dismissed with costs.

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9 M. 27.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

VENKATAGIRI RAJA (*Plaintiff*) *Appellant v.* PITCHANA (*Defendant*), *Respondent.**

Rent Recovery Act, Section 11, *Cls. i, iii, iv—Improvements effected by tenant—Enhancement of rent—Sanction of Collector.*

The sanction of the Collector required by the proviso to Cl. iv, Section 11 of the Rent Recovery Act as a condition precedent to the enhancement of rent when the landlord has improved the land or has had to pay additional assessment to Govern-[28]ment, is not requisite when, improvements having been made by the tenant, the landlord seeks to enhance the rent.

Per Muttusami Ayyar, J: The proviso to Cl. iv of Section 11 of the Rent Recovery Act implies that when the tenant has improved the land at his own expense the landlord is not entitled on that ground to enhance the rent.

Semble: Clause 1 of Section 11, which provides that all contracts for rent, express or implied, shall be enforced, cannot be so applied as to deprive a tenant of the benefit of improvements made at his own expense.

Per Hutchins, J: When improvements have been made by the tenant, the proper rate of rent has to be determined with reference to the several provisions of Section 11 quite irrespective of the improvements.

* Second Appeals 697—707 of 1884.

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[R., 17 M. 54 (57); 21 M. 136 (137); 28 M. 328 (334)=15 M.L.J. 14; 35 M. 134 (137)=8 Ind. Cas. 330=9 M.L.T. 76; 36 M. 4 (6)=10 Ind. Cas. 68 (69)=9 M.L.T. 443=(1911) 1 M.W.N. 315 (317); 14 M.L.J. 145 (146).]

THIS was an appeal from the decree of L. A. Campbell, District Judge of Nellore, modifying the decree of W. J. Tate, Sub-Collector of Nellore, in summary suit No. 22 of 1881, brought under Madras Act VIII of 1865 by the Raja of Venkatagiri to compel defendant to accept a patta for fasli 1291 (1881).

The defendant objected to the patta on the ground, *inter alia*, that it contained a clause providing for an increased rate of rent if the tenant dug a well without the sanction of the zamindar. It was admitted that the defendant had dug a well in the famine year (1877) to save his crops, and had been using this well ever since, thereby converting his "dry" land into "garden" land. The Sub-Collector held that the plaintiff could not enhance the rate without the sanction of the Collector. On appeal the District Court confirmed this finding on the ground that Cl. iii of Section 11, of the Rent Recovery Act, seemed to show that a landlord was not allowed to share in any increase of the value of the produce or of the productive power of the land brought about by the tenant's agency.

Against this decision, the plaintiff appealed.

Hon. *Rama Rau*, for appellant.

Kristnasami Chettiyar, for respondent.

The Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.) delivered the following

JUDGMENTS.

HUTCHINS, J.—The argument before us has been confined to the 10th issue and the 4th clause in the patta. The 4th clause runs thus:—"If you dig a well without having made an agreement with the zamindar and raise garden crops thereunder, you must pay either the crop sist according to the custom, or the babatvari sist of the village, whichever may happen to be higher." In the body of the patta, upon lands on which a well has been dug and garden crop raised, the zamindar has not charged either the crop [29] sist or the babatvari sist, but double the highest garden assessment, and the appeal petition urged that the latter is the proper rate; but it has been stated in the argument that this was a mistake, and only the alternative rate stipulated for in the 4th clause is now demanded.

The 10th issue was whether the enhanced rate of Rupees 24 is legal, the Collector's sanction not having been obtained to the enhancement. Rupees 24 is double the highest garden rate, but, as already stated, this is no longer demanded. The Collector's sanction has nothing to do with the matter. Where improvements have been made by the landlord or Government, such sanction is a condition precedent to enhancement, but where improvements have been made by the tenant, the Collector has no power either to give or refuse a right to enhance. The proper rate of rent for the land has to be determined with reference to the several provisions of Section 11, quite irrespective of the improvements. If authority is needed for this principle, it has been so held expressly in *Krishna Rau* v. *Pattanagiri Nayak* (1).

The 4th clause in this patta seems to have been framed with reference to Mr. Justice Kindersley's remark in *Gurusami Sastri* v. *Andi* (2)

(1) S.A. 98 of 1883 (not reported). (2) 5 Rev. Reg. 140.

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that if a tenant wishes to secure the benefit of his improvements he should protect himself from enhancement by a contract with his landlord. But in that particular case the landlord had for some years charged a lower rent than he was entitled to demand. All that was decided was, that his right to go back to the proper rate was not taken away, in the absence of a contract, by the fact that the increased productiveness of the soil and its ability to bear the higher assessment were due to improvements effected by the tenant.

It follows that at least part of the clause is bad and has been rightly expunged, *viz.*, so much as sets out that, if the tenant digs a well, his rent will be subject to a variation. It only remains to consider whether any part of the rest of the clause can stand, *i. e.*, whether the tenant would be liable to pay a different rate if he raised a garden crop and whether the proper rate for such garden crops has been allowed by the Courts below.

It is possible to conceive a case in which the land had not been classified as wet, dry or garden, but the rate of rent varied with [30] the crop. It is believed that in certain zamindaris the faisal accounts were prepared on this principle, and in such a case it might reasonably be contended that the tenant was bound to pay garden assessment for a garden crop, whether he was enabled to raise such crop by digging a well at his own expense or not. But no such case has been established by this appellant.

The only evidence which he adduced is his dittam account of 1869-70. The Sub-Collector has shown that no clause corresponding with that now in question is to be found in the pattas of that year ; but, even if there had been such a clause, it could not bind the tenant for other years. It could only bind him as a contract, and no contract for other years could be implied from his omission to dispute the clause in a year in which he might not have contemplated digging any well.

From 1870-80 the whole village was let on izara to the raiyats, or some of them, collectively. The present dispute relates to the year 1881-82. It was during the izara, at the time of the famine of 1877-78, that the wells in question were dug. In paragraph 20 of his judgment, the Sub-Collector has shown that, according to the evidence, before the digging of these wells the lands were dry and bore the assessment corresponding to the highest dry rate of the village, namely, 8 rupees per gorru. It is this rate which had been allowed by the District Judge, except as to certain lands which he finds had paid the mamul garden rate of 12 rupees before the wells were dug. Those lands, according to his judgment, will continue to pay the same rate. This second appeal fails ; it must be dismissed with costs.

MUTTUSAMI AYYAR, J.—I am also of the same opinion. The Collector's sanction is certainly not necessary in this case. It is not urged by either party that the landlord has dug the well at his own expense, or that he has to pay any additional assessment to Government. The proviso to Clause iv, Section 11, implies, however, that when the tenant improves the land at his own expense, the landlord is not entitled to enhance the assessment on that ground. The real question then is whether it is not inconsistent with such implied intention on the part of the Legislature to permit the landlord to levy a garden rate in the cases before us. It is of course open to the landlord to revert to the faisal rate where there has been no subsequent special contract to the contrary and where a lower rate has been levied provisionally as a matter [31] of indulgence

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to the raiyat. Nor is the tenant entitled to claim a reduction of assessment in the case of lands watered by wells constructed at his own expense prior to the date of Act VIII of 1865. I do not think that Section 11, Clause 1, can be so applied as to deprive the tenant of the benefit of the improvement made at his own expense.

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9 M. 31.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

KRISHNA *(Plaintiff), Appellant v.* READE *(Defendant), Respondent.** [12th February and 19th March, 1885.]

Act IX of 1861—*Civil Procedure Code, Sections* 11, 15—*Parent and child—Suit for recovery of minor by parent—Jurisdiction.*

Act IX of 1861 does not debar a District Munsif's Court from entertaining a suit by a Hindu father to recover possession of his minor son alleged to be illegally detained by the defendant.

[R., 25 B. 574 (580) ; 9 M. 391 (392) ; 2 L.B.R. 140 (141) (F.B.) ; D., 26 A. 594 (595) = 1 A.L.J. 266 = A.W.N. (1904) 135.]

THIS was an appeal against the decree of J. Hope, District Judge of South Arcot, reversing the decree of C. Suri Ayyar, District Munsif of Cuddalore, in suit 21 of 1884.

The plaintiff, Krishnachari, a Brahman, sued the defendant, Miss F.M. Reade, a Christian Missionary, to recover possession of the person of his son, Subba Rau, alleged to be a minor, and for Rs. 100 damages, being the cost to be incurred in taking his son to Rameswaram to perform expiatory ceremonies before he could be received into the family. The suit was valued at Rs. 100.

The defendant pleaded that the suit was only cognizable by the District Court, that Subba Rau was not a minor, that he had attained full discretion and was at liberty to choose his own religion, that he was not illegally detained by defendant, but resided in her house voluntarily, that he had been baptized at his own request in public and without any pressure on the part of defendant. It was contended for the defendant that, under Section 1 of Act IX of 1861, the District Court only had jurisdiction. The Munsif held that the Act did not make it compulsory to file a regular suit for the custody of a minor in the Principal Civil [32] Court of original jurisdiction in the district; found that the boy was fifteen years old; and held that under Hindu law, the plaintiff was entitled to the custody of his son during minority whatever his religion might be. As the boy admittedly resided in the defendant's house against the father's wish, the Munsif held that this amounted to illegal detention. The claim for damages was disallowed and delivery of Subba Rau to the plaintiff was decreed.

At the final hearing, a further objection was taken by the defendant that the amount at which the plaintiff valued the claim for Subba Rau was not stated in the plaint, and therefore it was impossible to determine whether the Court had jurisdiction or not.

The Munsif overruled this objection on the ground that the plaintiff having paid a further Court-fee stamp of Rs. 10 for the value of his claim

* Second Appeal 968 of 1884.

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for the recovery of the boy, the value of the suit should be taken to be about Rs. 130.

He held that the boy had no market-value and that the Court-fee payable should be computed according to the amount at which the relief sought was stated in the plaint. On appeal, the District Judge reversed the Munsif's decree. His judgment was as follows :—

"I am of opinion that it was not within the competence of the District Munsif to pass the decree appealed against. Act IX of 1861 is a special enactment governing all suits relating to the custody and guardianship of minors. It prescribes the course to be followed by any relative or friend of a minor who may desire to prefer any claim in respect of the custody and guardianship of such minor. There is nothing in the Act to show that it was intended to provide a summary remedy, which, it is at the option of the claimant to seek instead of having recourse to a regular suit. It is the law provided for dealing with claims relating to the custody and guardianship of minors, and those who prefer such claims must follow the procedure laid down in that Act.

"It is, therefore, unnecessary in disposing of this appeal to go into the merits of the case. I find the lower Court had no jurisdiction to decree the delivery of the so-called minor to the plaintiff and so far the decree must be reversed with costs."

The plaintiff appealed on the following grounds :—

(1) The District Munsif has jurisdiction to entertain the suit.

[33] (2) Act IX of 1861 is only permissive and is no bar to the present suit.

Hon. *Rama Rau*, for appellant.

This was a suit for damages and for custody of the minor. Two questions arise—

(1) Is the plaintiff bound to proceed under Act IX of 1861?

(2) Ought the plaint to be returned?

The Act is only permissive—see the preamble and Section 1.

A summary remedy is provided. The word used is 'may'—Sections 4, 5, 6. There is also a common law remedy. *In re Kashi Chunder Sen* (1), and the cases there cited—*Balmakund* v. *Janki* (2), *Nehalo* v. *Nawal* (3), *Pakhandu* v. *Manki* (4). There is nothing to take away the right of the Court to entertain this suit. The Civil Procedure Code only excepts suits barred by some express provision of law, see Sections 11 and 15.

Mr. *Wedderburn*, for respondent.

If the District Judge is right, the plaint ought not to be returned, (1) because this objection is not taken in the grounds of appeal, (2) because Subba Rau has left the defendant's house. The District Court certainly has jurisdiction—Civil Courts' Act, 1873, Section 12. In Act XXI of 1855 and Act XIV of 1858, it is only the District Court which has got jurisdiction with regard to the custody of the minors referred to therein. There might be great inconvenience if a Munsif's Court entertained a suit for the custody of the minor for whom the District Judge had appointed a guardian.

Munsifs' Courts were not originally invested with any such jurisdiction —Regulation VI of 1816.

In *Shanon's Case* (5) Act IX of 1861 is said to have amended the procedure in hearing suits relating to the custody of minors. There is nothing summary in this procedure.

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(1) 8 C. 271. (2) 3 A. 403. (3) 1 A. 428. (4) 3 A. 506. (5) 2 N.W.P. 81.

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The Civil Procedure Code is to be followed. Orders are appealable. A concurrent jurisdiction in the Munsif could hardly have been contemplated.

[34] In *Mussamat Harasundari Baistabi* v. *Mussamat Jayadurga Baistabi* (1), it was held that the Munsif's Court had no jurisdiction. A suit for winding up a partnership under Section 265 of the Indian Contract Act may be brought in the District Court. The plaintiff may apply if he likes to the District Court, but to no other Court—*Ramayya* v. *Chandra Sekara* (2).

Judgment was reserved.

On the 19th March, the Court (MUTTUSAMI AYYAR and BRANDT, JJ.,) delivered the following

JUDGMENT.

A Hindu, the father of a male minor, is the natural guardian of such minor, and is *prima facie* entitled to its custody and guardianship.

This right is certainly one of a civil nature, and there is, it appears to us, nothing exceptional in a suit brought by a Hindu father for the custody and possession of a minor son, alleged to be wrongfully detained and withheld from him, though it is open to the defendant in such a suit to show special circumstances having regard to which a Court would refuse to make a decree or order for removal of the minor from his care and custody.

The plaintiff in the case before us does not ask to be appointed guardian, but asks for a finding that the detention of the minor by the defendant is illegal as against him, the parent, and as such the legal guardian of the minor, and for relief or reliefs to which he may or may not be entitled on such finding.

The Courts of District Munsifs in this Presidency, though not specially invested under the Regulations and Acts passed prior to Act VIII of 1859 with power to try such a suit as the present, were under that Act, and under Act X of 1877, and are under the present Code of Civil Procedure, invested with power to take cognizance (within the limits of their pecuniary jurisdiction) of all suits of a civil nature excepting suits of which their cognizance was or is barred by any enactment for the time being in force.

It is not contended that the jurisdiction of the District Munsif in respect of a suit like that before us is barred by any enactment subsequent to Act VIII of 1859, unless it be by Act IX of 1861.

The question then is whether such jurisdiction is barred by that Act or not.

[35] The Act appears to us to be an enabling Act only, and not to deprive any Court of any jurisdiction or powers which it before possessed. "It does not," as was held by the High Court, N.W. P., "alter jurisdiction nor transfer from one tribunal to another powers previously belonging to the former."—*In re Shannon* (3). It relates to procedure only, as appears from the preamble. It confers on District Courts and on District Courts only, power to entertain and pass orders upon "applications by petition," which power was not before possessed by those Courts or by any Courts subordinate to them, but it does not either expressly or impliedly take away from any Court cognizance of claims in respect of the custody and guardianship of minors preferred in the form of regular suits, and otherwise cognizable by such Court.

(1) 4 B.L.R. App. 36. (2) 5 M. 256 (257). (3) 2 N.W.P. 79.

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The words in Section 1 " by which such application, if preferred in the form of a regular suit, would be cognizable " must be read in connexion with, and interpreted by Section 7, and when so read present no difficulty; the meaning is that the application by petition which may be made under Section 1 shall be entertained by the Principal Civil Court of original jurisdiction in the district in which it is made, provided that the jurisdiction of such Court would not be barred in a regular suit framed with a view to like relief, by reason, *e.g.*, of the minor being a European British subject, or being subject to the superintendence of the Court of Wards, or resident within the limits of the original jurisdiction of the High Court.

The other sections of the Act have no material bearing upon the question before us.

The true construction of the Act then seems to us to be that it provides a special and prompt remedy by application on petition instead of by regular suit, and was, it may be assumed, passed *inter alia* to meet cases in which a speedy decision by a competent Civil Court on the right to the custody of a minor, and an effectual order, are necessary to prevent action which might cause great, and perhaps irretrievable, injury to the minor, and with which a Magistrate might not be able to deal completely; that it vested the jurisdiction to hear the petition in the District Court only; and gave to the order which might be passed by that Court the force of a decree in a regular suit; but that it was not **[36]** the intention, and there are no words of which the effect is to take away the ordinary remedy in cases in which the special procedure provided by the Act is not availed of.

A case was cited before us, *Mussamat Harsundari Baistabi* v. *Mussamat Jayadurga Baistabi* (1), in which it is said by Mr. Justice Hobhouse that the Court of a District Munsif not being a principal court of original civil jurisdiction in the district had no power to entertain what in the last words of the judgment is described as a suit. The case was one in which a mother applied for the custody of her minor daughter after recovery of the child from another woman in whose charge she had left it, and it would appear from the wording of the first part of the judgment that " an application " had been made; if so if the mother had " applied " under the provisions of Act IX of 1861, then no doubt, as is observed by the learned Judge "the application should have been made to the District Court" and we think we may assume this was so, and that the word " suit " was used inadvertently or unadvisedly. If not, we feel constrained, for the reasons given in this judgment, to differ. Of the other cases cited, some go rather to support the view we take, while in others the question either did not arise or was not necessarily or not directly decided.

We are then of opinion that the District Munsif had jurisdiction to entertain and dispose of this suit, and accordingly set aside the decree of the lower appellate Court, and direct the District Judge to hear and dispose of the appeal on the merits.

Costs in this Court and in the lower appellate Court to abide and follow the result.

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(1) 4 B.L.R. App. 36.

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SEP. 10.

APPELLATE CRIMINAL.

9 M. 36= 2 Weir 460.

9 M. 36=2 Weir 460.

APPELLATE CRIMINAL.

Before Mr. Justice Hutchins.

QUEEN-EMPRESS *v.* NARAYANASAMI.* [10th September, 1885.]

Criminal Procedure Code, Sections 15,264,407,414 – *General Clauses Act, Section* 2 (13) —*Bench of Magistrates with second-class powers—Conviction—Appeal.*

An appeal lies under Section 407 of the Code of Criminal Procedure from a conviction by a Bench of Magistrates invested with second or third class powers.

[37] THIS was a case referred for the orders of the High Court by H. R. Farmer, Acting District Magistrate of Trichinopoly.

Narayanasami Nayak and another having been tried summarily by a Bench invested with the powers of a Second-Class Magistrate were convicted and fined.

On appeal the District Magistrate reversed the sentence and acquitted the accused. At the instance of G. Salisbury, a member of the Bench of Magistrates, the case was referred to the High Court in order to obtain a ruling as to whether the Bench were bound to record a judgment as provided by Section 264 of the Code of Criminal Procedure, or, in other words, whether the Code contemplated an appeal from a conviction by a Bench of Magistrates exercising second or third class powers.

Counsel did not appear.

The Court (HUTCHINS, J.) delivered the following

JUDGMENT.

This case was tried summarily by a Bench of Magistrates invested with powers of a Magistrate of the second class. The District Magistrate reversed the conviction on appeal, and the question raised is whether an appeal lay. The question hinges on this—Is a Bench invested with such powers a Magistrate of the second class within the meaning of Section 407 of the Criminal Procedure Code? If it is, it is quite clear that an appeal lies under that section and that the Bench is bound to record a judgment under Section 264. Section 414 precludes appeals in certain cases tried summarily by a Magistrate empowered to act under Section 260, but Section 260 itself refers only to Magistrates of the first class or a Bench having the powers of a Magistrate of the first class.

The District Magistrate has referred to the General Clauses Act, Section 2 (13), which provides that the term "Magistrate" shall include all persons exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure. But Section 15 of the Code itself is still more explicit. Every Bench, as far as practicable shall, for the purposes of this Code, be deemed to be a Magistrate of such class, *i.e.*, of the highest class to which any one of its members belongs. It is true that this clause is exceptional, "except as otherwise provided" by any order of Government under the section conferring or limiting the powers of the Bench, but it renders it pretty clear that the Legislature intended that a Bench with the powers of a Magistrate of any class should be deemed to be itself a Magistrate of that class.

[38] In Criminal Revision Case 3 of 1882 from the Godavari District a judgment was passed containing the following expressions:—"The

* Criminal Revision Case 476 of 1885.

1885 SEP. 10. — APPELLATE CRIMINAL. — 9 M. 36 = 2 Weir 460.

Bench tried the case summarily, being duly authorized; there is, therefore, no appeal." But in that judgment, as explained very shortly afterwards by the learned Judges who delivered it, it was erroneously assumed that the Bench had been duly authorized to act as a first-class Magistrate. They, therefore, informed the District Magistrate of Godavari that they never intended to hold that no appeal lay against the decision of a Bench with only second or third class powers.

I entertain no doubt that the District Magistrate had jurisdiction to entertain the appeal, and, consequently, I refuse to disturb his order.

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9 M. 38.

APPELLATE CRIMINAL.

Before Mr. Justice Parker.

OOTACAMUND MUNICIPALITY v. O'SHAUGHNESSY.* [24th August, 1885.]

Towns Improvement Act, 1871 *(Madras Act III of* 1871*)*, *Sections* 62, 169—*Profession tax, Non-payment of—Offence, Nature of—Prosecution—Limitation.*

A complaint having been laid (on the 26th March 1885), under Section 62 of Act III of 1871 (Madras) against O for having exercised his profession for more than two months in the official year 1884-85 in a Municipality without paying the tax in respect thereof, the Magistrate dismissed the complaint, on the ground that the prosecution was barred by Section 169 of the Act, inasmuch as five months had elapsed since the last payment in respect of the tax became due:

Held, that the complaint if laid within three months from the close of the official year, or, if O ceased to exercise his profession before the close of the official year, within three months from such date, was not barred by Section 169 of the Act.

THIS was a case referred to the High Court under Section 438 of the Code of Criminal Procedure by L. R. Burrows, District Magistrate of the Nilgiris.

The facts appear sufficiently, for the purpose of this report, from the judgment of the Court (PARKER, J.).

Counsel were not instructed.

JUDGMENT.

[39] PARKER, J.—The complaint laid against the accused was that he had exercised his profession for more than two months in the official year 1884-85 without paying the tax in respect thereof and was therefore liable to conviction under Section 62, Act III of 1871.

The First-class Magistrate (Mr. Clarke) dismissed the charge on the ground that the prosecution was not instituted till more than five months after the last payment on account of the tax became payable and was therefore barred under Section 169, Act III of 1871.

It was held in High Court Proceedings of 11th August 1882, No. 1568, that the offence imputed in a similar case was not that the accused made default in payment of the tax on a certain day, but that, having received the prescribed notice, he had exercised his profession for two months in the official year without having paid the tax.

The Court held that the offence was a continuing offence and that it was immaterial at what part of the year it was first completed, and that

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* Criminal Revision Case 287 of 1885.

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a complaint was within time if laid within three months after the close of the official year; or when the accused had before the end of the official year ceased to exercise his profession within three months from the time at which he so ceased to exercise it.

According to this ruling the complaint, having been made on 26th March 1885, was in time.

The order of the Magistrate is set aside, and he is directed to restore the complaint to his file and dispose of it in due course of law.

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9 M. 39=9 Ind. Jur. 459.

APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Parker.

RAGAVA (*Plaintiff*), *Appellant v.* RAJAGOPAL AND ANOTHER (*Defendants*), *Respondents.** [31st August and 4th September, 1885.]

Jurisdiction—Cause of action—Suit to set aside order of Revenue Court directing ejectment—Res Judicata.

A Revenue Court having ordered a tenant to be ejected under Section 10 of the Rent Recovery Act on the ground that he had refused to accept a patta as directed by **[40]** the Court, the tenant brought a suit in the Civil Court to set aside the order of the Revenue Court:

Held, that the suit would not lie.

[Appr., 21 M. 482 (485); **R.**, 17 M. 106 (107); 20 M. 392 (393).**]**

THIS was an appeal from the decree of J. H. Nelson, District Judge of Chingleput, confirming the decree of N. Narasimhayyar, District Munsif of Tiruvellur, in suit 754 of 1884.

The plaintiff, Parasei Strinivasa Ragavachari, brought the suit against the defendants Rajagopalachari and another to set aside a decree made by a Revenue Court under the Rent Recovery Act, directing him to be ejected from his holding, and to restrain the defendants from executing that decree.

The plaintiff alleged that he was a mirasi raiyat of his village, of which the defendants were the izaradars.

The defendants having brought a suit against plaintiff to compel him to accept a patta on the 12th August 1882, the Revenue Court, having amended the patta, directed the plaintiff to accept it.

The defendants then brought a summary suit under the Rent Recovery Act to eject plaintiff, alleging that he refused to accept a patta tendered ten days subsequent to the order of the Revenue Court.

The Revenue Court found that defendants had tendered and the plaintiff had refused to accept a patta as directed by the order of 12th August 1882.

The plaintiff alleged that this finding was based on false evidence.

It was contended by the plaintiff that the decision of the Revenue Court being summary, he was entitled to have it set aside by a regular suit.

The Munsif held that the decision of the Revenue Court, not having been appealed against, had become final, and that the suit was not maintainable.

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* Second Appeal 194 of 1885.

1885 SEP. 4. — APPELLATE CIVIL. — 9 M. 39 = 9 Ind. Jur. 459.

On appeal the District Judge held that the Munsif had no jurisdiction, no appeal against the order of the Revenue Court being provided by the Rent Recovery Act.

Plaintiff appealed on the grounds, *inter alia*, that the decision of the Revenue Court was no bar to this suit, and that there was nothing in the Rent Recovery Act to prevent a Civil Court setting aside an order obtained by fraud.

Sadagopacharyar, for appellant.

[41] *Srirangacharyar*, for respondents.

The Court (HUTCHINS and PARKER, JJ.) delivered the following

JUDGMENTS.

HUTCHINS, J.—In this case the appellant admits all the facts necessary to give the Revenue Court jurisdiction to determine whether he had made the default contemplated by Section 10 of the Act and was liable to be ejected. He admits respondent had sued him to enforce his acceptance of a patta; that the terms of the patta had been judicially settled and a decree passed requiring him to accept it; that ten days had elapsed from the date of the Collector's judgment, and that the amended patta had not been accepted. Then, the section provides, the Collector, on application made to him by the plaintiff, and on proof of such default on the part of the defendant, shall pass an order for ejecting the defendant. Such an application was certainly made and proof was taken from both sides as to whether there had or had not been a wilful default. Thereupon the Collector came to the conclusion that the tender of the amended patta on the 18th August was very clearly proved, and he ordered the appellant's ejectment. The object of the present suit is simply to induce the Civil Courts to go *de novo* into the evidence on this very same point and to revise the judicial finding of the Collector that the appellant had made wilful default and had not been in any way imposed on or deceived. I am clearly of opinion that such a suit will not lie, and that this second appeal should be dismissed with costs.

PARKER, J.—The suit is to set aside an order of the Assistant Collector directing that plaintiff be ejected from his holding for refusal to accept a patta as amended by the Collector. The plaintiff alleged that the amended patta had never been tendered him, that he had asked for one, and that defendant had neglected to give it. The Assistant Collector held that the refusal was that of the plaintiff and ordered his ejectment.

Both the Courts below have held that the suit is not maintainable.

It is clear that, if the suit be maintainable, the Civil Courts would really hear and determine certain issues of fact which have already been heard and determined by a Court of competent jurisdiction, whose decision the Legislature did not see fit to make subject to appeal.

It may be that a suit would lie to set aside an order of eject-[42] ment obtained against a wrong person, or to set aside an order irregularly obtained by abuse of legal process though under colour of the law. This, however, is not the case now before us. The suit here brought is to set aside a decision upon the ground that a Court of competent jurisdiction has come to a wrong conclusion, both sides having had full opportunity to plead and be heard, and the Legislature not having seen fit to allow an appeal.

I must hold that such a suit is not maintainable and dismiss this second appeal with costs.

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APPELLATE CRIMINAL.

9 M. 42 = 9 Ind. Jur. 387.

9 M. 42=9 Ind. Jur. 387.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

QUEEN-EMPRESS *v.* LAKSHMANA AND OTHERS.* [27th August, 1885.]

Criminal Procedure Code, Section 269—Jury wrongly treated as assessors by Judge—Unanimous opinion of jury treated as assessors accepted as formal verdict.

L and N were tried by a Sessions Court on charges of dacoity and murder. The jury returned a verdict of guilty on both charges. The Judge, contrary to the provisions of Section 269 of the Code of Criminal Procedure, treated the jury as assessors in respect of the charge of murder, and, convicting L and N of dacoity, acquitted them of murder :

Held, that the irregular procedure of the Judge could not deprive the verdict of the jury of its proper legal effect.

THIS was a case submitted to the High Court, under Section 307 of the Code of Criminal Procedure, by W. F. Grahame, Sessions Judge of Cuddapah.

The case was stated by the Sessions Judge as follows :—

"The prisoners were charged with dacoity, murder in committing dacoity, and murder. The jury have acquitted prisoners Nos. 2 and 3 and convicted Nos. 1 and 4. I overlooked the provisions of Section 269, para 2, and took the verdict of the jury on the first head of charge, while I looked on them as assessors on the second and third heads. Therefore, as regards the dacoity I resolved to submit the matter to the High Court, but acquitted all prisoners on the charges of murder in dacoity and murder, omitting to notice that, as all charges ought to have been tried by jury under Section 269, [43] I ought not to have recorded a judgment of acquittal on any of the charges. My own opinion is that the evidence must be taken as a whole against all four prisoners together. If it fails against any one of them, it must fail against all. None of them can be separated from the others. I think that the jury are wrong in their verdict of guilty as regards prisoners Nos. 1 and 4 on the second and third heads of charge, and wrong as to the acquittal of Nos. 2 and 3 on the first head of charge. I think that all four prisoners are guilty of the dacoity charged against them and not guilty of murder in dacoity or of murder."

Mr. *Subramanyam*, for prisoners Nos. 2 and 3.
Mr. *Powell* (Acting Government Pleader), for the Crown.

JUDGMENT.

The judgment of the Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.) was delivered by

HUTCHINS, J.—In this case there is no doubt that the woman Subbamma was killed and robbed of her jewels. Her death is shown by the medical evidence to have been caused by suffocation. The end of her cloth had been thrust ("plugged") into her mouth, and another cloth or jacket tied tightly over this gag, as if to keep it in its place, and over the nose. Those who gagged and secured her in this way must have been aware that their act was likely to cause death, unless her death had been caused by previous throttling or similar violence.

* Criminal Appeal 294 of 1885.

Five persons were accused of robbing her and causing her death. Of these, one is the approver, witness No. 9. The other four were charged before a jury with dacoity (Indian Penal Code, Section 395), with conjointly committing a dacoity, in the course of which one or more of their number committed murder (Section 396), and with murder (Section 302). The jury returned a verdict that prisoners Nos. 1 and 4, Lakshmana and Narayana, were guilty on all the three heads of charge, but that Nos. 2 and 3, Seshayya and Gangireddi, were not guilty. The Sessions Judge overlooked the provisions of Section 269 of the Criminal Procedure Code, Cl. 2, under which the first head of charge being triable by jury, the other heads should also be so tried, and treated the jury as assessors in regard to the second and third counts. He stated that he differed from them as assessors in regard to these counts, though in point of fact he only differed as regards prisoners Nos. 1 and 4 and concurred in respect of Nos. 2 and 3; and he recorded an acquittal of all the prisoners on those counts. He further [44] stated that he differed from that part of the verdict which declared Nos. 2 and 3 not guilty of dacoity, and, therefore, referred the case to this Court under Section 307.

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Various questions have been raised in consequence of this irregular procedure, but upon the view which we take of the merits of the case it is not necessary to determine them all. In our judgment the unanimous opinion of the jury on the second and third heads of charge must be treated as a formal verdict; the law made them the proper judges of the evidence and the facts, and the irregularity on the part of the Court could not deprive them of that power or their opinion of its proper legal effect.

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9 M. 44 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, and Mr. Justice Brandt.

VAYIDINADA (*Plaintiff*), *Appellant v.* APPU (*Defendant*), *Respondent.**
[30th September, 1881, 5th May, 1883 and 24th April, 1885].

Hindu law—Custom—Brahmans—Adoption of daughter's and sister's sons.

In Southern India the custom which exists among Brahmans of adopting a sister's or daughter's son is valid.

[F., 15 M.L.J. 211; R., 14 A. 53 (57); 17 A. 294 (302); 19 B. 428 (458); 17 M. 69 (71); 4 Bom. L.R. 140 (144); 107 P.L.R. 1901 = 110 P.R. 1906 = 31 P.L.R. 1907 = 59 P.W.R. 1907.]

THIS was an appeal from the decree of M. Cross, Subordinate Judge at Kumbakonam, reversing the decree of H. Krishna Rau, District Munsif of Mannargudi, in suit 189 of 1880.

The plaintiff, Vayidinada Ayyan, a minor, represented by his natural father, sued the defendant, Appuvayyan, his alleged adoptive father, to recover Rs. 399 for the costs of his upanayanam ceremony which the defendant had failed to perform, and for a decree that defendant should pay him Rs. 5 a month for maintenance during his minority.

It was alleged, in the plaint, that the family property was worth Rs. 1,50,000.

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* Second Appeal 328 of 1881.

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The defendant denied the adoption, alleging that, though he had intended to adopt plaintiff and had executed a will stating that he had adopted him, he had given up the intention on being informed that the adoption of a brother's daughter's son was contrary to the Hindu law and the decision of the High Court. [45] The Munsif was of opinion that the rule prohibiting the adoption of a daughter's son did not apply to the case of a brother's daughter's son.

Referring to *Gopal Narhar Safray* v. *Hanmant Ganesh Safray* (1), he held that an exception to the rule could be established by proof of custom, and on the evidence he found that such a custom did exist in the district of Tanjore.

Judgment for plaintiff.

Defendant appealed.

The Subordinate Judge held that, whatever the custom might be among Brahmans, the adoption of a daughter's son was invalid.

Judgment for defendant.

Plaintiff appealed to the High Court.

The case was referred to a Full Bench by Turner, C.J., and Kindersley, J., on the 30th September 1881.

On the 5th May 1883 the Full Bench (TURNER, C.J., INNES, KINDERSLEY, and MUTTUSAMI AYYAR, JJ.) delivered the following

JUDGMENT.

We have come to the conclusion that sufficient ground exists for remitting for trial the issue—Whether, by the custom of Southern India, it is competent to a Brahman to adopt the son of a sister or daughter; and we take occasion to correct the inference that has been erroneously drawn from the decision of this Court in *Gopalayyan* v. *Raghupati Ayyan* (2) that this Court is not prepared to recognize the existence of a customary law in the case of Brahmans, of which no trace appears in any written authority of the place to which they belong. All that the Court intended by the observations from which this inference is drawn was that strong proof must be produced to establish a customary law at variance with the law declared in written treatises of which the authority is still recognized in the place in which the custom is alleged to exist. To the proposition thus stated no reasonable objection can be urged. As to the degree of proof required to warrant the Court in recognizing as customary law a usage at variance with the law established either by a uniform course of judicial decisions or by the dicta of received treatises, we adhere to the ruling of this Court in *S. Perumal Sethurayar* v. *M. Ramalinga Sethurayar* (3).

[46] There must be satisfactory evidence of usage so long and invariably acted upon in practice as to show that it has become by common consent a governing rule of the family, class, or country; and, as observed in another case, it must be shown that the usage has been followed in pursuance of a custom understood to have the force of law, and not merely that there have been repeated instances of violation of the law.

The Judicial Committee, in *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (4), observed it is the essence of special usages modifying the law . . . . . that they should be ancient and invariable, and it

(1) 3 B. 273.
(2) 7 M.H.C.R. 250.
(3) 3 M.H.C.R. 77.
(4) 14 M.I.A. 570 (585).

is further essential that they should be established to be so by clear and unambiguous evidence.

The Subordinate Judge is directed to try the foregoing issue upon the evidence already recorded and upon such further evidence as the parties may adduce, and to return his finding together with the evidence to this Court.

In compliance with the above order, the Subordinate Judge submitted the following

FINDING :—" This second appeal has been referred by the Special Appellate Court for the trial of the following issue, on the evidence already recorded, and any additional evidence that the parties may offer.

" Whether, by the custom of Southern India, it is competent to a Brahman to adopt the son of a sister or daughter?

* * * * * *

" Of plaintiff's thirty-nine witnesses, twenty-two belong to the Tanjore district, sixteen to Trichinopoly district, and one to Madura district. The majority of these witnesses speak to their own adoption as sons of daughters, others are relatives in families where such adoptions have been made, and others speak to the usage of such adoption. Four documents have been filed by the 12th, 15th, 17th, and 39th witnesses in respect to their adoption varying in dates from 1847 to 1882.

" The traditional evidence of some of these witnesses as to such adoptions having been made compasses a period of 100 years.

" In addition to this evidence there is the testimony of eleven witnesses taken on commission by the Tinnevelly Subordinate Judge's Court of like adoption being the usage in that district.

[47] " Defendant (respondent) offers no evidence in this inquiry. He states he knows nothing of the truth or otherwise of the evidence adduced by appellant.

" The Appellate Court sees no cause to disbelieve the evidence recorded in this Court and the Lower Court of such adoptions, and on that evidence it finds that it is competent to a Brahman, by the custom of Southern India, to adopt the son of a daughter.

" No evidence has been adduced on the point of adoption of a sister's son."

On the 10th March 1884, the case was again argued before TURNER, C.J., KERNAN, MUTTUSAMI AYYAR, and BRANDT, JJ., and judgment was reserved.

Mr. *Subramanyam*, Hon. *Rama Rau*, and *Bhashyam Ayyangar*, for appellant.

Mr. *Shephard*, for respondent.

On the 24th April 1885, the Court delivered the following

JUDGMENT.*

There is, it must be admitted, a very considerable quantity of evidence as to the fact of adoption of daughters' sons by Brahmans in the Tanjore and Trichinopoly districts. One witness speaks to the custom as obtaining in the Madura district; and thirteen witnesses to the adoption of both daughters' and sisters' sons in the Tinnevelly district. In six cases witnesses (*viz.*, the plaintiff's 9th, 10th, 12th, 13th, 32nd, and 46th witnesses) being the natural fathers of the adopted sons, depose to the adoption of their children by maternal grandfathers.

* [After the return of the Finding by the Lower Court.—ED.]

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In thirty-one cases the adopted sons depose to having been adopted by their maternal grandfathers (*viz.*, plaintiff's 13th, 14th, 15th, 18th, 19th, 20th, 21st, 22nd, 23rd, 25th, 26th, 27th, 28th, 29th, 31st, 33rd, 34th, 36th, 38th, 39th, 40th, 41st, 42nd, 43rd, 45th, 50th, and respondent's 1st, 2nd, 6th, 11th, and 12th witnesses). Of the natural fathers of sons so adopted, the plaintiff's 9th witness, Sadagopa Ayyangar, is a Vaishnavite Brahman of the Nannilam taluk, Tanjore district; the 10th, Sambamurti Ayyan, is a Vaishnavite Brahman of Mannargudi in the same district; the 12th is a Brahman of the same sect of Srirangam, Trichinopoly taluk; the 13th witness for the respondent is a Brahman of Tinnevelly taluk, one Surya Sekarayyar; the plaintiff's 32nd and 46th witnesses, Sambamurthi Ayyar and Rajagopalacharyar, are Vaishnavite Brahmans of the Mannargudi and Kumbakonam taluks, Tanjore district. Of the adopted sons **[48]** who give evidence seventeen are from the Tanjore district, seven from the Trichinopoly district, one from Madura, and five from Tinnevelly.

In two cases the adoption is spoken to by the adopting fathers; the plaintiff's 30th and 35th witnesses, Krishnayyan and Pitchu Josyar, Sivite Brahmans of the Tanjore district, depose to having adopted each a son of his daughter. In eight cases relatives depose to the adoption of daughters' son in their families. Of these, four—the 16th, 24th, 27th and 48th witnesses—two from Trichinopoly and two from Tanjore, say that their fathers were so adopted; two, the 17th and 37th witnesses, speak to their brothers having been given in such adoption; the 44th witness deposes to his elder brother's son having been adopted by his mother's father; and the 45th witness himself, as he says, adopted by his maternal grandmother, states that the son of his (witness') maternal grandmother's sister was adopted by his (the adopted son's) maternal grandfather.

Twenty-one of the witnesses speak with more or less detail as to not less than forty adoptions of this character, mostly within their own knowledge, and as having taken place in their own or neighbouring villages.

The plaintiff's 2nd, 7th, 10th, 12th and 13th witnesses speak to the custom generally as "recognized from time immemorial" or as "sanctioned by the usage of the elders," while the defendant's 2nd witness, Venkata Subba Sastri, who, in examination-in-chief, stated that he could not say whether such adoptions were sanctioned by the "Shastras" or not, in cross-examination admitted that "it is customary in this," (the Tanjore) "country to adopt daughter's sons" and that "they have also made such adoptions."

It must then, we consider, be taken as proved by this evidence that the practice is prevalent among Brahmans in the Tanjore, Trichinopoly and Tinnevelly districts; that it has obtained for the last 80 years at all events, while, for reasons to be stated further on, we think it must be held to have obtained for not less than 150 or 200 years, and probably from time immemorial.

The 26th witness for plaintiff, Sivaramayyar, says that from documents in his possession it would appear that such adoptions have been made for the last 200 years; but as the documents referred to were not produced, little or no weight can be attached to this assertion. It would further appear that such adoptions have been of more frequent occurrence in later years, excluding **[49]** perhaps the last 10 or 12 years since the

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passing of the decision in *Gopalayyan* v. *Raghupati Ayyan* (1), in which it was held that "in the case of Brahmans it is impossible in any case to believe in the existence of a customary law of which no trace appears in any written authority of the place to which they belong," and that there did not exist evidence of a usage so continuous, public and uniform, as to establish a rule of customary law affirming the legality of the adoption of a sister's son by a Brahman.

The evidence recorded in the present case shows, however, that such adoptions have been made more than once in the same family; that the practice has obtained in several instances in the same village; and that it obtains alike among both Vaishnavites and Sivites; and there is no evidence on the side of the respondent showing that other members of the Brahman community have declined to recognize sons so adopted as validly adopted sons, or that the custom is repugnant to the general sense of the community, or that it is regarded as made in violation of the law.

Direct authorities are, moreover, referred to in this case by Seshayyangar (respondent's 9th witness), who says there are texts found in Vayidinada Dikshatar and Tholappa's book; the witness adds that "there is custom long sanctioned by the said books in regard to them."

The first of the works so referred to is a commentary by Vayidinada Dikshatar, who is reputed to have lived not less than 150 or 200 years ago, and the work of Tholappa is the "Sudhi Vilochanam."

The former author lived in the district of Tanjore, and the latter about the same time in Conjevaram.

The texts and the commentaries to which the witness referred will be treated of in due course.

It is, however, desirable first to add a few more words on the evidence.

The plaintiff's 14th witness states that for the last 7, 8, or 10 years such adoptions have been challenged "by the people;" this, it may be presumed, is in consequence of the decision of this Court in 1873 above referred to.

No inference, either for or against the validity of such adoptions, can be drawn from the statement of the plaintiff's 7th witness, **[50]** Pitchuvayyan, who admits that he cannot say whether such adoptions are valid or not according to the Shastras, as he says he is not conversant with the Shastras; and the omission of the plaintiff's 9th witness to consult any authorities on the subject before making such an adoption may have been the result of his having had no doubt as to the validity of the act, or of other reasons, not explained.

The plaintiff's 10th witness says he only gave his son in adoption after consulting a person skilled in the "Shastras," but there is no reason for inferring from this only that he had doubts on the subject; in this case as well as in the case of the plaintiff's 31st witness who states that at the time of his adoption, 50 years ago, question was raised as to the validity of the act, the result was, as the witnesses say, that the elders or authorities consulted declared that such adoptions were permissible. It was suggested in the argument on behalf of the respondent that, in several instances, the adoption was acquiesced in or not contested by reason of gifts, or concessions made to other members of the family who would have taken by inheritance, but for such adoption, or that the arrangement under which the adopted son succeeded to property was in virtue of a testamentary disposition acquiesced in for similar reasons.

(1) 7 M.H.C.R. 250.

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It is unnecessary to go in detail through the cases in which there is evidence of such arrangement. We do not attach much importance to the fact. It is not unnatural, and we believe not unusual, for a person adopting a son to make, at his pleasure, some provision for daughters and other relatives, and we do not think that it is at all a necessary inference that this was done in the cases as to which there is evidence in the record with the object suggested on behalf of the respondent.

Before passing on to the authorities referred to by the appellant's 9th witness, we would refer to a case in Strange's Hindu Law (Appendix, Vol. II, p. 100), in which, in the year 1806, it was said that: "In practice the adoption of a sister's son by persons of all castes is not uncommon." The case was, it is true, one from the more northern part of the Presidency, Cuddapah, but the learned Judge, in his remarks, speaks of the custom as prevalent generally, after referring to the text which we quote elsewhere: "in distress (apadi) when no other son can be procured, &c."

We have further ascertained that in a case decided on the Original Side of this Court in the year 1859, in which unfortu-[51]nately the judgment is not forthcoming, a decree was made by Sir H. Davidson and Sir A. Bittleston, dated the 22nd of March 1859, in the case of *Inguva Brahmani* v. *Venkatalakshmi Ammal*, in which the adoption by a Brahman of his sister's son was upheld as valid. Evidence had been given of the practice amongst Brahmans of making adoptions of daughters' and sisters' sons. This decision is valuable as it was made after the express point was raised and pandits were examined as witnesses.

In Tholappa's work on Sradhas, and on the subject of competency to offer funeral oblations, which is the only part of that author's writings of which we have been able to obtain a copy, we do not find anything bearing on the point now before us, although there is in the treatise obtained a brief notice on adoption. The text of Caunaka as given in Vayidinada Dikshatar's commentary does not differ from the text as given in the Vyavahara Mayuka, Chap. IV, Section V, verses 9 and 10; in the Dattaka Mimansa, Section II, para 74; and in the Dattaka Chandrika, Section I, para 17, until we come to the point to be specially noted further on. The latter texts are as follows: "The adoption of a son by any Brahman must be made from among sapindas, or on failure of these an asapinda may be adopted—not from others (than sagotras) (or, 'otherwise let him not adopt'). Of Kshatryas in their own class positively and (on default of a sapinda, kinsman) even in the general family following the same spiritual guide (guru). Of Vaiçyas from amongst those of the Vaiçya class; of Sudras from (their own) class only, and not otherwise. Of all, and the tribes likewise in (their own) classes only, and not otherwise."

Then comes a material divergence between the text as given by the authorities above quoted and that given by Vayidinada. The text, as given in the Vyavahara Mayuka, Dattaka Mimansa, and the Dattaka Chandrika (as translated, the two latter by Sutherland and the former by Borradaile), runs thus: "But a daughter's son and a sister's son are affiliated by Sudras;" and in the text, as it is found both in the Dattaka Mimansa and the Dattaka Chandrika, then follow these words: "For the three superior tribes a sister's son is nowhere (mentioned as) a son." But the text as given by Vayidinada Dikshatar is as follows: "Of all" or "as to all tribes (or classes) from (or in) their own classes only, daughter's son or sister's son; as for Sudras in time of distress only;" and

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[52] the words "For the three superior tribes a sister's son is nowhere (mentioned as) a son" are wholly omitted.

On these words, omitted in the text given by Vayidinada, there follows in the Dattaka Mimansa, an elaborate dissertation, paras. 75 to 105 inclusive, the latter clauses being devoted to showing that the words "sister's son" must include the daughter's son also.

The commentary of Vayidinada on the text, as given by him, is as follows: "as to all, from gnatis (a) son is to be taken, either daughter's son or sister's son (is) to be taken; as for Sudras in distress, daughter's son, &c., is to be taken"—"this is the meaning."

It is clear that if the words—"For the three superior tribes a sister's son is nowhere mentioned as a son"—were before the commentator when he wrote his gloss or if he had allowed them to remain, it would not have been possible for him to represent the permission to adopt a daughter's or a sister's son as applicable to the three superior classes; and it is not material whether the full text was not before him, or whether he intentionally omitted these words. But taking the text as given by him, the adoption of daughters' or sisters' sons being declared permissible among the three superior classes, it would seem to be wholly superfluous to add that such adoption was allowed in the case of Sudras; still less does it appear why the permission should have been apparently further limited in the case of Sudras by the words "in (time of) distress" or necessity.

We cannot but conclude that the text was intentionally given by the commentator in the shape in which we find it, if indeed the whole of the concluding sentence as given in the other authorities was not also intentionally omitted, and the cause of this is not, we think, incapable of explanation.

The practice of making an appointed daughter whose son, if she had one, became the son of the father making the appointed daughter, if he had no male issue, was a mode of affiliation prevalent from the earliest time, even before the widow and daughter had a place assigned to them by the Mitakshara in the line of heirs. The law of adoption obtained a considerable extension in the Kali-yug when only two sorts of sons, the "aurasa" (natural, or ordinary) and the "dattaka," (given) were recognized; and the Dattaka Mimansa and Dattaka Chandrika show that the theory as to the prohibition of the adoption of a son born of a woman with whom the adoptive father could not legally have married arose out [53] of a commentary on a passage in the Smriti of Manu or Caunaka (it is uncertain which) to the effect that the adopted son should have or be "the reflection of a son," and it is probable that from this were developed other restrictions and rules intended to ensure that the adopted son should be as far as possible an imitation of a real son. Whatever doubt we may have as to how far the adoption of a daughter's son is inconsistent with the theory as to the invalidity of the adoption of a son within the prohibited degrees of connection, the usage may still be fairly referred to those texts which recognize the practice of creating a daughter's son heir by appointment, the only difference being one of form and not of principle, the consent being given in the one case at the time of marriage, and in the other at the time of adoption.

Among Sudras the adoption of daughters' and sisters' sons has always obtained, and whether the Brahmans who settled in the South of India never recognized that such adoptions were prohibited in their case, or

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whether they adopted the practice which they found prevalent among the people of the country in which they settled, we are satisfied that the practice of making such adoptions has prevailed among Brahmans in what are now the southern districts of this Presidency from time immemorial.

There is in West and Buhler's Digest of Hindu law, Vol. II, pp. 884 to 888, 3rd edition, a passage bearing on the subject now before us, which deserves to be quoted at length—"The gradual abolition of the grosser means of supplementing a family in favour of the system of adoption is itself a striking evidence of progress in civilization. The appointment of a daughter held an intermediate place between this and the coarse materialism of the earliest modes of substitution. It is no longer recognized, but traces of the institution still remain in the existing law. From it, on the one hand, has been derived the right of succession of the daughter and the daughter's son, while, on the other, it is connected with the fitness of a daughter's son for adoption. As an imitation of a real son the adopted son ought to be born of some woman whom the adoptive father could have married. This excludes the son of a daughter, and such is the law generally received amongst the highest castes, but amongst the lower castes, sub-divisions of the great Sudra class, almost everywhere, and amongst some of the higher castes by their customary law, the daughter's son is deemed fit for adoption, and even the most fit on **[54]** account of the place he might formerly have taken as a son by appointment, as well as of the blood connection on which the system of appointment itself was founded. The passage of Vasishtha which directs that a man desiring to adopt shall make his selection from amongst near relatives, and for choice take the nearest, is so obscurely expressed as to admit of various interpretations. How the ingenuity of commentators has been exercised upon it may be seen in Colebrook's note to the Mitakshara, Ch. I, Section XI, verse 13. The Samskara Kaustubha, and the Nirnaya Sindhu, construing the direction most liberally, approve the adoption, failing a sagotra sapinda, of a daughter's or a sister's son. The Sastris, following Vyvahara Mayuka, are almost uniformly opposed to this, except in the case of Sudras. They rely on the impossibility of a real paternal and filial relation between the fictitious father and a son so born; and the decisions in Bombay must be considered, perhaps, to have confirmed the Sastris' view, but the customary law seems in a measure at least to have been represented by the doctrine of the two works referred to. These were, no doubt, written under the influence of ideas which shaped the customary law, and they afford an example in their divergence from the more generally received authorities of parallel growths of doctrine springing from the same original source, yet taking quite different lines of development according to the medium in which they were placed. The real nearness of the daughter's son once procured ready acceptance for the doctrine of appointment, and this in its turn has facilitated the admission of the daughter's son as fit for adoption. The Shastra had, however, to be interpreted accordingly, and this interpretation, setting aside the ordinary doctrine of a necessary difference in the families of birth of the real mother and the adoptive father, paved a way for the admission of the sister's son. In the south of India the Brahmanical law was, for the most part, apparently accepted only with this qualification, adapting it to previously existing customs, as in the case of marriage between the children of a brother and a sister rejected by the stricter law of the north, but allowed in the south, because it could not be prevented."

The divergence between the generally accepted authorities and actually existing customs, and the survival of the customs sanctioned by the earlier law appear to us to be accounted for in the above passage on sound historical principles, and the conclusions [55] therein arrived at to receive confirmation from what we find to be established by evidence in the case before us.

Even supposing the custom, which we find to be established by the evidence to have sprung up after the text-books which distinctly prohibit these adoptions were written, though it cannot be affirmed that it did so, that fact will not of itself invalidate the custom; and the alteration in the text of Caunaka as given by Vayidinada Dikshatar and his comments thereon, are, in our opinion, to be explained in this manner: the commentator finding, at the time when he wrote, that the custom was actually prevalent among the Brahmans in the south of this Presidency, gave the version of Caunaka's text which we find in his commentary together with his gloss thereon, with a view to the adoption of daughters' sons and sisters' sons being recognized as made in accordance with the authorities; and we are of opinion that the inception or prevalence of the custom is not the result of an innovation introduced by the commentator, but that the practice was followed and recognized as not only not inconsistent with the customary law of the land at the time when the commentator wrote, but as a custom having the force of law, and that the local authority simply gave or purported to give the colour of authoritative sanction to such usage; and we consider that we ought judicially to recognize such usage.

The decree of the Subordinate Judge is reversed and that of the District Munsif restored; but in view of the former ruling and of the relationship we have found to exist between the parties, we direct that each party do bear his own costs in the Lower Appellate Court and in this Court.

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9 M. 55 = 10 Ind. Jur. 25.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

KRISTAYA (*Defendant*), *Appellant v.* KASIPATI AND OTHERS (*Plaintiffs*), *Respondents.** [17th September, 1885.]

Cause of action — Suit by debtor to compel creditor to accept money due.

A bond having been executed, whereby it was stipulated that a debt should be paid by instalments subject to the condition that if any one instalment were not [56] paid within a certain time after it became due, the whole amount remaining due should become payable at once, the creditor evaded the debtor's attempt to pay the instalments as they became due, and the debtor brought a suit to compel the creditor to accept an instalment due:

Held, that such a suit would not lie.

THIS was an appeal against the decree of C. L. B. Cumming, Acting District Judge of Ganjam, confirming the decree of C. Simhachalam, District Munsif of Chicacole.

The facts appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.).

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Anandacharlu, for appellant.
Srirangacharyar, for respondents.

JUDGMENT.

The respondents executed a bond in appellant's favour for Rs. 1,150 in September 1882. The document provided for repayment by twenty-three annual instalments of Rs. 50 each, and for the entire unpaid balance becoming payable at once in case any one instalment was in arrear for three months or more. Prior to the date of this bond, there was another bond with like provisions, but, as it contained a clerical error, the bond in suit was executed. The plaint prayed for a decree directing the appellant to receive Rs. 50 on account of the second instalment due under the bond and to pay the respondents' costs. It stated that the appellant desired to defraud the respondents by causing some one instalment to become overdue, that he evaded accepting the first two instalments due under the first bond, that in original suits 197 of 1881 and 177 of 1882 they compelled him to accept those instalments, that the appellant behaved in the same way in regard to the first instalment due under the second bond, that the respondents obtained a decree in original suit 154 of 1883 which directed him to accept that instalment, and that the appellant again declined to accept the second instalment. Both the Courts below decreed the claim, and the Judge observed that the respondents were forced, owing to the appellant's conduct, to protect themselves by bringing suits to enforce acceptance of payment of each instalment. It is urged in second appeal that the facts alleged disclose no cause of action, and we consider that the contention is well-founded. The plaint contains no demand on the part of the respondents that any *right* be enforced, and though they are under an obligation to pay each instalment on or before the date fixed for its payment, it would be a sufficient answer to any action [57] which might be brought thereon by the appellant that they tendered payment in time. A suit is a demand made judicially for attaining or recovering a right, and it does not lie for the bare performance of a duty at the instance of the person bound to perform it, for the evident reason that, when he is willing to perform it, there is no need for a suit, and that, if he is not, it is for the other party to enforce its performance. It is true that, under the terms of the bond, the regular payment of each instalment is necessary to enable the respondents to preserve their right to pay the balance still due by instalments; but a tender of payment made in time would be effectual for this purpose also. It is suggested that a suit may be brought to obtain a declaration that the right has not been forfeited by default, and that it continues to subsist. But the suit before us is not one of that kind, and it is not necessary for us to express an opinion on the question whether, under certain circumstances, a declaratory suit may not be brought. We are satisfied that, in its present form, the suit instituted by the respondents cannot be maintained. We set aside the decrees of the Courts below and dismiss the suit. Having regard, however, to the appellant's conduct as found by the Judge, we direct that each party do bear his or their costs.

9 M. 57=9 Ind. Jur. 385.

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APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Parker.

SIVARAMA (*Plaintiff*), *Appellant v.* SUBRAMANYA (*Defendant*), *Respondent.** [5th & 10th August, 1885.]

Civil Procedure Code, Section 295—Mortgage—Sale by first mortgagee—Arrears of rent — Lien — Claim by puisne mortgagee on proceeds of sale — Limitation Act, Schedule II, Articles, 12, 13.

Certain land was mortgaged to A with possession to secure the repayment of a loan of Rs. 2,000 and interest. It was stipulated in the deed that the interest on the debt should be paid out of the profits, and the balance paid to the mortgagors.

By an agreement subsequently made, it was arranged that the mortgagors should remain in possession and pay rent to A. A obtained a decree for Rs. 2,000 and arrears of rent and costs and for the sale of the land in satisfaction of the amount decreed.

The land was sold for Rs. 2,855 in March 1881.

[58] In May 1881, B, a puisne mortgagee, applied to the Court for payment to him of Rs. 500 of this sum, alleging that A was entitled only to Rs. 2,000 and Rs. 280 costs, but not to arrears of rent, in preference to his claim as second mortgagee.

The claim of B was rejected on the 27th May 1881, and the whole amount paid out to A.

In February 1882, B (who had filed a suit on the 23rd March 1881), obtained a decree upon his mortgage.

On the 23rd May 1884, B sued to recover Rs. 510 paid to A on account of rent on the 27th May, 1881.

The lower Court dismissed the suit on the grounds

(1) that A was entitled to treat the arrears of rent as interest ;

(2) that the suit was barred by limitation :

Held, on second appeal, that B was entitled to recover the sum claimed.

[R., 15 B. 438 (441) ; 2 O.C. 84 (86); U.B.R. (1904), 4th.Qr. Limitation, Schedule II, 13.]

THIS was an appeal from the decree of E. K. Krishnan, Subordinate Judge at Calicut, confirming a decree of C. Gopalan Nayar, District Munsif of Shernad, in suit 279 of 1884.

The facts necessary for the purpose of this report are set out in the judgment of the Court (HUTCHINS and PARKER, JJ.)

Bhashyam Ayyangar, for appellant.

Sankaran Nayar, for respondent.

JUDGMENT.

The respondent (Subramanya Bhatta), was the first mortgagee of certain properties, on which the appellant (Sivarama Krishna Bhatta) obtained a puisne incumbrance. Under the terms of his mortgage, the respondent was to enjoy the lands as security for the principal sum (Rs. 2,000) advanced to appropriate to the interest due on that advance a certain sum annually, and to pay the balance of the estimated net produce, 50 paras of paddy, to the mortgagors. He elected, however, to leave the mortgaged lands in the possession of the mortgagors, and he took from them an agreement for the payment of an annual rent equal to the interest and the 50 paras of paddy. In July 1880 he obtained a decree

* Second Appeal 224 of 1885.

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directing that the lands should be sold for the discharge of the principal sum (Rs. 2,000) and costs, and also for the arrears of rent due under the rental agreement. The lands were accordingly sold on the 24th March 1881, for Rs. 2.855.

On the day before the sale the appellant instituted a suit against the mortgagors on his subsequent incumbrance, and on the 24th May 1881, he applied to the Munsif for payment of Rs. 500 and odd out of the sale-proceeds. He admitted that the respondent as the first incumbrancer, was entitled to recover first his principal of Rs. 2,000 as well as Rs. 280 for the costs of his suit; but he contended that the respondent was not entitled to any priority in respect of the sum decreed to him as rent.

[59] On the 27th May 1881, the Munsif dismissed the appellant's application and directed the whole of the sale-proceeds to be paid to the respondent, and the whole sum was accordingly paid out to the respondent on the same day. The Munsif treated the appellant's application as objecting to the sale as one made for the arrears of rent, and held that he was bound to take steps for the cancellation of the sale before he could lay claim to any part of the proceeds; but the appellant has never denied the validity of the sale; it had been ordered under a decree for the discharge of a prior incumbrance, to which he could not object. His claim was that the sale-proceeds must be taken to represent the mortgaged property, that the respondent was entitled to be paid the principal money due on his incumbrance and costs, but that he had no lien on the proceeds in respect of the rent, and that therefore the surplus proceeds should be paid to himself as the next incumbrancer.

In February 1882, the appellant obtained a decree on his mortgage. In November following, he put up to sale and himself purchased the same properties. But these properties had already been sold under the respondent's decree in virtue of a prior incumbrance, and the subsequent sale under the appellant's decree had no legal effect whatever.

The present suit was instituted by the appellant on the 23rd May 1884 to recover from the respondent the sum of Rs. 510 paid to the respondent on the 27th May 1881 an account of his claim for rent. Both the Courts below have held that the appellant is not entitled to this sum as against the respondent, and also that the suit is barred by the Law of Limitation. In both respects the decrees seem to us erroneous.

When immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance, and there is no other incumbrance entitled to priority, the proceeds of sale represent the property itself; and Section 295 of the Procedure Code prescribes how the proceeds should be applied. They are to go

(1) in defraying the expenses of the sale—these have been defrayed;

(2) in discharging the interest and principal money out of the incumbrance;

(3) in discharging subsequent incumbrances if any.

And the penultimate clause of the section provides that, "if **[60]** all or any of such assets be paid to a person who is not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets."

The appellant, as second incumbrancer, is clearly entitled to the surplus proceeds after discharging the principal and any interest which may be due on the respondent's incumbrance. The question between them,

therefore, resolves itself into this—Can the sum claimed by the respondent as rent, and paid to him under the decree for rent, be regarded as interest due on his incumbrance? It appears to us that it cannot; and indeed both the Lower Courts have treated it as rent and not as interest. By letting the mortgaged properties to the mortgagors under the stipulation that they should pay rent in lieu of interest, the respondent elected to convert the interest into rent. No doubt such a course has its advantages; but he is not entitled to those advantages, and also to the advantage of treating the sum conditioned to be paid as if it were interest. He sued for it as rent, and not as interest, and under the terms of the decree, directing the sale of the property, the sum now in question was awarded to him as rent. There is no foundation for the contention that arrears of rent are a charge on the land as against an incumbrance.

As regards limitation, the Munsif relied on Articles 12 and 13, and the Appellate Court on Article 12 alone. Article 12 relates to suits to set aside sales. We have already shown that the appellant admits the validity of the sale and does not seek to set it aside. Article 13 applies to suits to set aside the order of a Civil Court in *any proceeding other than a suit.* It has been repeatedly ruled that a proceeding in execution is a proceeding in the suit in which execution has been taken out, and the order in question appears to have been passed in a proceeding in execution in the respondent's suit. But even assuming that the order of the Munsif, dated the 27th of May 1881, being an order as between the appellant, who was not a party to the suit in which execution had been taken out, and the respondent cannot be regarded as having been made in a proceeding in the respondent's suit, we still consider that Article 13 does not apply to the present suit. The appellant does not seek to set aside the order, and the order was not one in a matter which the Munsif was competent to determine finally. Section 295 does not provide that an order for a payment out of assets shall be final, but, on the contrary, that it shall be subject to the [61] right of any person entitled to sue the person to whom payment has been made to compel him to refund. The appellant, we may observe, had not at that time obtained his decree, and his position was that of a person merely claiming to be an incumbrancer. It is not necessary to determine whether the plaintiff's suit falls under Article 62 or under the general Article 120, or whether he has not twelve years from the date of his incumbrance, for it is conceded that the suit will not be barred, unless Article 13 applies.

The result is that the decrees of the Courts below must be reversed, and in lieu thereof, there will be a decree requiring the respondent to pay to the appellant Rs. 510 with costs throughout.

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9 M. 61 = 2 Weir 337.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

AIYAVU AND ANOTHER v. QUEEN-EMPRESS.* [27th August, 1885.]

Criminal Procedure Code, Section 271—Murder—Explanation of charge essential.

At a trial before a Sessions Court a charge was read out to the prisoners to the effect that they, at a certain place on a certain date committed murder by causing the death of M, and that they had thereby committed an offence

* Appeal 288 of 1885.

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punishable under Section 302 of the Indian Penal Code and within the cognizance of the Court of Sessions. The prisoners pleaded guilty and were convicted on their plea.

The charge was not explained to the prisoners. In answer to questions put by the Court, prisoners stated that they had killed M, and that they made the admissions of their own accord and not on the persuasion of any one:

Held, that the conviction must be quashed and a new trial ordered.

[R., L.B.R. (1893—1900) 328.]

THIS was an appeal from a sentence of death passed by J. C. Hughesdon, Sessions Judge of Tinnevelly, in Session case 25 of 1885.

The facts appear sufficiently, for the purpose of this report, from the judgment of the High Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.).

Mr. *Wedderburn*, for the prisoners.

Mr. *Powell* (Acting Government Pleader), for the Crown.

For appellants, it was contended that the conviction must be quashed, the provisions of Section 271 of the Code of Criminal Proce-[62]dure not having been observed—*Empress* v. *Vaimbilee*, (1) *In re Gopal Dhanuk* (2).

The charge, which was as follows:—

"That you (1) Aiyavu Nadan, (2) Sivattiya Nadan, (3) Suppaya Nadan, and (4) Mari Nadan, on or about the 27th day of April 1885, at Panduvarapatti in Sattur taluk, committed murder by causing the death of one Marimuthu Nadan, and that you have thereby committed an offence punishable under Section 302 of the Indian Penal Code, and within the cognizance of the Court of Sessions," was read out, but not explained to the prisoners.

If it had been explained, it was probable from subsequent statements made by them that they would not have pleaded guilty.

For the Crown, it was contended that the facts admitted by the prisoners were sufficient to justify conviction.

JUDGMENT.

In this case four persons were tried on a charge of murder. Prisoners Nos. 1 and 2, the present appellants, pleaded guilty and the two others claimed to be tried. On recording their pleas, the Judge put a few questions to each of the four accused. He asked the appellants whether they killed Marimuthu Nadan as stated in the charge. Both said "yes." He next asked whether they said so of their own accord or whether they were persuaded by any one else to say so. The appellants said no one persuaded them to say what they said. The Judge then asked whether they knew they would be hanged for saying "yes." The appellant No. 1 said: "If I am to be hanged, let me be;" No. 2 said the same, adding "is it proper to deny after having done the deed."

The Judge then made a note that prisoners Nos. 1 and 2 will presently be convicted on their own plea, and that the trial does not proceed as regards them, that they are removed from the dock, and that it is probable they will be called as witnesses for the prosecution in the case against prisoners Nos. 3 and 4. Subsequently he examined them as the witnesses Nos. 1 and 2 against the prisoners Nos. 3 and 4. Eventually the prisoners Nos. 3 and 4 were acquitted. The Judge then convicted the appellants on their own plea, and having sentenced them to death, he has referred the sentence to this Court for confirmation.

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(1) 5 C. 826. (2) 7 C. 97.

In their petition of appeal they stated that they held the legs [63] of the deceased when his throat was being cut, but that they did so because Mari Nadan, the accused No. 4, threatened to kill them if they did not assist, and put them in fear of instant death.

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After reading out the charge to the appellants, the Judge does not appear to have explained it to them as he is required to do by Section 271 of the Procedure Code. It was argued by the learned Counsel for the appellants that "murder" is a technical word and that, unless it was explained as directed by that section, the plea of guilty should not be accepted.

We are precluded by the course taken by the Judge from looking at the evidence taken after the appellants were removed from the dock. The prisoners were not asked in their examination whether they intended to kill, or in what circumstances they killed the deceased, and their statements do not disclose on their part a knowledge of the elements constituting the offence of murder. If the statements contained in their petition of appeal could be taken to be true, we might convict them of murder, but we should then feel bound to take the whole of those statements together and to recommend a mitigation of the sentence on the ground that they committed the crime from fear of instant death.

We have asked the Judge to certify whether the nature of the offence with which the appellants were charged was properly explained, and he says that it was not. That being so, we cannot accept the admission "we *killed* Marimuthu" as an admission that the appellants had committed murder. We are constrained to set aside the conviction and to direct a new trial of the appellants.

In his explanation the Sessions Judge has referred us to two cases (Appeal 286 of 1884 (1), *Queen-Empress* v. *Netai Lafkar* (2),) in which the High Court might have pointed out, but did not point out, that the expression "I killed" did not amount to an admission of having committed murder. In both those cases the words "I killed" were coupled with other statements showing beyond doubt that the accused did not intend to admit facts which amount in the eye of the law to murder. Here no other statements were asked for, and the simple question is whether killing is equivalent and tantamount to murder. Most certainly it is not, or culpable homicide not amounting to murder would be an unmeaning expression.

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[64] APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

KRISHNA AND ANOTHER (*Defendants Nos. 1 and 2*) *Appellants* v. SAMI AND ANOTHER (*Plaintiffs*), *Respondents.**
[1st October, 1884 and 1st May, 1885.]

Hindu law—Inheritance—Partition—Disqualified heirs—Birth of qualified heir.

Under the Hindu law of inheritance which obtains in Southern India, the sons of a deaf and dumb member of an undivided Hindu family are entitled to

* Civil Miscellaneous Appeal 410 of 1881.

(1) Not reported. (2) 11 C. 410.

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a share of the family estate in the lifetime of their father, notwithstanding that they were born after the death of their grandfather.

In such a case the estate vests on the death of the grandfather in the qualified heirs subject to the contingency of its being divested on the recovery of the disqualified, or the birth of a qualified heir.

[F., 32 B. 455=10 Bom. L.R. 559 (561); **Expl.**, 23 B. 636 (640); **D.**, 17 M. 287 (292).]

THIS was an appeal from the decree of Arunachala Ayyar, Subordinate Judge at Tanjore, dated 13th April 1881, reversing the decree of S. Ramasami Mudali, District Munsif of Kumbakonam, in suit 383 of 1879, and remanding the suit.

The plaintiffs, Sami Reddi and Gopalu, minors, by their guardian Laksmi Ammal, sued the defendants Krishna Reddi and five others for partition and possession of a moiety of certain property. In the plaint it was alleged that Sami Reddi, the grandfather of plaintiffs, and Venkatasami Reddi, the father of defendant No. 1 and grandfather of defendants 2 and 3, were undivided brothers; that plaintiffs' father, was born deaf and dumb; that up to 1876 plaintiffs, their father, and defendants lived together; and since that time plaintiffs and their father lived separately from the defendants.

Defendants 4, 5, and 6 were made parties to the suit as being in possession of some of the property of which partition was sought.

Defendant No. 1 pleaded, *inter alia*, that as the father of plaintiffs was alive, plaintiffs were not entitled to a share.

[65] The Munsif held that the plaintiffs could not sue, inasmuch as they were not born in the lifetime of their grandfather, citing *Pareshmani Dasi* v. *Dinanath Das* (1), *Kalidas Das* v. *Krishan Chandra Das* (2).

On appeal the Subordinate Judge reversed this decree. His judgment was as follows:—

"The District Munsif quotes two Bengal decisions referred to in Sections 408 and 515 of Mayne's Hindu Law. In reading those decisions, I find that Mr. Justice Norman dissented from the other Judges, and was of opinion that a son born to an incapacitated person after the death of the grandfather is entitled to inherit the grandfather's estate. The original texts, Mitakshara and Vyavahara Mayukha, which he quotes in support of his opinion, are overruled by the Chief Justice, on the ground that they are not the authorities in Bengal. Hence it is clear that the said authorities which govern the southern parts of India must be our guide. Besides, there is vast difference between the Hindu law of that country and that of ours. There, a son cannot claim a share of the family property during his father's lifetime, and the property descends to him after his father's death. But the case is quite the reverse in the southern parts, where a son participates with his father, and the right of the son to the property springs on the date of the birth, and in some cases even in conception—*Vide* M.H.C.R. Vol. III, pp. 100 to 104. The respondents' vakil has not pointed out any provision in Hindu law that the son of a disqualified person, to be capable of inheriting the ancestral estate, should be born within the lifetime of his ancestor. The right of inheritance under Hindu law is based upon the principle of competency to perform the beneficial acts to the deceased proprietor of the estate. Since the son of a disqualified person, born after the death of the ancestor, is fully qualified to offer the funeral cakes to the ancestor, and since no difference is observed

(1) 1 B.L.R. A.C. 117. (2) 2 B.L.R. F.B. 103.

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in that respect between a grandson born before and one after the death of the grandfather, it is reasonable that such a grandson should have his share in the ancestral property. Besides, in this case the defendant No. 1, as first witness for plaintiffs, has fully admitted the relationship of the plaintiffs, and asserted that they and their parents lived with him and enjoyed the property jointly up to a year previous [66] to the suit, and that plaintiffs are entitled to half of the family property. Under these circumstances, I am of opinion that plaintiffs have a right to claim their share in the family property."

Defendants 1 and 2 appealed to the High Court on the following grounds:—

(1) The plaintiffs' father being admittedly disqualified to inherit, and their grandfather having died long before they were born, they acquired no right by birth in the property sued for.

(2) The property having devolved upon the defendants by right of inheritance long before the plaintiffs were born, their subsequent birth cannot divest the defendants of their right to any portion of their property.

The case came on for hearing on the 11th November 1881, on the 25th November 1882, and on the 11th January 1884, when it was referred to a Full Bench by TURNER, C.J., and KINDERSLEY, J.

On the 1st of October 1884 the case was argued before a Full Bench and judgment was reserved.

Bhashyam Ayyangar, for appellants.

If plaintiffs had been born in the lifetime of their grandfather, they would be entitled to a share.

The father being disqualified, the son cannot claim under the father.

(MUTTUSAMI AYYAR, J.—What is the reason of exclusion? Why is he allowed to inherit when cured ?)

(1) His incapacity to offer funeral oblations and to perform other religious ceremonies on account of sin in previous birth ;

(2) His capacity by being cured is due to the fact that his sins are supposed to be atoned for.

Mitakshara splits up Yajnavalkya's text into two and deals with only one portion of it. We must confine ourselves to it.

In the *Tagore case* (1) it is laid down that property once vested cannot be divested. The only exception to the rule is when an adoption is made. So that when property vested is sought to be divested, clear authority must be shown.

[MUTTUSAMI AYYAR, J.—When a coparcener goes abroad, the property is re-distributed for seven generations.]

[67] There the vesting of the property is contingent. The question is whether the son of a disqualified person has higher right than a qualified son.

If the father were cured and if he could not sue, his sons could not maintain suit. Under Mitakshara law the father could not sue.

The texts say his case is analogous to that of an after-born son, who clearly takes only what his father owns at the time of the son's birth. In Stokes' Hindu Law Books, Section 10, cl. 7, it is said that the right of a son cured by medicine, to claim a share after division, is analogous to that of a son born after division.

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(1) 9 B.L.R. 377, (397).

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[MUTTUSAMI AYYAR, J.—The Sanskrit word is "*gnata*" "born" not "begotten," thereby suggesting that his case is analogous to that of the son in the womb on whose birth the property is re-distributed.]

That is enough, the analogy goes only so far as to give the disqualified person his father's share when his disqualification ceases. It will not give him what he would have got if he was qualified and divided from his father and brothers.

The analogy relates only to division in the lifetime of the father. If the case of a disqualified person, subsequently cured, is analogous to a son in the womb, then he must be considered to be a son in the womb from the time of his conception till he is cured

Further, the son of a disqualified person must stand in his own shoes and cannot step into his father's shoes. That is to say he cannot inherit every thing which his father would inherit if not disqualified. He can inherit only as son and not as substitute of his father, *e.g.*—The son of a great grandson is disqualified to inherit.

The birth of a son to a disqualified great-grandson is no cure to his disqualification.

Mr. *Shephard* and Hon. *Rama Rau*, for respondents.

JUDGMENT.

The judgment of the Full Bench (TURNER, C.J., KERNAN, MUTTUSAMI AYYAR, HUTCHINS and BRANDT, JJ.) was delivered by

TURNER, C.J.—The decision of this appeal is governed by two rules of Hindu law—the rule which provides for the inheritance of the sons of persons who from some natural defect are themselves incapable of receiving a share, and the rule that an estate, which has once vested, cannot be divested by the occurrence of a contingency which, if it had occurred prior to the period of vesting, would have curtailed or avoided the rights of the person in whom the estate has vested.

[68] The first of these rules rests on the authority of a text of Vishnu: "The legitimate sons even of these (are sharers of the patrimony)," Vyavahara Mayukha IV, 11, 2, and of a text of Yajnavalkya: "But their sons, whether they be legitimate or the offspring of the wife by a kinsman, are entitled to allotments if free from similar defects," which is cited and thus paraphrased by the author of the Mitakshara: "The sons of these persons, whether they be legitimate offspring or sons of the wife, are entitled to allotments, or are rightful partakers of shares, provided they be faultless or free from defects which would bar their participation, such as impotency or the like."

The Munsif relying on the decisions of the High Court of Calcutta in *Pareshmani Dasi* v. *Dinanath Das* (1) and *Kalidas Das Das* v. *Krishan Chandra Das* (2) held that, inasmuch as the respondents were not born in the lifetime of their grandfather, they were not entitled to claim his share. He therefored ismissed the suit. The Subordinate Judge considered that the decisions referred to by the Munsif were not applicable to a case governed by the law of the Mitakshara, and held the plaintiffs entitled to share on the ground that there was no authority for imposing on the sons of disqualified persons, who are declared competent to share, the condition that they should be born in their grandfather's lifetime.

The argument in support of the defendants' case repeated the reasoning of Sir Barnes Peacock in the Full Bench case before mentioned.

(1) 1 B.L.R. A.C. 117.

(2) 2 B.L.R. F.B. 103.

The eminence of the learned Chief Justice and Judges who took part in that decision entitles it to the highest respect. The decision proceeds mainly on two grounds on the rule that an estate once vested in a full and absolute owner cannot be divested, and secondly on an inference from the texts of the Mitakshara, which declare a disqualified person, whose disqualification is removed after partition, entitled to share in like manner as an after-born son.

The rule that an estate once vested in a full owner cannot be divested is nowhere stated in so many terms by the Hindu commentators, and where these commentators vary on fundamental questions regarding property, it is not *prima facie* improbable that a variance would be found in the extent to which the rule against divesting ownership is applied.

[69] The case which came before the High Court of Calcutta was presumably a case governed by the law of the Dayabhaga. The learned Chief Justice called attention to the definition of the term "daya" adopted by the author of that treatise, "wealth in which property dependent on relation to the former owner arises on the demise of that owner"—Chap. I, verse 5, and to the observation preceding this section that, although "daya" by derivation signifies "what is given," the use of the verb "da" is here secondary or metaphorical, since the same consequence is here produced, namely that of constituting another's property, after annulling the previous right of a person who is dead or gone into retirement or the like—chap. I, Section 4. He also cited other passages to show that under the Dayabhaga law property arose on the natural or civil death of the owner —Chap. I, verses 1, 2, and 31.

The author of the Mitakshara on the other hand defined "daya" as wealth which becomes the property of another solely by reason of relation to the owner—Mitakshara, Chap. I, Section 1, verse 2, and, citing a text of Gautama which it is said is not found in the institutes of that sage, "Let ownership be taken by birth," he declared it to be a settled point that property in the paternal or ancestral estate, that is to say in the heritage which he termed unobstructed, was by birth —verse 23.

Again, while the Dayabhaga regarded the estate of undivided coparceners as held in separate shares and consequently defined partition as a manifesting of a property which had arisen in goods and chattels but which extended only to a portion of them, the Mitakshara treated the estate of coparceners as held in entirety without recognition of shares, and defined partition as the adjustment of divers rights regarding the whole by distributing them in particular portions of the aggregate.

As consequences of these fundamental differences respecting the event which gave rise to ownership in paternal estate and the nature of the interests of coparceners in the undivided estate, the son under the Dayabhaga took nothing till his father's death, and the share of a brother, though unascertained by partition, descended to his widow, whereas under the Mitakshara, the son became at his birth a coparcener as well in paternal as in ancestral wealth, and the right of survivorship among undivided brethren excluded the succession of a brother's widow to her husband's interest in the joint estate.

[70] It may well be that these fundamental differences to which we have alluded would justify a distinction in the application of the rule respecting the divesting of an estate once vested. In some instances, to which allusion will presently be made, it is clear that a difference exists.

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The Hindu law of the Mitakshara regards property as specially dedicated to the discharge of religious and moral obligations.

"Wealth was produced for the sake of solemn sacrifices and to the support of the joint family." Cited in Mitakshara II, 1, Section 14. "Immoveables and bipeds should not be sold . . . . for they who are born and they who are yet unbegotten and they who are still in the womb require the means of support." Cited in Mitakshara I, 1, Section 27.

A right of maintenance was assigned to members of the family whose claims to inherit were postponed to preferable heirs, or whose possibility of inheritance had been lost, or who were disqualified for inheritance. Sons as coparceners with equal rights with their father in ancestral estate might compel the father to divide that estate and retain but a single share for himself; but they could not compel him to divide his self-acquired property, and, if he was willing to do so, he might retain a double share of it for himself and must make his wives participants of shares equal to those of sons, unless separate property had been given to them and in that case they received half shares. There was thus secured to the parents a fund for children who might be born after partition. The child, if a son begotten before partition, was entitled to re-open the partition and receive a share equal to that of his brothers; if begotten after partition, he inherited what wealth remained to his father and all the father's subsequent acquisitions, and, if there was no daughter, he solely inherited his mother's portion also. The case in which a son born after partition would receive nothing is not contemplated by any of the authors of the texts and commentaries to which we have had access except Varadaraja in the Vyavahara Nirnaya in a passage to which reference will presently be made.

The text of Manu as to the right of a son born after partition is as follows :—" A son born after a division shall alone inherit the patrimony or shall have a share of it with the divided brethren if they return and re-unite themselves with him"—Chap. IX, Section 216.

Yanjnavalkya, after declaring that a father may make a partition [71] in his lifetime, and under some circumstances unequally, and that brothers after the father's death must make an equal partition, notices the case of the son born after partition : "When [after] the sons, &c., have separated a son is born of a wife of the same class, he becomes a partaker of a share, or his allotment should be made out of the visible estate corrected for profit or loss"—Yajnavalkya II, Section 123.

There is also a text of Brihaspati : "A son born before partition has no claim on the wealth of his parents, nor one born after it on that of his brother," and again " all the wealth which is acquired by the father himself who has made a partition with his sons goes to the son begotten by him after the partition. Those born before it are declared to have no right"—Mitakshara I, 6, Section 6.

Vijnaneswara commenting on these three texts observes that, the sons being separated from their father, one who shall be afterwards born of a wife equal in class shall share the distribution, and explains that the distribution means what is distributed, in other words the share of the father and the share of the mother, if there be no daughter. He deduces from the text of Manu that sons born previously to the distribution have no property in the share of the separated father and mother, and that a son born to separated parents is not a proprietor in his brother's allotments, but, as shown by the text of Brihaspati, is entitled to the property acquired by the father subsequently to partition as well as to the father's

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share. He meets the case suggested of a division after the father's death, wherein the father would receive no share, by deducing a rule from the last portion of Yajnavalkya's text. The posthumous son, whose mother's pregnancy was not manifest at the time of partition, must receive, out of his brother's allotments, a share equal to their shares after computing the income which has accrued and the father's debts that have been discharged.

As to the rights of sons born after partition, Devanna Bhatta, quoting the text of Vishnu that a son with whom a father has made a partition should give a share to the son born after the distribution (Vishnu, Ch. XVII, Section 2 *) explains that it refers to a partition made when the fact of the existing pregnancy of the mother was unknown—Smriti Chandrika, Chap. XIII, Sections 1, 2. He then refers to the text of Gautama, XXVIII, Section 29†—"A son [72] begotten after partition takes the wealth of his father only:" (it may be observed this text is otherwise translated "takes *exclusively* the wealth of his father" the term "eva" being referred to the taker and not to the wealth; but the sense is much the same). On this text Devanna Bhatta observes: "The reason why a son born after partition has no claim on the paternal wealth is because he has divided off from his father, and the reason why a son begotten after the partition has no claim on the wealth of the brother is because such a brother possesses no property in which the son born after the partition can have an interest. Thus it must be understood"—Smriti Chandrika, Chap. XIII, Section 8. After adverting to a text of Brihaspati as to all the self-acquired wealth of the father, the commentator observes the term "all" was used to preclude the supposition that in the wealth acquired by the father subsequent to partition, the sons born before the partition have a claim to share, no share having previously been obtained by them in it. Hence he concludes that the sons born before partition and the sons born after it have no claim whatever on each other's wealth, and in this respect they are viewed as if there were not at all related to each other—Section 11.

The same commentator, quoting the text of Yajnavalkya before cited, explains it as referring to a partition made by brothers on the demise of their father while the pregnancy of the father's widow was not manifest.

The author of the Sarasvati Vilasa, following Vijnaneswara, interprets the first part of the text of Yajnavalkya as applying to the son begotten after partition, and the last part of the text as applying to the son born of a mother whose pregnancy existed but was unknown at the time of partition—Sarasvati Vilasa, 227-239.

Without contradicting the views of Vijnaneswara, Devanna Bhatta and the author last-mentioned, Varadaraja, in the Vyavahara Nirnaya, explains the texts in terms which would apply to a son born at any time after partition if the father has no property. He observes: "Yajnavalkya says that for one born after partition a provision is to be made from the divided brother's own shares if there be no property of the father," and he cites the texts of Yajnavalkya and Vishnu before quoted in support of the statement.

Inasmuch as the rule declared by him accords with that stated by his more illustrious predecessors, if it be limited to the son born [73] immediately on his father's death, it would perhaps be dangerous to

* 7 Sacred Books of the East, p. 88. † 3 Sacred Books of the East, p. 302.

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accept it in its generality and rely on it as establishing an instance of divested estate.

The rule of the Mitakshara, the Smriti Chandrika, and the Sarasvati Vilasa, that a son begotten after partition has no property in the separated shares of the brothers is the legitimate sequence of the rule that property is acquired by a son by birth and is acquired by a son only in property, whether ancestral or self-acquired, of which at the time of his birth his father is the owner. There is some reason for recognizing the inchoate right of the begotten: the obligation to provide for the unbegotten, though recognized as moral, has legal effect given to it in no other instance in Hindu law.

An argument that the share obtained by partition may be divested in part by the appearance of a co-heir, whose right was not anticipated at the time of partition, may, however, be deduced from the rule respecting the absent coparcener and his descendants. This rule, the author of the Sarasvati Vilasa considers analogous to the rule respecting the son born after partition—Sarasvati Vilasa, 240.

Quoting Brihaspati, he declares that "when a division is made in ignorance of the existence of one who has for a very long time been absent in a distant place, a share belongs even to him"—Sarasvati Vilasa, 241; that this share is not a full share but a half share (Sarasvati Vilasa 240), and that the right to claim belongs to one in the third, fifth or even seventh degree from the ancestor (242); and he cites another text which he attributes to Vishnu, though it is elsewhere attributed to Brihaspati—"The right to take a share shall belong to him who returns after a division, or who returns before it and has determined to take his own share, when he has proved his proprietorship in wealth in the possession of another person by direct or indirect evidence, not otherwise."

The same rules will, with slight variation, be found in the Smriti Chandrika, Chap. XIII, 21-26, and are apparently glanced at in Mitakshara, Chap. II, Sections 9, 13. It may of course be said that the interest vested by birth in the coparcener who went to a distant country and was not divested by a partition made in ignorance of his rights. The point of analogy between the case of the after-born son and the absent coparcener is the ignorance of a latent right, which prevents the absolute vesting of the shares on partition.

[74] The Hindu law did not take thought only for those members of the family who were competent to discharge sacrificial functions, and while it saw the wisdom of restraining the disqualified from dealing with the family wealth, it secured to them maintenance during disqualification and a restoration to their rights when that disqualification ceased.

In Gautama's institutes no mention is made of the persons disqualified except idiots and eunuchs. These must, it is said, be supported and it is added: "The male offspring of an idiot receives his father's share"—Chap. XXVIII, 42—33 (1).

Narada mentions, among those incapable of inheriting, persons afflicted with a chronic or an agonizing disease, idiots, mad men, and lame men; and adds these must be maintained by their family, but their sons take their respective shares—Chap. XIII, Section 22 (2).

Vishnu declares that "out-castes, eunuchs, persons incurably diseased or deficient in organs of sense or action, such as blind, deaf, dumb

(1) 2 Sacred Books of the East, p. 301. (2) Jolly's Translation, p. 97.

or insane persons or lepers, do not receive a share; they should be maintained by those who take the inheritance and their legitimate sons receive a share—Chap. XV, Sections 32—35 (1).

Yajnavalkya's texts are rendered as follows:—

"An impotent person, an outcaste and his issue, one lame, a mad man, an idiot, a blind man and a person afflicted with an incurable disease .... are to be maintained.

"But their blameless sons, whether legitimate or the offspring of a kinsman, are entitled to inherit. Their daughters should be maintained until they are provided with husbands. Their childless wives conducting themselves aright should be maintained until they are provided with husbands—" Sections 140-142 (2).

Nilakantha Bhatta, citing the text of Yajnavalkya regarding the disqualification of an impotent person, an outcaste, &c., observes: "If after division virility be restored or the other [disqualification] be cured by medicine or by other means, the person will then receive his share like a son born after partition," Chap. IV, Section XI, 13 (Mandlik, p. 99). In chap. IV he had discussed what share was taken by a son begotten after partition [75] by a man separated from his sons, and in accordance with other commentators he declared him solely entitled to his father's wealth and to have no claim on that of his brothers (Mandlik, p. 47). He adds that, if the father leave nothing but debts, the son begotten after partition is not bound to pay those debts without receiving a share from those formerly separated, which seems to imply that, under such circumstances, a share should be given to him. But he also declares the right of a son born immediately after a partition of a mother or step-mother or brother's wife, whose pregnancy was uncertain, and he cites the text quoted by the author of the Mitakshara, and from which the learned Judges of the Calcutta Court inferred reference was made to the case of the son begotten after partition. Quoting this text: "When the sons have been separated, one who is afterwards born of a woman equal in class shares the distribution," the commentator proceeds—"the partition is to be thus effected. Something is to be contributed by all the brothers or others (who had previously shared) until the posthumous son's share is equal to their own." And he concludes with a text of Vishnu, "Sons with whom the father has made a partition should give a share to the son born after partition." The text of Yajnavalkya is in truth an authority generally for the right of the son born after partition to participate in the inheritance. The words rendered in the Mitakshara "shares the distribution" may be rendered "is a share-taker."

The author of the Smriti Chandrika devotes a chapter (Ch. V) to the consideration of exclusion from inheritance. He commences by quoting a text of Devala: "When the father is dead, an impotent man, a leper, a mad man, an idiot, a blind man, an outcaste, the offspring of an outcaste and an ascetic are not competent to share the heritage." He observes that the words "when the father is dead" were used simply to indicate the period of partition, and that it is not to be supposed that the classes mentioned would be entitled to inheritance if a partition were made during the lifetime of the father; and in support of his opinion he refers to the text of Apastamba (3)—"He should, during his lifetime, divide his wealth equally amongst his sons, excepting the eunuch, the mad man, and the

(1) 7 Sacred Books of the East, p. 64.
(2) V. N. Mandlik, p. 223.
(3) 3 Sacred Books of the East, p. 132.

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outcaste"—Smriti Chandrika, chap. V, Section 3. He observes the text of Vishnu above quoted that by the adjective "incurable" being placed in the [76] text before the term "disease" alone, it would appear that persons afflicted with impotence, loss of limb (Qy. of power in a limb), &c., that are of a curable character are also disqualified for inheritance. Hence it must be understood that such as appear at the time of division to have been afflicted with impotence, &c., are excluded from their shares and that the exclusion is not confined to those only that are naturally, that is by birth, impotent or the like (Section 9). He declares, citing the text of Yajnavalkya above quoted, that all whom he has enumerated as incompetent to inherit are entitled to be maintained (Section 20). Adverting to a text of Devala he states that the qualified sons of disqualified persons, other than the son of the outcaste born after his father's degradation, take the shares of their parents in the wealth of their grandfather Sections 32-38, that disqualified sons of disqualified fathers must be maintained, and that unmarried daughters of such fathers must be maintained until marriage.

The following passages in the treatise on inheritance of the Sarasvati Vilasa illustrate the views entertained in Southern India as to the position of disqualified heirs. The author declares it to be the duty of sons who take the inheritance to provide for the marriage of daughters who were capable of marriage, although they might have some personal defect which in a male would be ground of disqualification. He then quotes the text of Manu in the following terms :—

"The impotent and outcaste are not sharers ; he who is born blind and he who is deaf : so also mad men, idiots and the dumb ; also those who are memberless—verse 148 (Foulkes, p. 31).

He proceeds to observe:—

"The meaning of this is ; 'Impotent persons and outcastes do not take shares. The two thus mentioned are to be nourished and cherished by their brothers who are eligible or by those who take the estate or by those who take the women.

"Those who are blind and those who are deaf, as to those thus coupled together, to them a share belongs certainly (*tayoh amzsh aste eva*) ; but though they are possessed of a share they are maintainable (*Kantai amsahyuktam api poshyam*) by reason of potentiality of marriage (*vivahabhavat*). By the use of the word (*tata*) 'so' the inner meaning is, deformed persons, if they are eligible for marriage, are share-takers and are to be nourished and cherished."

[77] Mad men, idiots and the dumb, because all these are mentioned in a group, they are only to be maintained. They are not share-takers. "If they are not eligible for marriage" is to be supplied. The expression "memberless" includes also females. And in a latter passage, commenting on the text of Apastamba "Let him divide the heritage among his sons in equal shares during his lifetime rejecting the impotent, the insane and the outcaste also," the commentator observes the word "also" includes those who are not eligible for marriage.

The right of the disqualified person to inherit, if he is cured of his disqualification, is likened to the right of a son born after partition.

The son born after partition may be a son begotten and born after partition in his father's lifetime. He may be a son begotten before partition and born after it in his father's lifetime. He may be a son begotten before partition and born after it when the partition has been made after the father's death.

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The common feature in all three cases is that he takes a share in the wealth. In the first case he takes the shares of his parents and acquisitions made after partition, or, if his father has reserved no share, he may call upon his brothers to make up a share to him. In the second and third cases he takes a share made up out of the shares of his brothers. In no case is he excluded altogether although the estate may have vested.

Analogy is intended to illustrate and not to limit. The analogy between the case of the disqualified person and the case of the after-born son is incomplete if the opinion of the Calcutta High Court be adopted, and the true meaning of the analogy appears to be explained by the author of the Sarasvati Vilasa. There are classes of disqualified persons who cannot be relieved of their disqualification and cannot transmit heritable blood; there are classes who, though they may be unable to be relieved of their disqualification, are capable of transmitting heritable blood. Their right to share in the family wealth is latent, or may come into existence at a future time as it does in the case of the after-born son. When it comes into existence, either in the person of the formerly disqualified heir or of his son, it is to be recognized. If capable of transmitting heritable blood, they are share-takers though not at the time share-enjoyers. If the son of a disqualified person is born in his grandfather's lifetime and his father dies, he [78] is at once entitled to be recognized as a member of the coparcenary; the only ground for depriving him of that right, if his father dies after the grandfather's death, is insistence on the rule against divesting an estate once vested.

That the rule prohibiting the divesting an estate once vested in a full owner cannot be laid down without exception, in respect of property governed by the law of the Mitakshara, appears to be established by admitted rules and by judicial decision.

A, who after his father's death becomes the sole and absolute owner of the wealth in which on his birth he had become a co-owner with his father, marries and has a son B born to him. His absolute estate is immediately converted into a coparcenary estate, and as other sons C and D are born, the interests of A and B are practically curtailed by the admission of new coparceners. It is true that while the estate remains coparcenary it is vested as a unit in all the male members, and that the diminution in the interest which each member would take on a partition is not strictly a divesting, thoughit must be remembered that the right vests in birth and not on partition. But let a partition be made in A's lifetime and let him reserve no share for himself and then let a son E be born to him who was not in the womb at the time of partition. We have authority for saying he would be entitled to require his brothers to contribute out of their allotments so that all might receive an equal portion of the family wealth. Again, let the eldest son B have gone to a foreign country and let his brothers in his absence make a partition of the family wealth: a share is not necessarily set part for him; the time may have elapsed when it may reasonably be believed he was dead. According to Hindu law, which does not in other cases ignore limitation, he may, after seven generations, return and claim to have a share or a half share made up to him out of his brothers' allotments.

Again, let C have died before partition, leaving a widow and having given her power to adopt which she does not exercise till after a partition has been made by B, D and E. When she exercises her power we apprehend that the adopted son would be entitled to call upon his uncles to make over to him a portion of the wealth equal to that which would

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have been taken by his father—*Sri Raghunadha* v. *Sri Brozo Kishore* (1). To the argu-[79] ment of Mr. Justice Norman that a widow by adopting a son caused a divesting of the estate, it was objected that she divested only her own estate. This no doubt is true where the estate has descended to her as the sole heir; but where the estate has descended to more than one widow jointly, an adoption by any one of them divests the estate of the others—*Rakmabai* v. *Radhabai* (2).

It may, however, be objected that in this case the estate had not vested in a full male owner, and that the learned Judges of the Bombay Court supported the adopted son's claim on the ground that the widow who had not made the adoption was bound to consent to it.

A case, however, arose in this presidency and went before the Judicial Committee, in which an estate was divested from a full male owner by reason of an adoption made by a widow.

An impartible zamindari, the property of two undivided brothers, was in the possession of the elder. On his death, leaving a widow and no male issue, the brother became entitled by survivorship to the entire estate. The widow made a valid adoption to her husband and it was held the adopted son was entitled to possession of the zamindari—*Sri Raghunada* v. *Sri Brozo Kishore*(1).

The existence of a valid power creates a potentiality of inheritance, which may be likened to that of a son in the womb. The estate is taken conditionally. It is difficult to distinguish these cases from that of the disqualified share-taker, who may afterwards become qualified to demand possession or who may beget a qualified son.

In our judgment, it must be held that the estate vests subject to its being divested on the recovery of the disqualified, or the birth of a qualified, heir. We, therefore, affirm the decree of the Court of the Subordinate Judge and dismiss the appeal with costs.

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9 M. 80=10 Ind. Jur. 100.

[80] APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Parker.

SUDINDRA (*Appellant*), *v.* BUDAN (*Respondent*).*
[31st August and 4th September, 1885.]

Civil Procedure Code, Section 244.

B obtained a decree on a settlement of accounts made with V as trustee of a mutt. V's title as trustee having subsequently been negatived by decree and the title of S declared, B applied to execute his decree against the property of the mutt and to have S substituted as party to the suit in place of V.

The application was rejected by the Munsif, but on appeal the Distict Judge made S a party and reserved for determination in execution proceedings the question whether the debt was contracted for the benefit of the mutt:

Held, that S was properly made a party, but that it was not open to him to raise this question in execution proceedings.

[**F.**, 29 M. 553 (555)=16 M.L.J. 415; **Rel.**, 14 C.L.J. 83=10 Ind. Cas. 532; 7 Ind. Cas. 11 (14); **Appr.**, 23 C. 639 (641); **R.**, 22 B. 475 (480); 23 B. 237 (242); 12 M. 503 (504); 18 M. 131 (132); 19 M. 419 (422); 17 M.L.J. 484 (485); 1 O.C. 49 (50); 7 O.C. 199 (200); **Not Appl.**, 33 M. 75 (77)=3 Ind. Cas. 737=19 M.L.J. 651=6 M. L.T. 199.]

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* Appeal against Order 69 of 1885.

(1) 3 I.A. 154=1 M. 69.

(2) 5 B.H.C.R.A.C. 181.

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THIS was an appeal against an order of J. W. Best, District Judge of South Canara, reversing an order of K. Krishna Rau, District Munsif of Udipi, passed in execution of the decree in suit 374 of 1882.

The facts appear sufficiently, for the purpose of this report, from the judgments of the High Court (HUTCHINS and PARKER, JJ.).

Ramachandra Rau Saheb, for appellant.

Srinivasa Rau, for respondent.

JUDGMENTS.

PARKER, J.—The plaintiff made a settlement of accounts with defendants Nos. 1 and 2 as representatives of the mutt in September 1882. He sued on that settlement of accounts in original suit 374 of 1882 and obtained a decree in October 1882. Defendants Nos. 1 and 2 had been declared trustees of the mutt as against defendant No. 3 by the District Court on 20th April 1881, but, at the time of the settlement of accounts and of the decree in suit 374, an appeal by defendant No. 3 was pending in the High Court.

That appeal (66 of 1881) was decided by the High Court in favor of defendant No. 3 in May 1883, defendant No. 1 being pronounced illegitimate and his consecration to the priesthood of [81] the mutt invalid. The plaintiff then substituted defendant No. 3 for defendants Nos. 1 and 2 as the representative of the mutt on the record, and applied for execution.

The District Munsif refused the application on the ground that the decree had been obtained against the wrong party, but the District Judge on appeal allowed defendant No. 3 to be taken as the representative of the mutt in succession to defendants Nos. 1 and 2, but reserved as open to be considered under Section 244, Code of Civil Procedure, the question whether the debt had been contracted for the service of the mutt, and remitted the application to be disposed of by the District Munsif after taking the necessary evidence.

Defendant No. 3 appeals against this order on the grounds that Section 244 does not apply, that he cannot be bound by a decree obtained against trespassers, and that plaintiff's decree in suit 374 was fraudulently and collusively obtained.

The plaintiff, in dealing with defendants Nos. 1 and 2, was dealing with persons who had been pronounced by a Court of competent jurisdiction as rightfully representing the mutt. He could not have settled his accounts with defendant No. 3 as representing the mutt, but, as he brought his suit *pendente lite* without including defendant No. 3, he of course got his decree subject to the risk of having it questioned by defendant No. 3 should he succeed in his litigation.

Defendant No. 3 complains that the decree is not binding upon him. It is however binding on the mutt against which it has been given, and his only interest in the matter is as the representative of the mutt.

The question referred by the Judge to the District Munsif really reopens the whole litigation in an execution proceeding. The case relied on *Arandadhi v. Natesha* (1) is not in point, as in that case the plaintiff had been impleaded as the legal representative during the pendency of the suit and had been wrongly directed by the District Munsif to bring a regular suit to try questions arising in execution.

(1) 5 M. 391.

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In a suit brought by Sebaits entrusted with the property of an idol to set aside decrees obtained against their predecessors in the Sebaitship, it was held by the Privy Council in *Prosunno* [82] *Kumari Debiya* v. *Golab Chand Baboo* (1) that, in the absence of proof of fraud and collusion, the judgments upon which these decrees were founded were not open to review, but were entitled to the force due to judgments of competent Courts. It was observed, however, that, before applying the principle of *res judicata* to judgments of this character, the Courts should take care to be satisfied that the decreos relied on are untainted by fraud or collusion, and that the necessary and proper issues were raised, tried and decided in the suits which led to them.

It appears, therefore, that it is open to defendant No. 3 to bring a suit to have plaintiff's decree set aside on the ground of fraud or collusion, in which suit the plaintiff would not necessarily be allowed to plead *res judicata*. The initiative, however, must rest with defendant No. 3 upon whom lies the *onus* of coming forward and taking steps to set aside a decree, which, as it stands, is binding upon the mutt represented by him. This is quite a different thing to allowing a new trial in execution proceedings, in which the plaintiff would certainly be entitled to plead that the cause was already heard and determined in his own favor.

We must set aside so much of the Judge's order as directs the District Munsif to determine in execution whether the debt was contracted for the service of the mutt, and must allow the plaintiff to execute the decree.

Defendant No. 3 (appellant) must pay plaintiff's (respondent's) costs in this appeal.

HUTCHINS, J.—I think the conclusion arrived at by my learned colleague is right.

The first question is whether the appellant is the representative of the former Tirthasami in the sense that he can be placed on the record and the decree executed as against him. Vijayendra Tirthasami had been for some time the *de facto* trustee and manager of the mutt before the appellant brought his suit. The decree of the District Court, dated February 1881, dismissed that suit and confirmed Vijayendra in his position as manager. Although there was an appeal pending, the respondent could not have settled his accounts with any one but Vijayendra, and though he might perhaps have joined appellant as a defendant in his suit, it is obvious that appellant, being out of possession and [83] without access to the accounts, would have been placed at a great disadvantage in contesting the debt; indeed it is doubtful if he, a mere claimant as he then was, could have effectually resisted a suit on a settlement of accounts by the recognized trustee. The decree was given expressly against the mutt, though as represented by Vijayendra. Now that the appellant has succeeded in establishing his preferential title, he takes Vijayendra's place as representative of the mutt against which the decree was passed. I think the Judge has rightly held that he ought to be substituted for Vijayendra on the record as guardian and representative of the mutt.

But I also agree with Mr. Justice Parker that in execution the appellant cannot dispute the correctness of the decree. Under Section 244

(1) 14 B.L.R. 450.

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the questions to be decided in execution are questions relating to the execution, discharge or satisfaction of the decree. A question whether the decree was obtained by fraud or collusion is not one which relates to the execution of the decree, but which affects its very subsistence and validity. Such a question can only be raised by a separate suit.

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9 M. 83=2 Weir 356.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan (Officiating Chief Justice), and Mr. Justice Muttusami Ayyar.

SUBBA *v.* THE QUEEN-EMPRESS.*
[18th and 23rd September and 2nd October, 1885.]

Criminal Procedure Code, Sections 286, 288—*Witnesses, Examination of—Irregularity.*

At a trial before a Sessions Court, the Attorney who appeared for the prisoner suggested to the Court that, to expedite the trial, certain depositions of witnesses for the prosecution, taken before the Magistrate, should be read, and that he should be allowed to cross-examine the witnesses thereupon; to this course the Government Prosecutor and the Court consented.

Held, that this procedure was illegal, but that, inasmuch as it had not occasioned a failure of justice, a new trial should not be granted.

[R., 8 Bom.L.R. 538 (541).]

THIS was an appeal from the sentence of J. W. Reid, Sessions Judge of Coimbatore, in case No. 33 of 1885.

[84] Mr. *Grant*, for the prisoner.

The Acting Government Pleader (Mr. *Powell*), for the Crown.

The facts necessary for the purpose of this report appear from the judgment of the Court (KERNAN, OFFG. C.J., and MUTTUSAMI AYYAR, J.).

JUDGMENT.

KERNAN, OFFG. C.J.—When this case was called on for hearing on the 18th of September, Mr. Grant, Counsel for the prisoner, called the attention of the Court to the unusual course adopted at the trial in reference to the direct evidence of some witnesses for the prosecution, but which course, he admitted, was adopted by the Sessions Judge on the suggestion of the Attorney who acted for the prisoner and conducted his defence. The course adopted is specified at page 23 of the printed paper after the cross-examination of the sixth witness for the prosecution.

"Arrangement regarding the examination of witnesses:—The Attorney for the defence suggests that, to expedite the trial, the deposition of each witness called by the prosecution given by the witness before the Magistrate should be read in evidence and he be permitted to cross-examine. The Government Prosecutor consents to this procedure. The Court consents to this procedure if, on each witness being called, there be nothing which appears to render this procedure unadvisable."

Accordingly the rest of the prosecution witnesses, eleven in number, when called, were affirmed. The deposition by each witness before the committing Magistrate in the presence of the prisoner was read. The witness stated he had made that deposition which was then marked, and the witness was cross-examined on it.

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* Criminal Appeal 404 of 1885.

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The Sessions Judge does not refer to any section of the Code authorizing him to assent to the arrangement. Section 286 provides that after jurors or assessors are chosen, and after the prosecutor opens his case as thereby directed, "the prosecutor shall then examine his witnesses." This examination of witnesses present, clearly means oral examination (except in cases where evidence is taken by commission or in any case where a witness is deaf or dumb). Such oral examination is therefore the general rule and has always been so.

It will be admitted that it is of the utmost importance that the rule should be followed in all cases where the witness is present [85] to be examined. If a witness before the Magistrate gave a true statement, he will probably, if intending to tell the truth, repeat the same statement without substantial difference at the trial. If, on the contrary, his statement before the Magistrate was not true in important particulars, he may not be able to repeat the same statement and may omit something important mentioned in his former evidence, or may deny on oral examination that he did make a particular statement before the Magistrate. The demeanour of the witness may be important for the assessors or Judge towards forming an opinion of his truth. It is not necessary to go into the many reasons why this rule should be followed. It is sufficient to say it is the rule, and is founded on reason and justice.

Is there then any legal ground in this case for departure from that rule?

Section 288 provides that the evidence of a witness, duly taken in the presence of the accused before the committing Magistrate, may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case. Section 288 is not an exception to the rule in Section 286, for it contemplates that the evidence taken in the presence of the Magistrate may, in the discretion of the Judge, if the witness is produced and *examined*, be treated as evidence. Section 288 does not dispense with the examination of the witness as directed by Section 286. The examination contemplated in Section 288 is examination of a witness in the ordinary way, *viz.*, orally, in reference to the case. The provision is *not* that the evidence before the Magistrate may be put in as the evidence of the witness *if* he is tendered for cross-examination, but it is that such evidence before the Magistrate may be treated as evidence in the case if the witness is *examined*; that is, examined as a witness, not if he is cross-examined or tendered for cross-examination.

The rule appears to contemplate that the witness shall first have been examined, and that after that his evidence before the Magistrate may be *treated* as evidence. It cannot be said that the mere examination of the witness as to his making the deposition before the Magistrate is "examination" within the meaning of Section 288. Section 288 provides for the exercise by the Sessions Judge of a discretion whether he will treat the evidence of a witness before the Magistrate as evidence in the case.

[86] Section 288 does not provide that the Judge may treat the evidence before the Magistrate of *all* the witnesses for the prosecution as evidence, if all the witnesses are produced and examined.

If such was the intention of the Legislature, different language would have been used. The language is, "the evidence of a witness," and no doubt this language would justify a Judge in a proper case in exercising his discretion in respect of any witness or witnesses. But it does not appear to contemplate (by admitting the evidence before the Magistrate of

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all witnesses or a number of them together) a complete change of the course and practice of law especially laid down in Section 286.

Discretion is to be exercised by the Judge. Apparently this is discretion in respect of some circumstances affecting the evidence of the witness under the consideration of the Judge.

It appears to apply very usefully when, upon hearing the oral evidence of a witness and looking at his deposition before the Magistrate, the Judge may think that a witness has told the truth before the Magistrate, and has not, either through design, mistake, or forgetfulness, told the real facts at the trial. Without this Section 288 a witness might be cross-examined as to his prior evidence before the trial, and such prior evidence might be relied on to discredit the witness; but his evidence before the Magistrate could not be treated as evidence in the case except under proper circumstances governed by Section 288.

In my judgment Section 288 applies to the evidence of cases of individual witnesses, each case treated by itself and under the circumstances of which the Judge in his discretion thinks it advisable for the ends of justice that the prior evidence should be treated as evidence, and I think it does not justify the order made by the Sessions Judge.

In this case I do not see that there were any circumstances on which the Judge had to exercise discretion as to any witness. The reason for the proposal of the Attorney is recorded, "to expedite the trial." The meaning of this proposal was that the course which the law required to be taken should not be taken because such course would take time. To yield to the proposal on that ground the Judge would not exercise a discretion, because he was bound to take the time required by law, but he would be acting contrary to law. To yield to the proposal because the Attorney [87] for the defence requested, and for the prosecution assented, would not be exercising discretion. He had no discretion to exercise on either of these grounds.

The District Judge says: "The Court consents to the procedure if, on each witness being called, there be nothing which renders the procedure unadvisable." That is to say, the Judge adopts as the general rule that the evidence *before the Magistrate* of each witness is treated as evidence, unless, in the case of any witness called, it appears advisable to examine the witness orally. In adopting that as the general rule, he reverses or *prima facie* refuses to act on the rule laid down in Section 286, and adopts as the general rule a procedure which can only be adopted when circumstances calling for exercise of discretion appear.

There is nothing on the record to show that any discretion was exercised by the District Judge in respect of admission of the evidence of any witness, or that any circumstances calling for exercise of discretion arose.

If the course adopted by the Judge had been taken on his own motion, or on the motion of the prosecutor, speaking for myself, I should feel it my duty to set aside the trial and conviction and direct a re-trial.

The question is whether we should take that course when the procedure by the Sessions Judge was adopted on the suggestion of the Attorney for the prisoner. We must assume that the Attorney acted in the interest of his client in making the application, though he put forward an inappropriate reason for it. Some of the most important witnesses against the prisoner were not examined orally on direct examination at the trial; their evidence before the Magistrate was put

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in; however, these witnesses were cross-examined for the prisoner. Considering the part taken by the prisoner's Attorney for his benefit, we are unable to say that the course pursued was an error which occasioned a failure of justice, Section 537, and we proceed with the appeal.

MUTTUSAMI AYYAR, J.—In this case the prisoner was arraigned on a charge of murder. The trial was held before the Judge aided by two assessors. The Public Prosecutor called seventeen witnesses for the prosecution. The first six witnesses gave their evidence *viva voce* in the regular way, and, at the conclusion of the examination of the sixth witness, the Attorney for the defence suggested that, [88] to expedite the trial, the deposition of each witness called for the prosecution, given by him before the Magistrate, should be read in evidence, and that he should be permitted to cross-examine. The Government Prosecutor consented to this procedure. The Judge agreed to adopt the procedure if, on each witness being called, there was nothing which appeared to render the procedure unadvisable. It was followed with reference to the other witnesses for the prosecution—7 to 17. The witnesses for the defence were examined in the ordinary mode. At the conclusion of the trial the assessors found the prisoner not guilty. The Judge, differing from them, found him guilty and sentenced him to death. The Judge has referred the sentence for confirmation to this Court, and the prisoner has also appealed. At the hearing before us, Mr. Grant, Counsel for the prisoner, called our attention to the special procedure which was adopted in the Court below, but did not object to it.

The question which we have to consider is whether the evidence recorded in the mode indicated above is such as we might act upon in deciding whether the sentence of death should be confirmed.

Section 286 directs that, after the assessors are chosen, the prosecutor shall open his case and shall then examine his witnesses. In the absence of a special direction, the examination contemplated must be taken to be an examination in the ordinary mode.

Section 288 confirms this view. It provides that the evidence of a witness, duly taken in the presence of the accused before the committing Magistrate, may, in the discretion of the Judge, *if such witness is produced and examined*, be treated as evidence in the case. This shows that the evidence recorded by the committing Magistrate is not ordinarily evidence in the case, and that the Judge may treat it as such, subject to the condition that the witness is produced and first examined by the Judge.

The intention was to confer a power on the Judge when he considers that the evidence given before the Magistrate is true and that the evidence given before him is not true, to treat the former as evidence in the cause, that is to say, as evidence on which he may found the conviction or acquittal of the prisoner. Unless the witness was first examined in the ordinary way there was no room for exercising any discretion. It follows then that the procedure adopted in this case is contrary to the Code of Criminal Procedure.

[89] The next question which requires to be considered is whether the depositions may be treated as evidence because the Attorney for the prisoner suggested that they might be so treated. The fact that the suggestion came from the prisoner's solicitor warrants the presumption that the prisoner was not prejudiced by their adoption. It is provided by Section 537 that no sentence passed by a Court of competent jurisdiction shall be reversed or altered on account of any irregularity in any

inquiry under this Code, unless such irregularity has occasioned a failure of justice. It has been held in cases in which evidence which is legally inadmissible has been received at the trial without objection, that the opposite party is not entitled to ask for a new trial on the ground that the Judge did not warn the Jury to place no reliance upon it. In the case before us the prisoner's Attorney suggested the course that has been taken. I also think, therefore, that the appeal may be proceeded with, and that the irregularity in the procedure followed at the trial may be treated as one by which the prisoner has not been prejudiced.

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9 M. 89=9 Ind. Jur. 419.

APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Parker.

GAJAPATHI (*Plaintiff*), *Appellant v.* ALAGIA AND OTHERS (*Defendants*), *Respondents.** [5th and 12th August, 1885.]

Vendor and purchaser—Fraudulent concealment by vendor of defect of title—Damages.

In 1881 a Hindu executed a sale-deed of a house in the Mufassal. The deed contained no covenant for title. The purchaser having been ejected from a portion of the house under a decree, of which the vendor was aware at the time of the sale, sued the vendor for damages. The Munsif decreed the claim on the ground that the vendor had fraudulently concealed the existence of the decree.

On appeal the District Judge reversed this decree, holding that as the purchaser had not insisted on a covenant for title, he must be held to have accepted all risks.

Held, that if there had been fraudulent concealment as alleged, the purchaser was entitled to damages.

[**R.**, U.B.R. (1892—1896) 615 (617) ; **Cons.**, 20 B. 522 (531).]

THIS was an appeal from the decree of J. H. Nelson, District Judge of Chingleput, reversing the decree of N. R. Narasimhayyar, District Munsif of Tiruvellur, in suit 709 of 1882.

[90] Messrs. *Michell* and *Ambrose*, for appellant.

Bhashyam Ayyangar and *Srirangacharyar*, for respondents.

The facts appear sufficiently, for the purpose of this report, from the judgment of the Court (HUTCHINS and PARKER, JJ.).

JUDGMENT.

The appellant (Gajapathi Sastri) purchased a house from the respondent No. 1 (Alagia Pillai) for Rupees 1,500 on the 16th September 1881. On the 26th December following he was ejected from half the house under a decree for partition, which had been obtained some eight years previously by a coparcener of respondent No. 1 against the father of respondent No. 1. The appellant alleges that at the time of his purchase the respondent No. 1 assured him that the house was his self-acquired property, and the title-deeds delivered to him by the respondent No. 1 (B and C) were conveyances in favour of respondent No. 1. The appellant's contention was that he was deceived by the fraudulent concealment by respondent No. 1 of the decree for partition, and is entitled to damages.

The pleas of respondent No. 1, so far as they are material, were—(1) that the appellant had notice of the decree, and received a copy of it along with the title-deeds ; (2) that the house is, in fact, his self-acquisition.

* Second Appeal 243 of 1885.

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Respondents Nos. 2 and 3 are the undivided brothers of No. 1 and deny their liability. The District Munsif found that the respondent No. 1 had been guilty of fraudulently concealing the existence of the decree for partition, and awarded the appellant 750 rupees as damages with proportionate costs. As regards respondents Nos. 2 and 3 he found that they had taken the benefit of the purchase-money, and that their property was liable, but not their persons.

The respondents appealed to the District Court, which held that the vendor was not bound in law to have mentioned the existence of the decree, and that the vendee, having omitted to insist on a covenant for title, must be taken to have accepted all risks.

The Munsif's decree rests on the following propositions, which, since the sale, have been enacted in the Transfer of Property Act, Section 55:—(1) The seller is bound to disclose to the buyer any material defect in the property, of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary [91] care discover; and the omission to make such disclosure is fraudulent; (2) the seller shall be deemed to contract with the buyer that the interest with the seller professes to transfer to the buyer subsists, and that he has power to transfer the same. It is contended for the appellant that these are no new principles enacted for the first time, but that the Transfer of Property Act has merely declared the law which already existed. On the other hand, the respondents assert that, although the appellant might have been entitled to set up the alleged concealment against a suit for specific performance, yet as the conveyance has been executed and there has been no covenant for title, the appellant is not entitled to any refund of the purchase-money.

It appears to us that, if the respondent No. 1 did conceal from the appellant the existence of the decree for partition, he was guilty of a fraudulent concealment, and is bound to refund half the purchase-money. In the absence of positive law, we are bound in this country to apply the principles of good conscience and equity. The strict doctrines of the English law relating to real property have never been applied to the mufassal, and it appears to us that it would be manifestly inequitable to attempt to apply them; but even under English law the vendee is bound to make compensation for a fraudulent concealment of a defect in the title or of an incumbrance. The same rules apply to incumbrances and defects in the title to an estate as to defects in the estate itself (Sugden, Vendors and Purchasers, p. 5, ed. xiii). Although a purchaser cannot ordinarily obtain relief against a vendor for any incumbrance or defect in the title to which his covenants do not extend, an exception is made to this rule in the case of a vendor or his agent suppressing an incumbrance or a defect in the title (*ibid.*). Even though the purchase-money has been paid and the conveyance executed by all the parties, yet if the defect do not appear on the face of the title-deeds and the vendor was aware of the defect, and concealed it from the purchaser, he is in every such case guilty of a fraud, and the purchaser may either bring an action on the case, or file his bill in equity for relief (*ibid.* p. 443).

The District Judge considered it "probable that the vendor, having continued always in undisturbed possession, entirely overlooked or disregarded the existence of the decree." This, however, is contrary to the case of respondent No. 1, for he said in his [92] written statement that, so far from overlooking or disregarding the decree, he had before sale given a copy thereof with the title-deeds to the appellant's next friend.

1885 AUG. 12. — APPELLATE CIVIL. — 9 M. 89 = 9 Ind. Jur. 419.

We observe, too, that the appellant was ousted by the respondent's coparcener within about three months after his purchase.

On being dispossessed, the appellant should have given his vendor notice of the proceedings. Although the respondent No. 1 has admitted that he has all along been aware of the decree for partition, and yet has never set up that the house was his self-acquisition, he may still be able to prove that he had in fact the interest which he assumed to transfer. There has been no direct issue upon this point, and notwithstanding his admissions, we think that the respondent No. 1 is entitled to show that the alleged defect in his title did not exist.

We will ask the Judge to return findings, within six weeks from the receipt of this order, on the following issues :—

1. Did the respondent No. 1 fraudulently conceal from the appellant the existence of the decree for partition ?

2. Is the house the self-acquisition of respondent No. 1 ?

3. To what damages, if any, is the appellant entitled, and against which of the respondents ?

Further evidence may be adduced by either side on the second issue only.

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9 M. 92.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

BRAHANNAYAKI (*Representative of Muttu, Defendant No. 2*) v. KRISHNA (*Plaintiff*), *Respondent.** [25th September, 1885.]

Civil Procedure Code, Section 43—Lis pendens.

N being mortgagee in possession of five-eighths of a pangu (share) of certain and —security for a debt of Rs. 400—hypothecated his rights to M in 1876. In 1878, K brought two-eighths of the said five-eighths from the mortgagor. In 1879, K sued N claiming possession of his two-eighths on payment of Rs. 400 and obtained a decree and possession thereof.

Pending this suit, N assigned his mortgage to M. M was aware of the suit, and K was aware of the assignment when he paid Rs. 400 into Court for N. In 1883, [93] K bought the remaining three-eighths from the mortgagor and sued N and M to recover possession thereof.

M pleaded that the suit was barred by Section 43 of the Code of Civil Procedure, inasmuch as K might have recovered the five-eighths in the suit against N :

Held, that this plea was bad. M also pleaded that he had a valid mortgage over three-eighths :

Held, by MUTTUSAMI AYYAR, J., that, if the assignment of the mortgage by N to M was a real transaction, this plea was good.

Per MUTTUSAMI AYYAR, J.—The doctrine of *lis pendens* can only be relied on as a protection of the plaintiff's right to property actually sought to be recovered in the suit.

[R., 12 M. 439 (441).]

THIS was an appeal from the decree of G. A. Parker, District Judge of Tanjore, dismissing an appeal from the decree of E. Muttusami Ayyar, Acting District Munsif of Patukota, in suit 698 of 1883.

The facts appear sufficiently, for the purpose of this report, from the judgments of the Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.).

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* Second Appeal 30 of 1885.

1885 SEP. 25.

APPELLATE CIVIL.

9 M. 92.

Bhashyam Ayyangar, for appellant.
Hon. *Rama Rau*, for respondent.

JUDGMENTS.

HUTCHINS, J.—In 1871 defendant No. 1 (Narayana Ayyan) obtained an assignment of five-eighths of a panga (share) by way of usufructuary mortgage to secure the repayment of Rs. 400, and was put in possession. In November and December 1876 he hypothecated the whole five-eighths to Muttu Ayyan, the appellant (defendant No. 2), as security for two sums of Rs. 50 and 99 respectively—exhibits I and II. Neither of these deeds was registered.

The original mortgagor died, leaving him surviving his brother Ramakrishna Ayyan and his mother Nacharammal. In 1878 both these sold to Krishna Ayyangar, the respondent (plaintiff), two out of the five-eighths mortgaged as aforesaid, together with other properties not in dispute, in consideration of Rs. 500, it being agreed that the purchaser should redeem the mortgage for Rs. 400 out of the purchase-money.

On 10th March 1879 the respondent instituted Original suit 83 against defendant No. 1 alone, claiming redemption of the two-eighths so sold to him upon payment of the 400 rupees. A decree was passed accordingly in October 1879, affirmed in appeal in June 1880, and duly executed in October 1881.

While that suit was pending, on the 28th June 1879, defendant No. 1 settled accounts with the appellant and executed in his favour **[94]** an assignment (III) of the original mortgage for Rs. 400, including the sums mentioned in exhibits I and II and a further sum of Rs. 163. The appellant was aware of the suit then pending, but did not apply to be made a party to it; nor did he resist the execution of the decree by the respondent, who paid the money into Court and obtained delivery of the two-eighth pangu then in the appellant's possession.

On the other hand, the respondent must have been aware of the assignment of the mortgage by defendent No. 1 to the appellant at least in June 1881, when he wrote the letter IV, some 15 months before he paid the money into Court for defendant No. 1. He has also attested the assignment deed III itself.

In September 1883 Ramakrishna Ayyan sold the remaining three-eighth pangu to the respondent for Rs. 500 (A), and also his right to recover the mesne profits which had accrued thereon since the payment of the mortgage money into Court (B). Thereupon the respondent demanded from defendant No. 1 the return of the residue of the five-eighths mortgaged to him and mesne profits, and eventually instituted the present suit against him and the appellant.

The appellant pleaded that Ramakrishna Ayyan was incompetent to inherit, as he was lame, and that there had been no *bona fide* sale. Both these pleas were overruled and are no longer insisted on. The appellant does not rely on the unregistered hypothecations, but on the third mortgage (III). As regards that the Judge held that, having been made during the pendency of Original suit 83, it was subject to the result of that suit; he further stated that he entertained a strong suspicion (as did also the Munsif) that it was not a *bona fide* transaction at all, but there is no positive finding to that effect.

The two points urged upon our consideration by the learned Pleader for the appellant are—(1) that the suit is barred by Section 43 of the Civil Procedure Code; (2) that the *lis pendens* affected the two-eighths only, the

three-eighths not being directly and specifically in question in Original suit 83; and that as to the three-eighths, the appellant cannot be affected by respondent's payment of the debt to the original mortgagee, after becoming aware of its transfer to the appellant.

The first contention is, in my opinion, unsound. It is true [95] that the assignee of the mortgagor's equity of redemption over a portion of the mortgaged property is generally entitled to redeem the whole and to hold the residue as against the mortgagor charged with its due proportion of the debt—*Asansab Ravuthan* v. *Vamana Rau* (1); and if he fails to claim the whole in his suit for redemption, he would probably not be at liberty to bring another suit to enforce the right which he might have put forward before. But the present suit is not based on any right to hold the residue of the property as against the mortgagor, nor on any right which the respondent had acquired at the time of the previous litigation. It seems to me clear that, after the respondent had paid off the entire debt, the mortgagor became entitled to eject the mortgagee from the residue of the property. Such a suit would not, in my opinion, have been barred under Section 43; and under the conveyance A the respondent has now acquired all the rights then vested in the mortgagor. I further observe that, in the particular circumstances, the respondent could not have laid claim to the three-eighths at all in the former suit; he had acquired a title to two-eighths only on the express condition that he should pay off the entire mortgage-debt.

Upon the second contention I am disposed to think that the appeal should be allowed, but it will not be necessary to determine this if the Judge intended to find that exhibit III did not represent a real *bona fide* transaction at all. I, therefore, propose that we should ask for a distinct finding on this point—to be submitted within a month and with reference to the evidence already recorded.

MUTTUSAMI AYYAR, J.—Two questions are raised for decision in this appeal. It is urged first that the suit is barred by Section 43 of the Code of Civil Procedure. The respondent instituted Original suit 83 of 1879 to recover two-eighth pangu which he purchased in 1878 and he instituted the present suit to recover three-eighth pangu which he bought in September 1883. The causes of action in the two suits are not only distinct but the second cause of action had also no existence at the date of the first suit. But it is urged that, when the respondent instituted the first suit, he might have recovered the three-eighth pangu in trust for his vendors on another ground, *viz*, the payment [96] which he then offered to make extinguished the charge which defendant No. 1 had on the whole five-eighth pangu. Assuming that he was entitled to do so, it does not follow that he could not enforce a right of purchase which he acquired subsequent to that suit. The original mortgagor might sue to recover three-eighth pangu after the respondent satisfied the mortgage of defendant No. 1 over five-eighth pangu, and the respondent, who stands in his place as purchaser in regard to the three-eighth pangu, is equally competent to maintain the suit. Section 43 is clearly no bar to the present suit. The next contention is that, as Original suit 83 was instituted to recover two-eighth pangu only, the assignment of the mortgage from defendant No. 1 to the appellant, whilst that suit was pending, could invalidate it against the respondent only to that extent and that the assignment must be upheld as against the three-eighth pangu now in suit if it is valid in other

(1) 2 M. 223.

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respects. This contention is, in my judgment, well-founded. The true rule as to *lis pendens* does not rest either on implied notice of everything deducible from, or appearing in, the suit, or on the constructive extension of parties so as to warrant the purchaser *pendente lite* being treated as if he was a party to the suit in every respect. But it consists, as stated in *Bellamy* v. *Sabine* (1), in that "*pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent." In that case the Lord Chancellor observed that the doctrine was not peculiar to Courts of Equity, and that in the old real actions the judgments bound the lands in suit notwithstanding any alienation by the defendant pending litigation. Lord Justice Turner also observed that the doctrine of *lis pendens* rests on this foundation; that it would plainly be impossible that any suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail, and that the plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or the decree and would be driven to commence his proceedings *de novo* subject again to be defeated by the same course of proceeding. According to the Roman law, after *litis contestatio*, the subject in dispute became litigious and passed into *quasi*-judicial custody and both parties came under an obligation not to withdraw it from the decision of the Judge—(Lord Mackenzie's Roman law, page **[97]** 329, and Tomkins' and Jenkins' Modern Roman Law, page 91). It follows then that *lis pendens* can only be relied on as protection of the plaintiff's right to the property actually sought to be recovered by the suit.

This being so, the further question arises whether apart from *lis pendens* an express notice or knowledge of the pending suit would make any difference. In the case before us, the Judge finds that the appellant was aware of the suit when he took the assignment and that he did not intervene until the decree was satisfied. If with the plaint the money due by the mortgagor were paid into Court, or if the respondent satisfied the decree before he became aware of the assignment, the question of actual knowledge might be material. But it appears that the appellant became aware of the assignment at all events in 1881, and before he satisfied the decree, whilst in the plaint in the suit of 1879 there was only an offer to pay the appellant's assignor the debt due to him. Thus, the payment made by the respondent, though it was in satisfaction of a decree, was made with the knowledge of the appellant's claim and could not be accepted against him as valid.

The Judge observes, however, that he suspects that the sub-mortgage in favour of the appellant was not a *bona fide* transaction but merely an attempt to evade the respondent's claim. It is, therefore, necessary before disposing of this second appeal to have a clear finding on the point. For these reasons I also think that the Judge must be asked to try the issue whether exhibit III represented a real transaction at all.

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(1) 1 De G. & J. 566.

9 M. 97=1 Weir 630

1885 OCT. 9.

APPELLATE CRIMINAL.

9 M. 97= 1 Weir 630.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

THE QUEEN-EMPRESS *v.* SESHAYA.* [9th October, 1885.]

Abkari Act, 1864, *Section* 26—*Police Act,* 1859, *Section* 1—*Police officer—Village police—Mohatad.*

The term "Police officer" used in Section 26 of the Abkari Act (Madras Act III of 1864) includes a mohatad or village policeman.

[98] THIS was a case referred for the orders of the High Court under Section 438 of the Code of Criminal Procedure by M. R. Weld, Acting District Magistrate of Kistna.

The case was stated as follows:—

"In this case the Magistrate convicted two accused persons under Section 22 of the Madras Abkari Act III of 1864 of being in possession of more than one imperial quart of liquor without a valid permit, and fined them Rs. 5 and As. 8 respectively. A peon under the Abkari renter gave information to the mohatad of the village, who apprehended the accused and seized the liquor. The Magistrate awarded half the fines (Rs. 2-12-0) to the renter's peon as informer and half to the mohatad of the village as apprehender and seizer under Section 26*b*.

"The Divisional Magistrate, the General Deputy Magistrate of the Vinukonda Division, has noted in the margin opposite the word 'mohatad' the words 'village police officer,' which seem to indicate that he considers that the Second-class Magistrate of Tumurukode is right, as a mohatad is a police officer within the meaning of the Abkari Act.

"The term 'police officer' is not defined in the Abkari Act.

"According to Section 1 of the Madras Police Act XXIV of 1859, the word 'police' includes village police.

"As I doubt whether it was the intention of the Legislature to give the powers conferred on police officers under the Abkari Act to village police, I refer the case for the orders of the High Court.

"If the term police officer in the Abkari Act does not include a village policeman, the mohatad's apprehension of the accused and seizure of the liquor was illegal, and the award made to him must be cancelled."

Counsel were not instructed.

JUDGMENT.

The judgment of the Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.) was delivered by

HUTCHINS, J.—It is conceded that a mohatad is a village policeman. It was not necessary in Act III of 1864 to define the term 'police officer'; the definition is contained in the General Police Act XXIV of 1859, which says that the "word 'police' shall include general and village police, kattubadies, kavalgars, and all other persons by whatever name known, who exercise any police functions throughout the Madras Presidency." There is [99] nothing to show that the Abkari Act intended to narrow this definition. Sections 24 and 24*a* confer certain powers to be exercised by officers in charge of a station only; 24*b* confers a power on the head of a village; 24*c* expressly requires all police officers and heads of villages to comply with

* Criminal Revision Case 531 of 1885.

1885 Oct. 9. — Appellate Criminal. — 9 M. 97= 1 Weir 630.

any lawful requisition of a renter on his agent. When therefore Section 26 speaks of any police officer, it must be taken to include an officer of the village police.

There is consequently no ground to disturb the order passed by the Second-class Magistrate.

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9 M. 99.

APPELLATE CIVIL.

Before Mr. Justice Kernan (Offig. Chief Justice), and Mr. Justice Parker.

LAKSHMANA (*Plaintiff*) v. KULLAMMA (*Defendant*).*
[23rd October, 1885,]

Married woman—Imprisonment for debt.

Married women against whom personal decrees for debt have been made are not exempt from arrest or imprisonment in execution of such decrees under the Code of Civil Procedure.

THIS was a case referred to the High Court under Section 617 of the Code of Civil Procedure by Ramasami Mudaliar, District Munsif of Bellary.

The case was stated as follows :—

" The suit was brought to recover a sum of money which the defendant contracted to pay to the plaintiff. It appears from the evidence of the plaintiff and his witnesses that the debt had been outstanding against the defendant and her husband, and that the defendant, when a demand was made against her husband, undertook to pay the debt herself.

" A decree was passed against the defendant Kullamma, who was arrested. She having failed to pay the decree amount, the plaintiff's vakil requested the Court to send her to jail ; but this application is opposed by the vakil for the judgment-debtor, who **[100]** argues that she cannot be sent to jail as she is a married woman and that she is only liable to the extent of her stridhanam.

" There are two decisions of the Bombay High Court on the subject, one of which is reported at pp. 124, 125, Vol. I of the Law Reports, Bombay Series, and the other at p. 318 of Vol. IV of the same reports, which decide that any contract entered into by a Hindu married woman jointly with her husband or separately for herself must, in the absence of special circumstances, be considered as entered into with reference to her stridhanam and that execution will only issue against her person.

" In Section 550 of Mayne's Hindu Law, however, Mr. Mayne says, 'when the suit is founded upon a purely personal debt or contract of her own, the decree can only be against her *own person* and property.'

" There seem to be no Madras cases deciding the point, and I respectfully refer the question of the liability of the person of a married woman for a debt contracted by her, under the circumstances above mentioned, for the opinion of the Honorable the Judges of the High Court, and further request instructions as to whether I am to try the question, whether the defendant has got any stridhanam, in case their Lordships should hold that her person is not liable."

Counsel were not instructed.

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* Referred Case 12 of 1885.

1885 OCT. 23. — APPELLATE CIVIL. — 9 M. 99.

JUDGMENT.

The judgment of the Court (KERNAN, Offg. C.J., and PARKER, J.) was delivered by

KERNAN, Offg. C. J.—We do not know any provision of law which exempts married women, against whom personal decrees have been made, from arrest or from being sent into civil custody in default of payment of the amount decreed. Section 640, Civil Procedure Code, provides that nothing contained therein shall exempt women (not bound to attend Court) from arrest in execution.

There is no exemption of married women from arrest in the Code, nor is there any proviso that a married woman shall only be liable to arrest to the extent of any stridhanam she may have, or that such stridhanam alone should be made available. The defendant may be sent in custody to the Debtors' Jail.

It is not necessary that we should make any further observation. The Munsif will follow the provisions of the Code.

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9 M. 101=1 Weir 183.

[101] APPELLATE CRIMINAL.

Before Mr. Justice Hutchins.

THE QUEEN-EMPRESS *v.* PILLALA.* [6th October, 1885.]

Civil Procedure Code, Section 258—*Satisfaction of decree not certified—Fraudulent execution—Charge under Penal Code, Section* 210—*Proof of payment.*

Section 258 of the Code of Civil Procedure which provides that no payment or adjustment of a decree not certified to the Court, as in the said section provided, shall be recognized by any Court, does not debar a Criminal Court from recognizing such payment where the decree-holder is charged with fraudulently executing a satisfied decree.

[R., 16 C.L.J. 174 (179)=16 C.W.N. 923 (927)=13 Ind. Cas. 63; U.B.R. (1897—1901) 278 Cr.]

THIS was a case referred to the High Court under Section 438 of the Code of Criminal Procedure by J. R. Daniel, Sessions Judge of Ganjam.

The facts are set out in the judgment of the Court.

The accused did not appear.

JUDGMENT.

HUTCHINS, J.—The accused was charged under Section 209 of the Indian Penal Code with having made a false claim in a Court of Justice. Apparently the offence, if any, was one falling under Section 210 rather than 209, in that he fraudulently caused, or attempted to cause, a decree to be executed after it had been satisfied.

But the Principal Assistant Magistrate (H. W. Foster) acquitted the accused on the ground that he was precluded by Section 258 of the Civil Procedure Code from recognizing in any way the alleged payment made in satisfaction of the decree, because it had not been duly certified. The Civil Procedure Code was enacted to regulate the procedure of the Courts of Civil Judicature, and unless the contrary clearly appears, nothing therein contained should be deemed to affect the Criminal Courts. I am clearly of opinion that the acquittal on the ground stated is wrong, and I therefore set it aside and direct the Principal Assistant Magistrate to dispose of the case on the merits.

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* Criminal Revision Case 368 of 1885.

1885
MAY 29.

APPELLATE CRIMINAL.

9 M. 102 = 2 Weir 315.

9 M. 102 = 2 Weir 315.

[102] APPELLATE CRIMINAL.

Before Mr. Justice Brandt.

PITCHI *v.* ANKAPPA.* [27th and 29th May, 1885.]

Criminal Procedure Code, Section 250 – *Frivolous complaint – Compensation* - *Cattle Trespass Act, Ch. V – Complaint of illegal seizure not complaint of offence.*

The illegal seizure of cattle under colour of the Cattle Trespass Act, 1871, not having been constituted an offence under that Act or otherwise, an award of compensation under Section 250 of the Code of Criminal Procedure to the accused on such complaint is illegal.

[**F.**, 13 C. 304 (305) ; 23 C. 248 (249) ; **R.**, 18 A. 353 (354) = 16 A.W.N. 98.]

THIS was a case referred for the orders of the High Court by J. Grose, District Magistrate of Nellore.

The facts appear sufficiently for the purpose of this report from the judgment of the Court.

Counsel were not instructed.

JUDGMENT.

BRANDT, J.—The illegal seizure of cattle under the colour of Act I of 1871 is not constituted an offence under that Act or otherwise, and the Third-class Magistrate was not empowered under Section 250 of the Criminal Procedure Code to award compensation for what he held to be a frivolous and vexatious complaint in respect of such alleged illegal seizure, for, as the District Magistrate observes, that section deals with the acquittal or discharge of an accused person in a case instituted upon "complaint" which, for the purposes of the Code, is defined as " an allegation * * * made * * * that some person has committed an offence." The order of the Magistate, in so far as it awards compensation, must then be, and it is, set aside and the money awarded must be refunded.

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9 M. 103.

[103] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

APPASAMI AND ANOTHER (*Defendants Nos.* 1 *and* 2), *Appellants v.* MANIKAM (*Representative of Ramanadhan, Plaintiff*), *Respondent.*† [13th July and 28th September, 1885.]

Civil Procedure Code, Section 375—*Agreement to compromise appeal – Petition to Court by both parties – Consent withdrawn before decree by one party – Remedy – Transfer of Property Act, Section* 59 – *Charge on immoveable property—Oral agreement as to terms of compromise of suit – Terms of compromise in dispute – Proof by affidavit and further evidence.*

The parties to an appeal, in which an issue had been remitted for trial to the Lower Court, having presented a petition to the Lower Court stating that the suit had been compromised and the terms of the compromise, requested the Lower Court to move the Appellate Court to pass a decree in accordance with such terms. Before a decree was passed, one of the parties objected to the compromise being accepted :

* Criminal Revision Case 271 of 1885.

† Appeal 43 of 1884.

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Held, that it was open to the Court, such objection notwithstanding, to pass a decree in accordance with the agreement—*Ruttonsey Lalji* v. *Pooribai* (I.L.R., 7 Bom., 304) and *Karuppan* v. *Ramasami* (I.L.R., 8 Mad., 482) followed; *Hara Sundari Debi* v. *Kumar Dukhinessur Malia* (I.L.R., 11 Cal. 250) observed upon.

An oral agreement by the parties to a suit that a decree be passed, creating a charge on immoveable property above Rs. 100 in value, is not rendered inoperative by Section 59 of the Transfer of Property Act.

The parties to an appeal applied to the Court to pass a decree in accordance with the terms of a compromise, and, before decree was passed, one of the parties objected to such decree being passed on the ground that certain conditions precedent to be performed by the other party had not been performed. The Court (this being denied by the other party) called for affidavits in proof of the terms of the agreement of compromise, and, these being found not to be sufficiently conclusive, directed the Lower Court to take evidence on the point.

[**F.**, 18 M. 410 (414) = 5 M.L.J. 145; **Appr.**, 16 B. 202 (209); 20 B. 304 (308); 5 O.C. 49 (53); **R.**, 24 C. 908 (928) (**F.B.**) = 1 C.W.N 597; 23 M. 101 (105); 12 C.P.L.R. 56 (58); 12 M.L.J. 360 (362); **D.**, 9 O.C. 365 (369).]

APPEAL from the decree of C. Purushotam Ayyar, Acting Subordinate Judge of Madura (West) in Suit 8 of 1883.

The facts and arguments in this case, so far as they are material for the purpose of this report, appear from the judgment of the Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.)

Bhashyam Ayyangar and *Kalianarama Ayyar*, for appellants.

Hon. *Subramanya Ayyar* and *Rangacharyar*, for respondent.

JUDGMENT.

[104] The respondent (Ramanadhan Chetti) sought to recover from the appellants (Appasami Nayak, zamindar of Kannivadi and three others) Rs. 16,000 with interest due upon a hypothecation bond which the appellants executed in his favour on the 6th June 1882. He alleged that, out of Rs. 16.000, Rs. 1,000 was a debt acknowledged to be due upon a settlement of accounts in respect of monies advanced by him from time to time, and Rs. 15,000 the purchase money due uuder a deed of sale executed by him at the request of the appellants in the names of first appellant's wives. At the trial it was elicited that one Narayana Ayyar, from whom title to the land sold was derived, had a minor son, and that on his behalf a guardian objected to the sale. The Court of First Instance however decreed the claim, but on appeal this Court considered that the hypothecation was valid to the extent of Rs. 1,000, but in regard to the claim for Rs. 15,000 referred for trial the issue—Whether with reference to the minor's interest, if any, in the property agreed to be sold, the respondent could make out such a title as a purchaser would be bound to accept.

During the trial of this issue in the Subordinate Court, on the 23rd February 1885, the appellants and the respondent presented a petition of compromise, reporting that the respondent's claim was amicably adjusted. The petition stated the terms on which the parties had agreed to compromise the suit and requested the Subordinate Court to move this Court to pass a decree in accordance with those terms.

In pursuance of this request the petition was forwarded to this Court, but when the appeal came on for disposal, the appellants presented Civil Miscellaneous Petition No. 226 of 1885, objecting to the compromise being accepted. It was alleged that the compromise was entered into subject to certain conditions, that it was agreed that those conditions should be fulfilled prior to the acceptance of the compromise by this Court, that they were not inserted in the razinama because they were not connected

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with the subject-matter of the suit, and that the respondent failed to fulfil those conditions.

The conditions were :—

(a) The plaintiff should satisfy the claims of the minor son of the said Narayana Ayyar and convey the property in [105] dispute to defendants free of any defects in the plaintiff's title to the said property and that he should execute a registered sale-deed.

(b) The plaintiff should be responsible for any expenses to be incurred in getting the possession of the property transferred to petitioners.

(c) That plaintiff should lend Rs. 60,000 to petitioners and get a bond executed by them for the said sum, payable in six years with interest at 12 per cent. per annum and with a bonus of Rs. 7½ per 100.

On the other hand the respondent contended that the petition of compromise contained the whole agreement, that it was absolute and unconditional, and that as a special consideration for entering into the compromise, a sum of Rs. 4,500 was paid to the zamindar.

The agreement set out in the petition of compromise is that Rs. 19,000 was to be paid with interest at 12 per cent. per annum in certain instalments in full satisfaction of the respondent's claim, that on default being made in respect of any instalment, the instalment overdue together with interest was to be recovered by taking out execution on the twenty-five villages mentioned in the compromise and their income, and that no execution was to be taken out against any other property or against the body of either of the judgment-debtors.

Before deciding whether the razinama should be accepted, it was considered desirable to call for affidavits. Affidavits having been filed on both sides, the appeal comes on again for disposal. It is urged by the learned pleader for the appellants (1) that we are not at liberty to accept the compromise unless the parties thereto continue to consent to it until we pass a decree in its terms ; (2) that the agreement is not valid nor enforceable by suit ; and (3) that the affidavits filed for the appellants show that the agreement made in adjustment of the suit was conditional.

As to the first contention, our decision must depend on the construction which we ought to place on Section 375 of Act XIV of 1882. It is in these terms : "If a suit be adjusted wholly or in part by *any lawful agreement*, or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the suit, such agreement, compromise or satisfaction shall be recorded, and the Court shall pass a decree in accordance therewith so far as it relates to the suit, and such decree shall be final, [106] so far as relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction." The appeal before us was adjusted by an agreement, and the only questions open to us under Section 375 are whether there was an agreement in adjustment of the appeal, and whether that agreement was lawful. If we are satisfied on both these points, the section seems to us to leave no alternative but that of recording the agreement and passing a decree in accordance with it so far as it relates to the suit. Apart from this section, the parties to a suit are at liberty to ask for a decree by consent, and if the contention for the appellants, *viz.*, that the parties should continue in agreement up to the date of moving for

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the decree, were to prevail, there was no necessity for inserting in the Code Section 375. We, accordingly, held *Karuppan* v. *Ramasami* (1) that when it was shown that a suit had been adjusted by a lawful agreement, a decree must be passed in accordance with it and concurred in the decision of the Bombay High Court in *Ruttonsey Lalji* v. *Pooribai* (2).

Our attention is now drawn to the decision of the Calcutta High Court in *Hara Sundari Debi* v. *Kumara Dakhinessur Malia* (3). In that case the plaintiff claimed relief as against defendant No. 1, who was in possession of the property in dispute. Both those parties receded from the compromise and prayed that the suit might be dealt with on its merits, but defendant No. 2, who was not in possession, insisted on the agreement being enforced. It appears further that the agreement provided for partitioning the property in suit among the members of the family, whilst defendant No. 1 had no beneficial interest in it, but held it as a trustee for certain idol. Thus, there were other grounds on which the decree made under Section 375 was set aside and the observation made as to the construction of Section 375 could only be regarded as an *obiter dictum.* It was no doubt observed that Section 375 is but an amendment and modification of the corresponding Section of Act VIII of 1859, and that it did not apply to a case in which the parties concerned, or some of them, declined to carry out the agreement before judgment was recorded, and in support of this view, it was pointed out that Section 375 allowed no appeal while, if a suit were brought for the specific performance of the agreement **[107]** and a decree obtained, an appeal would lie. In answer to this remark it may be observed that under Section 523 an order may be made specifically enforcing an agreement to refer a matter in dispute to arbitration and there too no appeal is allowed. The question whether or not a compromise had been agreed to, may have been considered so simple that the decision upon it might well be made conclusive, especially as the parties entering into such an agreement *pendente lite* would have distinct notice that there would be no appeal.

We are still inclined to agree with the Bombay High Court that Section 375 was intended to meet cases in which the parties having once agreed subsequently fall out and that it was framed to provide an alternative and a more expeditious remedy than a suit for specific performance. It will be observed that the section puts an adjustment by agreement upon the same footing as a satisfaction in whole or in part by payment. It does not seem open to question that a payment after suit brought would entitle the defendant to a decree *pro tanto,* and if he can rely on a payment, he is equally entitled to rely on an agreement or compromise.

As to the English cases referred to on the subject—*Pryer* v. *Gribble* (4), *Scully* v. *Lord Dundonald* (5), *Holt* v. *Jesse* (6)—their result, as stated by the Bombay High Court, is that a simple agreement for the compromise of a suit may be enforced by an interlocutory application in the pending suit, but when the agreement goes beyond the subject-matter of the suit, the remedy is a bill for specific performance. This rule is extended by Section 375 and the agreement is rendered enforceable even when it goes beyond the subject-matter of the suit in so far as it relates to it. This is only in accordance with the observation made in some of the English decisions. The intention of the Legislature, therefore, appears to us to have been to carry out, as far as possible, the policy of avoiding a

(1) 8 M. 482. (2) 7 B. 304. (3) 11 C. 250.
(4) L.R. 10 Ch. App. 534. (5) L.R. 8 Ch. D. 658. (6) L.R. 3 Ch. D. 177.

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multiplicity of suits and of determining all matters in controversy in a pending suit in that suit—(See also the Judicature Act, Section 24, Clause 7). For these reasons we still adhere to the opinion we expressed in *Karuppan* v. *Ramasami* (1).

It has however been urged by the appellants' pleader that the agreement recited in the petition of compromise was oral and that [108] it is invalid and ineffectual to create a charge on the village, under Section 59 of Act IV of 1882. The intention of the parties to the agreement was, not that it should of itself create a charge on immoveable property, but only that it should create a right to obtain a decree by way of specific performance. It is in the nature of a preliminary contract intended to be perfected by another document, and we do not consider that it is inoperative under Act IV of 1882.

As to the third contention, the case made out by the affidavits for the respondent is that, on the 7th February, he arranged with the persons acting for the minor that Rs. 4,500 should be paid for his benefit, that the minor's claim should be renounced, that until the renunciation was communicated to the Court, the money should be deposited with one Sitarama Ayyar, and that after it was so communicated, it should be paid by Sitarama Ayyar, to those who acted for the minor; that on the 12th February the zamindar invited the respondent to arrange the whole matter with him, and offered to settle with the minor about his claim, and to put in a razinama admitting the whole of the respondent's claim in the suit and making the zamindari security for it if the respondent paid him Rs. 4,500 and agreed to receive the decree amount in five instalments, and further undertook not to proceed in execution against his body or that of his son: that the respondent accepted the offer, that the razinama was then drawn up and signed by the zemindar and his son, that on the 23rd February it was brought to Madura, by Appasami Nayak, that it was then presented to the Subordinate Court by the pleaders of both parties and acknowledged by them, and that thereupon Rs. 4,500 was paid to Appasami Nayak for the zamindar. Manikam Chetti, the respondent, has filed an affidavit to that effect, and it is supported by the affidavits of Balagurunatha Pillai, Alagappa Chetty and Perya Karuppan Chetti. It is supported further by the affidavit of Annamalai Chetti in regard to the remittance of Rs. 4,500 from Madras to Madura, and by the letters which then passed between Annamalai Chetti and the respondent.

On the other hand, the appellants' case, as sought to be established by four affidavits, is that the terms of the compromise were settled with the zamindar's manager, that the respondent agreed to fulfil the conditions referred to before the razinama was accepted by the High Court, that on the 25th February the respondent [109] took a list of immoveable property to be attached to the razinama and asked the zamindar to sign it, that the zamindar refused to do so until the conditions were fulfilled, and that the respondent since promised to get Rs. 60,000 from Rayapuram within one week when called upon to lend that sum according to his agreement. Appasami Nayak, to whom the respondent states that he paid Rs. 4,500, produces a letter, dated 26th February, purporting to be signed by the respondent. It states that Rs. 64,500 will be paid through the Village Magistrate of Rayapuram and that Rs. 322½ are sent for the stamp. This letter is denied by the respondent. As to the affidavits filed for the appellants, it must be observed that some of them speak

(1) 8 M. 482.

of a proposal that the zamindar and his son should execute a bond for Rs. 19,000. This is inconsistent with the terms of the razinama. Again, Appasami Nayak does not distinctly deny that he received Rs. 4,500 for the zamindar as a consideration for entering into the compromise. Nor is the statement that a list of immoveable property to be attached to the razinama was taken to the zamindar for his signature on the 25th February at all likely, for the razinama was presented to the Subordinate Court on the 23rd February, and the twenty-five villages seem to comprise the whole zamindari. Further, it is in the highest degree improbable that if the appellants' contention is *bona fide*, the petition of compromise would have been presented for transmission to this Court with the prayer that a decree should be passed in accordance with it. The story that the alleged conditions were not inserted in the razinama because they were not connected with the subject-matter of the suit is also unlikely, for the present contention is that the razinama was intended to have no legal force at all until these conditions were fulfilled.

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Judging from the affidavits the appellants' contention does not appear to be free from suspicion, but the affidavits are not sufficiently conclusive. As our decision under Section 375 will be final, we consider it proper to direct the Subordinate Judge to take evidence and forward it to this Court with his opinion. He will also ascertain on which villages the debt was agreed to be a charge. We, accordingly, order the Subordinate Judge to try upon such evidence as the parties to this appeal may adduce, what was the real agreement made between the parties to this appeal in view to its adjustment.

[110] And the Subordinate Judge is directed to submit his finding and the evidence thereon on the foregoing issue.

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9 M. 110.

APPELLATE CIVIL.

Before Mr. Justice Hutchins and Mr. Justice Parker.

LOGAN (*President of the Municipal Commission, Tellicherry*), (*Plaintiff*) v. KUNJI (*Defendant*).*
[30th and 31st October, 1885.]

Small Cause Court Act, XI of 1865—*Jurisdiction—Suit to recover Municipal Tax.*

A suit to recover a Municipal tax is not cognizable by a Small Cause Court constituted under Act XI of 1865.

THIS was a case referred to the High Court under Section 617 of the Code of Civil Procedure by the Acting District Judge of Tellicherry (L. Moore) at the request of the District Munsif of Tellicherry.

The case was stated by the District Munsif as follows:—

"The Municipal Commissioners of Tellicherry, through their President, the Collector of Malabar, sued the defendant for the recovery of Rs. 14-1-4, being the Municipal tax due by the defendant for the years 1882, 1883 and 1884. The amount was due by the defendant as the tax on houses and lands owned by the defendant within the Municipality.

"The defendant admits the legality of the assessment and his liability to pay the rate, but only pleads payment of the same. The defendant

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* Referred Case 11 of 1885.

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further pleads that the suit by the Municipality is not one cognizable by the Court of Small Causes.

"The Municipal Commissioners brought two other suits in the Subordinate Court of Tellicherry on its Small Cause side—suits 361 of 1885 and 357 of 1885. The Subordinate Judge, Mr. Kunjan Menon, held that the suits were not in the nature of those cognizable by Courts of Small Causes, and ordered the plaints to be returned. The plaint in 361 of 1885 was presented in my Court on the Regular Side on the 22nd June 1885. I was of opinion [111] that the suit was one clearly falling under Section 6 of Act XI of 1865. I held that I had no jurisdiction under Section 12 of Act XI of 1865, and ordered the plaint to be returned. The plaintiff, the President of the Municipality, appealed against my order, and the District Judge, Mr. Moore, reversed my order, holding that the suit was not cognizable by a Small Cause Court. The other plaint 357 of 1885 returned by the Subordinate Judge is also re-presented in this Court. Though I am still of opinion that a suit by the Municipality for the arrears of tax is one cognizable by the Small Cause Courts, I feel considerable doubt about the soundness of my view, as my appellate authority differed from me.

"I think there is an implied contract between the citizens, the rate-payers, and the Municipal Commissioners. The latter contracted to see to the general conservancy and sanitation, &c., of the towns, and the former undertook to supply the latter with the necessary funds. The liability is cast on the rate-payers by legislative enactments. Section 161 of Act IV of 1884 recognized the privilege of the Municipality to enforce the liabilities of the tax-payers by suits before competent Civil Courts. Suits to enforce the liability under implied or constructive contracts are cognizable by Courts of Small Causes—see cases reported in 5 M.H.C.R. 200; 12 W.R. 372; 10 Bom. H.C.R. 21; I.L.R. 4 Bom. 321; I.L.R. 3 All. 67; I.L.R. 4 All. 19; I.L.R. 4 All. 6; I.L.R. 2 All. 671; I.L.R. 8 Mad. 277.

"Suits to recover tax illegally levied by the Municipality, &c., are cognizable by Courts of Small Causes—I.L.R. 1 Mad. 159 and 14 W.R. 248.

"The case in I.L.R. 2 Mad. 146, relied on by the Subordinate Judge and the District Judge, in my humble opinion, does not apply, for the right of the inamdar to collect the proprietary dues referred to therein was not admitted there, and consequently the liability of the defendants was not determined.

"I had many suits by the Municipality against the tax-payers on the Small Cause side of the Munsif's jurisdiction. I disposed of them as Small Cause suits. The suit 396 of 1885 is still pending in my Court on the Small Cause side, and there will be many more cases of such nature. I, therefore, deem it necessary to refer the question for the decision of the Honorable the Judges of the High Court.

"The question is one of general importance.

[112] "The question, I respectfully beg to submit, for the decision of the Honorable the Judges of the High Court, is 'whether a suit by the Municipal Commissioners for the recovery of Municipal tax is one cognizable by Courts of Small Causes.'"

Counsel were not instructed.

JUDGMENT.

The judgment of the Court (HUTCHINS and PARKER, JJ.) was delivered by

HUTCHINS, J.—The question submitted is whether a suit by Municipal Commissioners for the recovery of Municipal tax is one cognizable by a Court of Small Causes. The tax is not one due under a contract, either express or implied or constructive, as supposed by the District Munsif, but the obligation to pay is imposed on the rate-payer by law; nor is the suit one for damages. We are of opinion that the suit is not cognizable by a Court of Small Causes.

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9 M. 112.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

SETHU (*Appellant*) *v.* VENKATRAMA (*Respondent*).*
[2nd and 3rd October, 1885.]

Civil Procedure Code, Sections 5, 360, *Ch. XX—Small Cause Court, Mufassal—Insolvency jurisdiction.*

Under Section 360 of the Code of Civil Procedure, the Local Government cannot invest a Mufassal Small Cause Court with the insolvency jurisdiction conferred on District Courts by Ch. XX of the said Code, inasmuch as by reason of Section 5, Ch. XX does not extend to such Courts of Small Causes.

THIS was an appeal against an order of G. Ramasami Ayyar, District Munsif of Kumbakonam, passed in a Small Cause suit declaring one Venkatrama Ayyan, a judgment-debtor, an insolvent, and appointing a receiver under Ch. XX of the Code of Civil Procedure.

The appeal was made by Sethu Ammal, creditor No. 6, who opposed the application on the ground that the insolvent had been guilty of bad faith.

[113] This creditor also presented a petition under Section 622 of the Code against the same order on the ground that the Court had no jurisdiction to pass it.

Bhashyam Ayyangar, for appellant.

Krishna Rau, for respondent.

The facts necessary for the purpose of this report appear from the judgment of the Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.).

JUDGMENT.

The Government Notification of 17th October 1877 invested the Courts of all Subordinate Judges and District Munsifs in this Presidency with the powers conferred on District Courts by Chapter XX of the Code of Civil Procedure. In the Proceedings of Government which directed the publication of this Notification (17th October 1877, No. 2473), there are some expressions tending to show that they may have had in view insolvent applications by parties arrested under any warrant of a District Munsif, whether in a regular suit or under a decree passed on the Small Cause side of his Court, but this is not very clear and the Notification itself does not say so. We must assume that the Government only intended to exercise such powers as it possessed; and if the Notification went beyond those powers, it would, to that extent, be *ultra vires* and of no legal effect whatever.

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* Appeal against Order 94 of 1885.

1885 OCT. 3. — APPELLATE CIVIL. — 9 M. 112.

Section 360 of the Code then in force empowered the Local Government to invest any Court other than a District Court with the powers conferred on District Courts by the preceding sections of Chapter XX, and provided that any Court so invested may entertain an application to be declared an insolvent by any person arrested under its decrees. But Section 5 of the same Code declares that no section or chapter of the Code, other than those mentioned in the second schedule, shall extend to Courts of Small Causes. Neither Section 360 nor any part of Chapter XX of the Code was then to be found in Schedule II, and it follows that on the date of the Notification the Government had no authority to apply Section 360 to Courts of Small Causes or under that section to confer any powers on such Courts. Subordinate Judges and District Munsifs are Courts of Small Causes constituted under Act XI of 1865 when exercising their Small Cause jurisdiction.

We hold therefore that the Government did not intend by their Notification to give authority to a District Munsif in the exercise of his Small Cause jurisdiction to entertain petitions of insolvency; and also that, if they did intend to confer such **[114]** authority, their Notification is to that extent invalid. The latter conclusion has been arrived at by the High Court of Bombay on the same ground. *Lallu Ganesh* v. *Ranchhod Kahandas.* (1)

The proceedings of the District Munsif in this case must be quashed as without jurisdiction. The judgment-debtor must pay the costs of this appeal as well as the appellant's costs in the Munsif's Court. The revision petition, No. 180 of 1885, will be simply dismissed. The order of the District Munsif was one made under Section 351, and therefore an appeal lay to this Court under Section 588, Clause (17) and 589. In such an appeal it is open to the appellant to take the preliminary objection that the Court had no jurisdiction to make such an order.

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9 M. 114.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

CHENCHAMMA (*Defendant No.* 4), *Appellant v.* SUBBAYA AND ANOTHER (*Plaintiff and Defendant No.* 3), *Respondents.**
[14th and 22nd September, 1885.]

Hindu Law—Illatam custom—Status of son-in-law—Co-parcenary—Survivorship—Proof of special custom.

Although an illatam son-in-law and a son adopted into the same family may live in commensality, neither they nor their descendants can, in the absence of proof of custom, be treated as Hindu co-parceners having the right of survivorship.

[R., 17 M. 48 (49); 3 M.L.J. 239.]

THIS was an appeal from the decree of L. A. Campbell, District Judge of Nellore, confirming the decree of V. Rama Ayyar, Acting District Munsif of Ongole, in suit 571 of 1882.

The facts necessary for the purpose of this report appear from the judgments of the Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.).

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* Second Appeal 994 of 1884.

(1) 2 B. 641.

Mr. *Wedderburn*, for appellant.
Ramachandra Rau Sahib, for respondents.

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APPELLATE
CIVIL.

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JUDGMENTS.

MUTTUSAMI AYYAR, J.—Both parties to this second appeal derive their claim from one Nalluri Ramanappa. He gave his daughter Mangamma in marriage to one Ala Ayanna and admitted [115] him into his family as illatam son-in-law. Subsequently, Ramanappa adopted one Venkataramanappa. Ala Ayanna had by Mangamma a son named Ramudu and a daughter named Sitamma. Venkataramanappa married Sitamma and had by her a son named Punnaya and a daughter named Chenchamma who is the appellant before us. On Mangamma's death, Ala Ayanna married another wife, and, in consequence of this marriage, a disagreement arose between him and the other members of the family. Thereupon, Ala Ayanna left the family with his second wife, but, before doing so, he renounced his illatam rights, with the consent of the rest of the family, in favour of his son Ramudu. It is found by the Judge that Ramudu, the son of Ayanna, enjoyed, in commensality with Venkataramanappa, the property belonging to the family, and to this finding no objection has been taken. Ramudu and Venkataramanappa died first, and Punnaya, Venkataramanappa's son, died afterwards. Sitaramudu, the son of Ramudu, and Chenchamma, the sister of Punnaya, and Ala Ayanna are the only members of the family now alive. In October 1881, the respondent No. 1 purchased the land in suit, which admittedly belonged to the family, from the guardian of Sitaramudu, who is a minor, and brought this suit to recover possession. Both the Lower Courts upheld the purchase and considered that, as the sole surviving male co-parcener of the joint family, the minor Sitaramudu was entitled to the whole property. It was urged in second appeal that Ayanna having separated from his father-in-law, he could not assign his illatam right to his son, and that, even if it was assignable, Venkataramanappa's adoption put an end to that right. When the second appeal came on for disposal on the 9th March last, three issues were referred for trial with reference to the customary law, *viz.*, (1) What share is taken by an illatam son-in-law in competition with an adopted son? (2) Whether there can be union between an adopted son and an illatam son-in-law or the son of an illatam son-in-law? (3) Whether an illatam son-in-law inherits from an adopted son's son. But neither of the parties produced evidence of usage in regard to any of these points.

Ala Ayanna was taken as illatam son-in-law before Venkataramanappa was adopted, and, in the absence of evidence in regard to any special usage, I do not see my way to hold that the adoption could divest any interest which had already vested in Ayanna. Nor do I see any ground for the contention that it was not [116] competent to Ayanna to renounce his illatam right in favour of his own son. It is found by the District Munsif that this renunciation was made with the consent of the rest of the family, and the Judge has adopted the finding. As an illatam son-in-law and the natural son share equally, we see no reason to think that the adopted son could be in a better position than the natural son. The question which remains to be considered is whether, when an illatam son-in-law and an adopted son live in commensality, they are to be regarded as co-parceners. The right of survivorship is an incident under Hindu Law of co-parcenary, which is only possible between the male descendants of a common paternal ancestor, and in the absence of proof that it is also

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an incident of the illatam custom, we are unable to treat it as such, for the custom derogates from the Hindu law, and the extent to which it does so must be proved like any other fact when it is disputed. We can, therefore, only uphold the sale to respondent No. 1 to the extent of Sitaramudu's share, and decree to him possession of a moiety of the land in suit. I would modify the decrees of the Lower Courts accordingly and award proportionate costs.

HUTCHINS, J.—The sole question is whether the lands in dispute belonged to the appellant, Chenchamma, or to the minor Sitaramudu, whose rights have been assigned to the plaintiff, now respondent No. 1, or to both, and if to both, in what shares.

On the findings, we must take it that the minor has succeeded to all the illatam rights of his grandfather, Ala Ayanna. Both the Courts below agree that Ala Ayanna's evidence may be implicitly relied on: he became affiliated to Nalluri Ramanappa as illatam, and his account is that some time after Ramanappa's death, his wife, the daughter of Ramanappa, having died and he having married again, he was asked by Chenchamma's father—an adopted son of Ramanappa with whom till then he had lived in commensality—to relinquish his illatam right to his son Ramudu and quit the Nalluri family, and that he did so accordingly. It follows that, whatever right to the property in dispute was formerly vested in Ala Ayanna, was transferred to Ramudu with the assent of Chenchamma's father, and Chenchamma herself cannot question the validity of the transfer. The rights of Ramudu have now passed to his son, the minor Sitaramudu, by inheritance. So it has been found, and even if the finding is not indisputable as it seems to [117] me to be, it has become conclusive by appellant's failure to object to it.

Thus all the illatam rights formerly vested in Ayanna are now vested in his grandson Sitaramudu, and we have next to see in what those rights consisted with regard to this particular property. After Ramanappa's death, when his illatam son-in-law and his adopted son lived in commensality, were they Hindu co-parceners to all intents and for all purposes, or joint tenants, or tenants in common? Whatever their true relation, it must be remembered that Ramudu took exactly his father's place by mutual consent and the very same relation, and no other, was continued between Chenchamma's father and Ramudu.

The learned Counsel for the appellant maintains that they were not co-parceners, but joint tenants. His contention is that Ramudu having predeceased Chenchamma's brother, Punnaya, the former's rights did not pass to his son by representation, as would have been the case if they had been true co-parceners, but to the other joint tenant, Punnaya, by survivorship. He overlooked, however, that the original co-parcenary or joint tenancy was between Ramudu and Punnaya's father, and that no interest could have passed even to Punnaya himself except upon the principle that the son represents the father. Yet there is no doubt that the interest of Punnaya's father devolved on Punnaya himself and the patta was for many years in his name.

But I see no reason why Ramudu and Punnaya's father should be supposed to have been joint tenants, and, in the absence of evidence on the third issue remitted, I do not see my way to holding that they were fully co-parceners. It seems to me that they were merely tenants in common if they were not co-parceners, and *Hanumantamma* v. *Rami*

Reddi (1) is an authority for saying that Ramudu's share was a full moiety. It follows that the minor's share, now conveyed to respondent No. 1, was also a moiety and the decree in his favour must be modified accordingly.

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Although the respondent No. 1 brought his suit in ejectment and has only proved a title to partition, there is no reason why the decree should not run as for the delivery up of half the land. I agree that the costs should be borne throughout proportionately.

9 M. 118.

[118] APPELLATE CIVIL.

Before Mr. Justice Kernan, Offg. Chief Justice, and Mr. Justice Hutchins.

ERAJABI (*Plaintiff*) v. MAYAN (*Defendant*).*
[11th and 29th September, 1885].

Village Munsif—Civil Jurisdiction—Limitation of suits—Regulation IV of 1816, *Section* 5—*Limitation Act,* 1877, *Section* 6.

Section 5 of Regulation IV of 1816, which prohibits Village Munsifs from trying any suit cognizable by them, unless (*inter alia*) the cause of action has arisen within twelve years previous to the institution of such suit, does not exclude such suits from the operation of the Indian Limitation Act, 1877.

[R., 20 B. 543 (547); 11 M. 220 (229) (F.B.)=12 Ind. Jur. 49; 4 N.L.R. 184 (186).]

THIS was a case referred to the High Court by W. P. Austin, District Judge of North Malabar.

The facts appear sufficiently for the purpose of this report from the judgment of the Court (KERNAN, Officiating C.J., and HUTCHINS, J.).

Counsel were not instructed.

JUDGMENT.

HUTCHINS, J.—In this case the plaintiff sued before the Village Munsif of Mylanjenmom to recover a sum of money due on a bond. According to the contract, and as stated in the plaint itself, the money accrued due and the cause of action arose on the 14th November 1880.

The time limited for such a suit by Article 66, Schedule II of the Limitation Act, is three years from that date, but the plaint was not presented till on or after 17th November 1884. Without noticing that the suit was barred, the Village Munsif took cognizance of it and has passed a decree in the plaintiff's favour.

It is possible that the Village Munsif was under the impression that the Limitation Act of 1877 did not apply to his Court, and that under Clause 2, Section 5 of Regulation IV of 1816, he was only bound to see that the cause of action had arisen within twelve years before suit but he does not appear to have considered the point. Section 4 of the Limitation Act plainly says that every suit [119] instituted after the prescribed period shall be dismissed. The language is quite general, and the Act applies to the whole of British India and to all suits instituted therein. It is expressly provided in the Code of Civil Procedure, Section 6, that nothing therein shall affect the jurisdiction or procedure of Village Munsifs, but no such exception is to be found in the Limitation Act.

* Civil Revision Case 158 of 1885.
(1) 4 M. 272.

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It is true that Section 6 of the Limitation Act provides that nothing contained in the Act shall alter or affect a period specially prescribed by any special or local law for any suit, appeal or application, but Section 5, Regulation IV of 1816, can hardly be said to prescribe a period of limitation for any particular suit or class of suits. It simply prohibits a Village Munsif from taking cognizance of any suit, whatever its nature, unless the cause of action has arisen within twelve years. It would be unreasonable to suppose that, when prescribing different periods of limitation for different suits according to their nature, the Legislature intended to preserve a rule of limitation applicable only to a particular class of tribunals, and which would entirely defeat their object in regard to all suits which might be brought before such tribunals.

We set aside the decree passed by the Village Munsif, direct him to exercise his jurisdiction and consider the question of limitation, and whether there are any circumstances sufficient under the law to save the claim from limitation.

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9 M. 119.

APPELLATE CIVIL.

Before Mr. Justice Kernan, Offg. Chief Justice, Mr. Justice Hutchins, and Mr. Justice Parker.

KADAR (*Defendant No.* 2), *Appellant v.* ISMAIL (*Plaintiff*), *Respondent.**
[9th September and 20th October, 1885.]

Registration Act, Section 50—*Registered purchaser—Notice of prior contract to sell.*

The words "former part of this section" used in the second paragraph of Section 50 of the Registration Act, 1877, refer to the whole preceding portion of the section :

Held, therefore, that a registered purchaser of land, who bought with notice of a prior unregistered contract by his vendor to convey to the plaintiff, could not resist a suit for specific performance on the plea of registration.

[F., 13 M. 324 (331); R., 12 M. 148 (165) (F.B.) ; 12 M. 505 (508).]

[120] THIS was an appeal from the decree of C. Ramachandra Ayyar, Subordinate Judge of Madura (East), confirming the decree of A. Kuppusami Ayyangar, Acting Additional Munsif of Madura, in suit 126 of 1884.

The plaintiff, Kaji Shaik Kaji Ismail, sued (1) Husain Bibi, (2) Kadar Padsha, and (3) Muhammad Ali to obtain a decree cancelling the sale-deed of a house executed by defendants Nos. 1 and 3 to defendant No. 2, and directing defendant No. 1 to execute a conveyance of the said house to plaintiff and for possession thereof.

The plaintiff alleged that, on the 17th May 1883, defendant No. 1 agreed to sell the house to him for Rs. 275, from which sum certain prior debts were to be deducted, and that in breach of such agreement she, jointly with defendant No. 3, fraudulently sold the house to defendant No. 2.

Defendant No. 1 denied the alleged agreement. Defendant No. 2 pleaded that he was not aware of the agreement and that he had obtained a registered sale-deed on the 21st of May 1883 and paid Rs. 250 to his vendors.

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* Second Appeal 221 of 1885.

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Defendant No. 3 was *ex parte*.

The Munsif found that defendant No. 1 had orally agreed to sell the house to the plaintiff on the 17th or 18th May, that defendant No. 2 had notice of this agreement, that his purchase was not *bona fide*, and that plaintiff was entitled to specific performance of the agreement alleged in the plaint with costs against defendant No. 1.

Defendant No. 2 appealed.

On appeal, the Subordinate Judge found that the agreement by defendant No. 1 to sell had been reduced into writing in the form of a receipt (exhibit F), which was as follows:—

"Receipt granted by Husain Bibi Ammal, widow of Shaik Imam Sahib, living in the East Masi Street, Madura, to Shaik Ismail Sahib of the same place on the 17th May 1883.

"As it has been settled that I should sell you the house belonging to me for Rs. 275, and as I have agreed to sell the same by receiving the balance after deducting from the said amount the sum due to you and to your younger paternal uncle, Kadumiya Sahib, I have received in advance one rupee for my subsistence and three rupees for purchasing stamp paper. For this sum of four rupees you are to hold this as a receipt."

[121] The Subordinate Judge held that, under Section 27, Clause (*b*) of the Specific Relief Act, the plaintiff was entitled to specific performance of this agreement.

Defendant No. 2 appealed.

Bhashyam Ayyangar, for appellant.—But for Sections 48 and 50 of the Registration Act, a purchaser with notice would take subject to the prior contract; but this Court has held that the equitable doctrine of notice has been rejected in earlier Registration Acts—*Nallappa* v. *Ibram* (1), *Madar* v. *Subbarayalu* (2), *Muthanna* v. *Alibeg* (3). By reviewing the history of legislation as to registration, the Court was led to the conclusion that notice was immaterial. The Specific Relief Act, Section 27, does not affect the Registration Act (see Section 4).

(KERNAN, OFFG. C.J.—The Registration Act gives the registered document priority. The Specific Relief Act then introduces a new element by which the registered holder with notice is bound; that does not affect the operation of the Registration Act).

The Specific Relief Act was passed first, but the Registration Act came into operation first.

Section 91 of the Trusts Act, which makes a purchaser with notice a trustee in certain cases is similarly limited in its operation, and the Transfer of Property Act also saves the operation of the Registration Act [Section 2, Clause (*a*).]

Further, Section 50 of the Registration Act refers firstly to documents which take priority if registered, and secondly to all unregistered documents with two exceptions (decree or order) which are postponed to the former. Then from the privileged class of registered documents, certain documents are excepted, *viz*., those mentioned in clauses (*e*), (*f*), (*g*), (*h*), (*i*) of Section 17 and (*a*), (*b*) of Section 18. If the agreement here, which comes under Clause (*h*) of Section 17 had been registered, it could have gained no priority.

If the words "former part of the section" mean all that proceeds, then there is redundancy, for decrees and orders have already been dealt

(1) 5 M. 73. (2) 6 M. 88. (3) 6 M. 174.

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with, and decrees or orders are the documents referred to in Clause (*i*) of Section 17.

But there will be no redundancy if "the former part of this section" is taken to refer to the enacting portion only of the preceding paragraph.

[122] The reason for the existence of the second paragraph of Section 50 may be that, if the provisions were included in the first paragraph, the sentence would be too long and complicated.

Hon. *Subramanya Ayyar*, for respondent.—The contention is not that a document required to be registered shall operate if unregistered, but that although defendant has a registered document plaintiff is entitled to specific relief. A fraudulent conveyance, though valid between parties, may be invalid against a third party—Transfer of Property Act, Section 53.

A registered document can be impeached on the ground of fraud; why not on the ground of notice?

Section 50 of the Registration Act does not deal with fraud. If the Specific Relief Act intended that relief should not be granted against a registered purchaser, it would have said so.

Former decisions of this Court only deal with rival conveyances. In construing Section 50, there is a difficulty in either case. Former part does not mean half a sentence.

Title by specific performance is acquired by the decree, therefore on getting this decree plaintiff is not affected by the registered conveyance.

The only person protected by Section 53 of the Transfer of Property Act is a *bona fide* purchaser.

Bhashyam Ayyangar.—Section 53 does not apply; plaintiff is not a prior transferee.

The Court (KERNAN, Offg. C.J., HUTCHINS and PARKER, JJ.) delivered the following

JUDGMENTS.

KERNAN, Offg. C. J.—The facts of this case are sufficiently stated in the judgments of my learned colleagues.

Reading Section 50 of the Registration Act, I am not able to see that there is any ambiguity, patent or latent, in the language used, and we must take the meaning to be that which is plainly expressed thereby, reading it exactly as it is printed.

It is argued that the word "former" mentioned in the second paragraph refers not to the whole of the antecedent sentence, but only to that *portion* of it which mentions the documents that are declared to have priority by registration, that is, as far as the figure 18. My answer to this argument is that the second paragraph refers in express terms to the whole of the former part of the section. The words used are "nothing in the former part of this section, &c.;" the words "portion of" the former part are not used.

[123] It is contended that the use of the words "former part" show that a contrast has been drawn by the section between a former part and a latter part (not expressed), and that the former part refers to the documents which have priority by registration, and that the latter part (not expressed but understood) refers to unregistered documents. This is, as it appears to me, a forced construction.

Is not the contrast satisfied by treating the first paragraph, which is a complete sentence, as the "former part" of the section and the second paragraph as the latter part?

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Moreover, the construction would seem to be impossible, as the whole of the first paragraph of the section is only one sentence, which must be read in its entirety before the sentence and the meaning of it is complete.

It is sought to make the true reading thus, after 18 insert the words, "not being, cases, &c."

But why should the language of the Act be thus displaced or transposed and new language introduced? It does not appear necessary to do so in order to effectuate any intention of the Legislature apparent from what is the plain meaning of the language used.

It is true that if the words "former part" of this section apply to the whole section, then the documents mentioned in the second paragraph, though not registered, will not have their priority affected by registered deeds. It is contended that this was not the meaning of the Legislature.

The argument, I believe, is that, if all the documents referred to in the second paragraph of the section are omitted, there will be many unregistered documents not affected by registered documents.

I cannot see this is any answer, as the question is what is the meaning of the Legislature expressed by the language they have used. The plain meaning of the section appears to be the words "former part" of this section refer to so much of the section as consists of the one sentence as the first paragraph. The draftsman has adopted this very form of expression "former part of this section" in the proviso to Section 17. Giving the language of the second paragraph its ordinary construction, it means that those documents mentioned in it are to be considered as if the former part of the section had not been enacted.

[124] The language, "nothing in the former part, &c.," shows that it was intended that these excepted documents were not to be treated as unregistered documents for the purpose of the former part of that section.

The result of the construction contended for by the appellant would be that all the excepted documents, *viz.*, "leases, &c.," mentioned in the second paragraph of Section 50, would be placed under a double disadvantage—

(1) they would not be allowed any priority by registration over unregistered documents, and

(2) they should be registered or they would be postponed to registered documents. Practically these documents would be "compulsorily registrable" in order to save them from registered documents.

In the present case and such like cases there would be the further disadvantage that the plaintiff would have to register his contract which is excepted under (*h*), and would have to register his conveyance also when he got it.

As the Court is now unanimous in deciding that the defendant's registered conveyance does not take priority of the contract sued on by the plaintiff under the Registration Act, it is clear that Section 4 of the Specific Relief Act does not apply, and that a decree was rightly made for the plaintiff by the lower Courts.

I would dismiss the appeal with costs.

HUTCHINS, J.—The respondent brought this suit to enforce the specific performance of an agreement to sell a house. Defendant No. 1 was the former owner. Defendant No. 2 and appellant is a purchaser, with notice of the agreement in respondent's favour under a registered

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conveyance. The appellant may or may not have obtained possession; the respondent certainly did not.

In both the Courts below a decree has been passed in the respondent's favour. The Munsif treated the agreement as an oral agreement, but upheld it upon the authority of *Chunder Nath Roy* v. *Bhoyrub Chunder Surma Roy* (1). The Subordinate Judge found that it had been reduced to writing in the receipt F, upon which an agreement stamp and penalty have been levied accordingly. He pointed out, in his judgment, that the Calcutta cases [and the same remark applies to the Bombay cases—including **[125]** *Waman Ramchandra* v. *Dhondiba Krishnaji* (2)] proceed upon the notion that notice of a prior unregistered document prevents the holder of subsequent conveyance from setting it up, although he may have had it registered, and that is a doctrine which this Court has more than once declined to follow—I.L.R., 5 Mad. 73; 6 Mad. 88; 8 Mad. 167; S.A. 221 of 1885. He held, however, that the agreement F fell under the exceptional clause (*h*) in Section 17 of the Registration Act, 1877, and was, therefore, exempted from the operation of Section 50 of that Act by its second clause.

Assuming the agreement to be an oral one, it has not been accompanied or followed by delivery of possession, and, under Section 48 of the Registration Act, it must give place to the registered instrument, unless there is anything in the respondent's argument that agreements for sale are to be specifically performed without reference to the Registration Act.

We all consider, however, that the Subordinate Judge was right in holding that the agreement had been reduced to writing. The only object of inserting in the receipt all the terms of the agreement—the settlement of the price and the consequent promise to sell on payment of the balance, deducting two prior charges which the respondent already held on the premises—was to have those terms embodied in a writing. The Subordinate Judge was therefore right in treating the respondent as the holder of an unregistered document, creating a right to obtain a conveyance for a sum exceeding Rs. 100, and falling under Clause (*h*) of Section 17 of the Registration Act.

The next question is whether he was also right in treating this document as wholly exempted from Section 50 of the Act by its second clause. The contention, on the other side, is that this second clause, exempting certain documents from the former part of this section, refers not to the whole of the first clause of the section, but only to the former of the two categories of documents with which the first clause deals. The argument is ingenious and there is certainly much to be said in its favour.

Section 50 of the Act of 1871 consisted simply of one clause and an explanation. The second clause is an interpolation and in drawing it the draftsman may have regarded the old existing clause **[126]** as *the section* and have referred to the former part of the clause as the former part of this section. The first clause is even now the only enacting part of this section; the second clause merely contains a proviso or exception. Grammatically "the former part of this section" seems hardly equivalent to "the whole preceding part."

Former and latter are expressions usually applied to distinguish the first and second of two things, both mentioned just before. Although the first clause is not divided into two distinct sentences, still it does mention and set in apposition two things, and the words "the former part

(1) 10 C. 250. (2) 4 B. 126.

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of this section" would have a reasonable meaning if they are restricted to the former of these two things. There is, first, a class of documents to which priority is given, and next another class which are postponed to the first class. The first class comprises all documents mentioned in clauses (*a*), (*b*), (*c*), (*d*) of Section 17 or in clauses (*a*) and (*b*) of Section 18. Now, if we turn to Section 17 we find that (*b*) and (*c*) are general clauses, which but for a special exemption would include all the documents mentioned in the second clause of Section 50. It seems natural that the same Act, which in Section 17 had said that the clauses (*b*) and (*c*) should not include these exempted documents, should maintain just that very exemption and no other in Section 50. In other words, read as the appellant would read it, the second clause of Section 50 merely repeats the very same qualifications which had been enacted before in Section 17. The very documents which Section 17 declares must be registered are given priority, but certain other documents which come under the general terms of Section 17, but are exceptionally declared to be optionally registrable, are also excepted from the general words which would have otherwise given them priority.

The second category of documents, *viz.*, those which are postponed to the first class, comprises "*every* unregistered document relating to the same property and not being a decree or order." Now, if the exemption made in the second clause is to apply to this class as well as to the first class of documents, the second class is cut down from a category including every document not duly registered with the solitary exception of a decree or order to one with many exceptions, *viz.*, first, a decree or order expressly excepted in the first paragraph and next, those numerous documents exempted by the second paragraph ; and one of these exempted documents is itself a decree or order [clause (*i*)], so that a decree or order is needlessly repeated.

[127] The interpretation for which the appellant contends gives some meaning to the words "the former part of this section" and also to the words, "not being a decree or order" and it also appears to be in harmony with the whole enactment According to it no document would obtain priority to a decree or order merely by virtue of its registration—the reasonableness of this is obvious enough—but every other unregistered document, except a decree or order, would be liable to be defeated by certain favoured documents, the registration of which had been made compulsory under Section 17 or was to be specially encouraged. It seems difficult to conjecture why the holder of a registered conveyance should be allowed to defeat one who has long been in possession under an unregistered conveyance, but not one who has merely obtained an agreement to sell.

It has, however, now been pointed out to me by the learned Chief Justice that the very same words "the former part of this section" occur in the proviso to Section 17, where they certainly refer to all the preceding part of the section. The same meaning should therefore be given to them, if possible, in all parts of the same enactment, and I therefore now agree that the appellant's contention is unsound, and that the view taken by the Subordinate Judge is right. The whole foundation of the appellant's agrument therefore fails, and it becomes unnecessary to consider the further question whether, if his registered document gave him priority under Section 50, the Specific Relief Act would take it away. Upon that point I will not now say more than that I cannot agree that the competition would be between the decree, to which, it is assumed, the respondent is

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entitled, and the appellant's document. It seems to me that the competition must be between the two documents, for the very question before us is whether respondent is entitled to a decree on his contract, or whether that contract has been defeated and made of no effect by the registered conveyance.

PARKER, J.—The suit is to compel specific performance of the agreement of defendant No. 1 to sell plaintiff the plaint house. The agreement was reduced to writing on 17th May 1883 (exhibit F), but the document was not registered. Four days later—on 21st May 1883—defendant No. 1, together with defendant No. 3, executed a deed of sale in favour of defendant No. 2 (exhibit I), which deed was registered. It does not appear [128] that defendant No. 2 got possession. On 5th August the plaintiff brought this suit to compel specific performance as regards defendant No. 1, to cancel the sale-deed given by her to defendant No. 2, and for possession of the house.

The District Munsif found that defendant No. 3 had no title in the house, and that the sale-deed of defendant No. 2, though registered, was not *bona fide*. The Subordinate Judge generally concurred in that opinion and both the Courts decreed in plaintiff's favour.

In second appeal it is urged that the Courts below have not followed the decisions in the Presidency with regard to the doctrine of notice; and that under Section 50 of the Registration Act the registered conveyance of defendant No. 2 will take priority over plaintiff's unregistered agreement.

It is not denied that Section 27, Clause (*b*) of the Specific Relief Act, gives plaintiff a general right to enforce specific performance as against defendant No. 2, but it is urged that the provisions of the Specific Relief Act are controlled by the operation given to documents by the Registration Act (Section 4, Clause (*c*) of the Specific Relief Act), and that the rulings of this Court in *Nallappa* v. *Ibram* (1) and *Madar* v. *Subbarayalu* (2) gives absolute priority to a subsequent registered deed, notwithstanding notice.

Section 50 of the Registration Act consists of two sentences and an explanation. The second sentence runs as follows: "Nothing in the former part of this section applies to leases exempted under the proviso to Section 17, or to the documents mentioned in clauses (*e*)—(*l*) of the same section." According to the ordinary meaning of language the words "former part of the section" would appear to refer to the first sentence of the section, in which case it would follow that an agreement under Section 17, Clause (*b*), would gain no advantage by being registered, and be under no disability from non-registration. But the learned pleader for the appellant has put forward a very ingenious argument to the effect that the words "former part of this section" do not refer to the whole of the preceding sentence, but to the words "every document of the kind mentioned in Clauses (*a*), (*b*), (*c*), (*d*) of Section 17 and Clauses (*a*) and (*b*) of Section 18 only. The argument is that this sentence in Section 50 divides documents into two classes, one [129] privileged, the other unprivileged, and that the effect of the second sentence is to enact that the documents therein mentioned never can gain admission into the privileged class by the fact of registration.

The second clause of Section 50 is, it must be admitted, somewhat awkwardly expressed, but it appears to me the meaning contended for is

(1) 5 M. 73. (2) 6 M. 88.

non-natural. I take the words "former part of this section" as being synonymous with "preceding part" or "first clause of this section" and cannot but regard this as more natural interpretation. If the Legislature had intended to draw the distinction between the "former" and "latter" class of documents, nothing would have been easier than to say so in express terms.

Independently however of this argument, I am not prepared to admit these two documents, exhibit F and exhibit I, are really brought into competition. Exhibit F does not of itself create any title which will come into competition with the title of defendant No. 2 under exhibit I, but it creates a right to receive from defendant No. 1, or from the Court, a title which will do so. The plaintiff's right to succeed as against defendant No. 2 depends entirely upon his being able to show that he has a right to a decree for specific performance as against defendant No. 1. Such decree is a condition precedent, and though defendant No. 2 is joined in the same suit, this is a mere exception to the ordinary rule of pleading that a stranger is not a proper party to a suit for specific performance (*vide* Fry on Specific Performance, Sections 183—185). If the plaintiff can establish no such right, the title of defendant No. 2 is good and valid against all the world; but if he can, it is the decree to that effect against defendant No. 1 (not the unenforced and perhaps unenforceable agreement F), which entitles him to further relief and makes defendant No. 2 *ipso facto* a trustee for plaintiff and bound to re-convey to plaintiff the property which had passed to himself subject to the equity previously created by his vendor—see Section 91, Indian Trusts Act, II of 1882. Section 50 of the Registration Act gives no priority to a registered conveyance over a decree; and as the decree declares defendant No. 2 a trustee bound to re-convey to plaintiff, the prior date of the sale-deed of defendant No. 2 will avail him nothing. In other words I hold that the relief given to plaintiff as against defendant No. 2 is not given upon plaintiff's prior but unregistered contract with defendant No. 1, but upon the contract [130] of trust which is by construction of law imposed upon defendant No. 2.

On these grounds, therefore, I would dismiss this second appeal with costs.

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9 M. 130=10 Ind. Jur. 101.

APPELLATE CIVIL.

Before Mr. Justice Kernan (Offg. Chief Justice) and Mr. Justice Parker.

SUBBAYA (*Petitioner*) *v.* YELLAMMA AND OTHERS (*Respondents*).*
[22nd September, 1885.]

Decree—Execution—Invalid sale—Possession given to purchaser—Restitution sought in execution by judgment-debtor—Remedy by suit.

Certain land having been attached in execution of a decree by a District Court, S, the representative of the judgment-debtor, preferred a claim to the land in his own right, which was rejected, and the land was subsequently sold to a stranger and the sale was confirmed on the 23rd February 1884. On the same date the High Court, on appeal by S, set aside the order rejecting his claim.

The District Court, in ignorance of the order of the High Court, having subsequently put the purchaser in possession of the land, S applied for restitution :

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* Civil Revision Petition 29 of 1885.

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9 M. 130 = 10 Ind. Jur. 101.

Held, that the order of the District Judge confirming the sale was passed without jurisdiction, but that the District Judge had no power to restore possession to S.

THIS was a petition to the High Court under Section 622 of the Code of Civil Procedure against an order of W. F. Grahame, Acting District Judge of Cuddapah, rejecting an application by Voraganti Subbaya (a minor), representative of the judgment-debtor in suit No. 16 of 1876, to be put in possession of certain land which had been sold in execution of the decree in the said suit.

The facts are fully set out in the judgment of the Court (KERNAN, Offg. C.J., and PARKER, J.).

Ramachandra Rau Saheb, for petitioner.

Krishnasami Chetti, for respondents.

JUDGMENT.

KERNAN, Offg. C. J.—The plaintiff in suit 16 of 1876 obtained a decree against the defendant in that suit for Rs. 5,617-12-0. The defendant died and his son was made party to the suit, as representative of his father, and then that son died and his son, **[131]** the present petitioner, was made party to the suit, as representative of his grandfather, the original defendant.

In June 1883, the decree-holder attached lands in Vontimitta and in certain villages in Proddatur taluk. The present petitioner filed an objection to the attachment and claimed the attached property as his own. That objection and claim were disallowed by the District Judge by order, dated the 20th of August 1883. On the 5th day of December 1883, the petitioner filed Civil Miscellaneous Appeal No. 162 of 1883 in the High Court against that order, and the High Court on the 22nd of February 1884 reversed the order of the District Court of the 20th of August. In the meantime, the lands attached were put up for sale and were purchased; and on the 22nd February 1884, the same day as the High Court set aside the order disallowing petitioner's claim, the District Judge made an order confirming the sale.

At the time the District Court made the order of the 22nd of February 1884, the District Judge was not aware of the order of the High Court; nor does it appear which order was made first in point of time on the 22nd February. The purchaser appears to be a stranger to this suit; he paid his purchase-money into Court and is a *bona fide* purchaser. On the 16th of August 1884, the petitioner filed in the District Court a petition No. 217 of 1884, praying that the attached lands might be given to, and put in possession of, the petitioner. The District Judge was referred to Sections 583—590, but said he did not see how they affected the case. He treated the application as one to set aside the sale which had been confirmed and which, he was of opinion, could not be set aside, and dismissed petitioner's petition.

The petitioner now applies to this Court under Section 622 to revise the District Judge's order on the ground that he refused to exercise the authority vested in him to restore petitioner to possession under the order of the High Court and on the ground that the confirmation only was made without jurisdiction. The petitioner also presented an appeal against the order as a question between the decree-holder and petitioner, parties to the suit, relating to execution.

The petitioner could not after the appeal order appeal against the confirmation order under Section 588, as there was no material

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irregularity in publishing or conducting the sale, Section 311, Procedure Code, and, as no application was made under that Section, neither [132] could the order for confirmation be set aside, Section 312; and, if the order of the District Judge disallowing petitioner's objection was valid, and if the confirmation order was valid, the sale should have become absolute. But it was not necessary to set aside the confirmation order, as it was void and made without jurisdiction. Until reversed, the order of the District Judge of the 20th of August 1884 was valid; but it was reversed by the order of the High Court of the 22nd February 1884, and from the time that order was pronounced, the order of the 20th August had no legal existence, and the District Judge had no jurisdiction to act on it. If any authority was wanted on this point, see *Basappa* v. *Dundaya* (1).

The order of reversal of the High Court and the order of confirmation being made on the same day, are subject to the rule that judicial proceedings are to be considered as taking place at the earliest period of the day on which they are done—*Wright* v. *Mills* (2). The law does not regard fractions of a day—*R.* v. *St. Mary, Warwick* (3), *Lester* v. *Garland* (4). In *Pugh* v. *Robinson* (5) it is said that to avoid injustice the day is divisible; but in this case it seems to be impossible to ascertain which order was made first on the 22nd of February 1884; and as one or other of the two orders must prevail, it is obvious that the order in reversal should. The fact that the District Judge and the purchaser were not on the 22nd February aware of the order in reversal, is not material, and their ignorance on the subject could not affect the reversal force of the order of the High Court. See *Basappa* v. *Dundaya* (1).

The purchaser bought while the appeal was pending; under the ordinary rule he took subject to whatever would be the ultimate result of the decision in the pending appeal, whether he knew of the *lis pendens* or not—*Pranjivan Govardhan Das* v. *Baju* (6), *Mnual Fruval* v. *S. Latchmidevamma* (7), *Mina Kumari Bibee* v *Jojat Sattani Bibee* (8). Section 583 enables a party entitled to any benefit under a decree passed in appeal to apply to the Court that passed the decree appealed against, and that such Court shall proceed to execute the decree passed in appeal according to the rules prescribed for the execution of decrees in suit.

[133] The appeal in this case was against an order; however Section 590 provides that the same procedure prescribed in Chapter XLI, *viz.*, Section 583, shall apply to appeals from orders.

The petitioner was entitled under the appeal order to the benefit of having the sale and the confirming order treated by the District Judge as no longer of any valid legal existence, and to the benefit of being free from any further proceeding to carry out the sale or put the purchaser in possession.

If the petitioner had at once carried out the order in appeal before the Subordinate Judge, it cannot be doubted that no further proceedings to carry out the sale would have been taken. But the petitioner appears to have taken no steps to bring the appeal order to the notice of the Judge until the 16th of August 1884 when the petition was filed praying for possession of the lands sold. In the meantime the purchaser got an order for confirmation.

The purchaser thus obtained possession under the order of the Court, but such order was made after the order in appeal and was made without

(1) 2 B. 540. (2) 28 L.J. Ex. 223. (3) 1 El. & Bl. 816.
(4) 15 Ves. 257. (5) 1 T.R 116. (6) 4 B. 34.
(7) 7 M.H.C.R 104. (8) 10 C. 220.

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jurisdiction. However he acted *bona fide* and paid his purchase-money and it has been paid out to the creditor.

The petitioner might have applied to the District Court to stay the execution pending the sale, but did not do so, and he might, by diligence, after the appeal order was made, have prevented the sale certificate and the possession from being given to the purchaser; but he did not do so; under such circumstances, if we had power to order the District Judge to deliver possession to the appellant (and if we had any discretion in the matter) we should be inclined to refuse to do so and to leave the appellant to assert his title against the purchaser by a separate suit. However, we do not see that the District Judge had any jurisdiction or authority after possession was given over to the purchaser (who is not one of the parties to the suit) to make an order on him to deliver up possession as prayed for by the appellant. If the plaintiff desires to assert his rights, whatever they may be, he must proceed by separate suit.

We must therefore dismiss the appeal and revision petition with costs.

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9 M. 134=9 Ind. Jur. 423.

[134] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

In re KOTA.* [28th July, 1885.]

Court-fees Act, Section 14, *Schedule I, Articles* 4, 5 - *Review of judgment—Stamp duty—Ninety days—Computation of time.*

In computing the period of eighty-nine days from the date of decree, within which an application for review of judgment may be presented on payment of half the fee leviable on the plaint or memorandum of appeal (under Article 5 of Schedule I of the Court-fees Act, 1870), the time during which the Court is closed for vacation cannot be excluded.

[R., 15 C.L.J. 505 (507) = 15 Ind. Cas. 455.]

THE question raised in this case was whether the petitioner was entitled to present a petition of review of judgment on payment of the Court-fee leviable under Article 5 of Schedule I of the Court-fees Act, after ninety days had elapsed from the date of the decree, on the ground that the Court was closed for two months, during which period the time had expired, the petition being presented on the re-opening of the Court.

Mr. *Wedderburn*, for petitioner.

The Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.) delivered the following

JUDGMENTS.

HUTCHINS, J.—I am clearly of opinion that the petitioner must pay the full stamp. I have already ruled in the Admission Court that Article 4 in the first schedule of the Court-fees Act must be construed strictly and cannot be modified by any argument from analogy, based on provisions contained in the law relating to limitation of suits, &c., and the same view was taken in Civil Miscellaneous Petition, No. 431 of 1884, by the late Chief Justice and Mr. Justice Muttusami Ayyar, who held that the

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* Civil Miscellaneous Petition 307 of 1885.

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applicant for review must pay the full stamp, as the Court-fees Act did not recognize any allowance for the time requisite to obtain a copy.

In the present case the ninetieth day from the date of the decree fell on the 23rd May during the Court vacation. The [135] petition for review would not have been received then even if presented. It was presented on the day that the Court re-opened. It is therefore clearly in time so far as limitation is concerned under Section 5 of the Limitation Act, 1877. But so was Miscellaneous Petition, No. 431 of 1884, under Section 12 of the same Act, which declares that, for purposes of limitation, the time requisite for obtaining a copy shall be excluded.

The wording of the Court Fees Act, taken by itself, seems perfectly plain. Article 4 says if the application is presented on or after the ninetieth day, it shall pay the same stamp as the plaint. Article 5 reduces the fee by one-half if the application is presented before the ninetieth day. It is perhaps not altogether without significance that the full stamp is put first as the rule, and the levy of half the stamp treated as a concession or exception; but I do not wish to lay stress on that, for the words are plain enough anyhow.

In contending that the full stamp is not necessary, Mr. Wedderburn relies on Section 377 of the first Code of Civil Procedure and on the Full Bench decision of the High Court of Calcutta in *Narayan Mandal* v. *Beni Madhab Sircar* (1), and he argues that the Limitation Act is *in pari materia* with the Court-fees Act and that, therefore, regard may be had to the former in interpreting the latter.

It seems to me, however, that the two Acts are not at all *in pari materia*. It is true that the old Code generally dealt indiscriminately with matters of stamp, matters of limitation and matters of procedure, but the inconvenience of this soon became apparent and they have long since been separated and are governed by distinct Acts, each of which contains its own rules and principles. In this very point of delay, for example, the Limitation Act has its Section 5 containing a proviso that an application for review may be admitted freely after the period of limitation if the applicant can show sufficient cause for the delay. The Court-fees Act, on the other hand, has its fourteenth section, the provisions of which are not quite similar though evidently aimed at the same class of cases, and it seems to me that in regard to stamp questions that alone can be looked to. In my opinion, this section shows beyond all doubt that the full stamp must be paid in all cases after the eighty-ninth [136] day, whatever the cause of the delay, but it allows the Court to certify for a refund if satisfied that the delay was not caused by the applicant's laches. It is argued that, in this case, there has been no delay, but the section itself shows that it is not speaking of delay caused by laches, but simply of the eighty-ninth day having been allowed to pass from causes for which the applicant cannot be held responsible.

And when I look at Section 377 of the old Code I find that the law was precisely the same then. The Court could excuse delay for purposes of limitation, but it was never authorized to excuse payment of the stamp. "The application shall be made within ninety days......unless the party preferring the same shall show just and reasonable cause...... If made within the period above mentioned, it shall be written on the stamp paper prescribed for petitions......but if made after the expiration of that period, it shall be written on the stamp prescribed for plaints." The second clause

(1) 4 B.L.R. F.B. 32.

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was absolute and the proviso in the first clause could not be imported into it. The "period abovementioned" must refer to the ninety days and not the ninety days *plus* any time allowed by the Court, for no application was receivable at all after the ninety days so extended, and if every application made within the ninety days so extended were to bear a petition stamp. there would be nothing left on which a plaint stamp could be levied. On the true construction of Section 377, as on that of the present law, it seems to me that the Court has no jurisdiction to look at the petition or consider whether it is or is not barred by limitation, whether certain days must be excluded or others can be excused, until it has been properly stamped; and the proper stamp depends on the mere arithmetical calculation of the number of days since the date of decree.

The Calcutta case referred to does not touch the question of the stamp, for the applicant had been required to pay, and had paid, the full stamp prescribed for a plaint. If he had not, his petition would have been dismissed on those grounds. The decision only dealt with question of limitation, and even upon that it is at variance with a decision of this Court—*K. J. Subburajulu* v. *N. Venkataraya* (1)—and was professedly based to a great extent on the practice of the Northern Presidency.

[137] I would allow the petitioner twenty days to pay up the full stamp.

MUTTUSAMI AYYAR, J.—This is an application for review of judgment. It was presented on the day the Court was re-opened after the last vacation, but the ninety days prescribed for its presentation expired on the 23rd May when the Court was closed. The question raised for our decision is whether, for purposes of Court fees, it is governed by Article 4 or Article 5, Schedule I of Act VII of 1870.

Article 4 directs that full stamp should be paid if the application is presented "on or after the ninetieth day from the date of the decree." Article 5 prescribes half stamp "if presented before the ninetieth day from the date of the decree." Taking the articles by themselves, it is clear that the liability to pay full stamp accrues on the expiration of eighty-nine days from the date of decree. The words used in the articles are clear and unambiguous; and they afford no ground for the contention that, when the Court is closed on the ninetieth day, they ought to be taken to refer to that date after the ninetieth day on which the Court is re-opened.

Our attention was drawn to Section 14 of Act VII of 1870 as supporting this contention. It provides that "when an application for review of judgment is presented on or after the ninetieth day from the date of the decree, the Court, unless the delay was caused by the applicant's laches, may in its discretion grant him a certificate authorizing him to receive back from the Collector so much of the fee paid on the application as exceeds the fee which would have been payable had it been presented before such day." This section treats every application presented on or after the ninetieth day as presented out of time and authorizes the Court to refund the excess stamp in its discretion, unless the delay is caused by the applicant's laches. According to it, there may be delay but it may not amount to laches, and in such cases the Court is to have a discretion. When the delay amounts to laches, no refund is to be made. The apparent intention is to require full stamp in every case of delay after the eighty-ninth day from the date of the decree, and to permit a refund at the discretion of the Judge when the delay is not due to the applicant's laches.

(1) 2 M.H.C.R. 268.

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In the case before us, it cannot be said that there was no delay by reason of the vacation, though the delay was not due to the applicant's laches.

It might no doubt seem anomalous at first sight that the time [138] during which the Court was closed for the vacation should be treated as delay. It is possible that a special arrangement might be made for the reception of material papers during the vacation and duly notified, and in that case the Court might reasonably hold that the delay amounted to laches and refuse a refund.

Another contention is that the period of ninety days, which is referred to in the Court-fees Act, is the period prescribed by Article 173, Schedule II of Act XV of 1877, that that Act should be treated as one *in pari materia* with the Court-fees Act, and that Section 5 of the enactment should be read as if it were part of the other. It does not appear to me, on further consideration, that it would be accurate to say that the two Acts are *in pari materia.* Their object-matter is not the same, and the delay in excess of the prescribed period may be treated strictly for fiscal purposes, whilst it may be differently treated for purposes of limitation. As to the Calcutta case cited, the decision proceeded on the ground of the practice which obtained in that Presidency with reference to Section 377 of Act VIII of 1859. I do not consider that the circumstance of the provision as to stamp and the provision as to the limitation of ninety days having been inserted together in that section can be accepted as a sufficient warrant for the contention that Section 5 of the Limitation Act should be read as if it formed part of Act VII of 1870. The suggestion is at variance with the language of Section 14 of the last-mentioned enactment.

On these grounds, I also come to the conclusion that we must follow the decision of this Court in Civil Miscellaneous Petition, No. 431 of 1884, and direct that the application should be on full stamp.

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9 M. 138 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kernan (Offg. Chief Justice), Mr. Justice Muttusami Ayyar, Mr. Justice Hutchins, Mr. Justice Parker, and Mr. Justice Handley.

REFERENCE FROM THE BOARD OF REVENUE UNDER SECTION 46 OF THE INDIAN STAMP ACT, 1879. * [6th November, 1885.]

Stamp Act, Section 67.

The second clause of Section 67 of the Indian Stamp Act, 1879, is not controlled by the first clause of the section, which refers only to bills of exchange and promissory [139] notes, but applies to all cases in which a document is executed with intent to defraud the Government of stamp duty.

REFERENCE from the Board of Revenue under Section 46 of the Indian Stamp Act, 1879.

The facts were stated as follows :—

"The executant of an instrument for repayment of loan, and the person in whose favour it was executed, were both convicted by the Sub-Magistrate of Kundapur under Sections 61 and 67 of the Stamp Act.

* Referred Case 5 of 1885.

1885 Nov. 6. — Full Bench. — 9 M. 138 (F.B.).

"The Head Assistant Magistrate, on appeal, confirmed the conviction of the executee (first accused) under Section 64, Clause 2, on the ground that the document itself contained evidence of intent to defraud Government of duty.

"The High Court, however, (Mr. Justice Brandt) quashed the conviction on the ground that Clause 2 of Section 67 is governed by Clause 1, and relates only to bills of exchange or promissory notes, which the instrument in question was not.

"The Board take exception to the ruling of the learned Judge and are unanimously of opinion that Clause 2 of Section 67 is of general application, otherwise the Act will be deprived of any provision for the punishment of those who, with intent to defraud Government of duty, resort to any of the practices set forth in paragraph 2 of Section 67.

"The case is of importance, as the ruling, on an apparently novel point, is likely to exercise an injurious influence on the stamp revenue."

The Acting Government Pleader (Mr. *Powell*), for the Board of Revenue.

JUDGMENT.

The judgment of the Full Bench (Kernan, Offg. C. J., Muttusami Ayyar, Hutchins, Parker, and Handley, JJ.) was delivered by

Kernan, Offg. C. J.—We are of opinion that the second clause in Section 67 of the Indian Stamp Act is not controlled by the first clause so as to restrict its application to negotiable instruments. It is a clause of general application as suggested by the Board.

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9 M. 140 (F.B.).

[140] APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kernan (Offg. Chief Justice), Mr. Justice Muttusami Ayyar, Mr. Justice Hutchins and Mr. Justice Parker.

Reference from the Board of Revenue under Section 46 of the Indian Stamp Act, 1879.* [6th November, 1885.]

Stamp Act, Section 3 (17), *Schedule II,* 15 (*b*)—*Receipt —Consideration—Barrister's fee, Honorarium not merces.*

A receipt given by a Barrister for a fee is exempted from stamp duty by Article 15 (*b*) of Schedule II of the Indian Stamp Act, 1879.

[R., 25 A. 509 (519) = 23 A.W.N. (1903) 104; D., 10 C.P.L.R. 11 (Cr.).]

This was a case referred to the High Court by the Board of Revenue under Section 46 of the Indian Stamp Act, 1879.

The reference was in the following terms:—

"The accompanying document, which purports to be an unstamped receipt, dated 15th December 1880, for a Barrister's fee, amounting to Rs. 50, issued by Mr. (now the Hon.) J. W. Handley to a client, was recently impounded under Section 33 of the Stamp Act by the District Munsif of Tiruvadi and forwarded to the Collector of Tanjore, who has submitted it for the orders of the Board, with the remark that the only course open is to prosecute the executant under Section 61 of the Act.

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* Referred Case 6 of 1885.

"The case turns upon the question whether a Barrister's fee is a payment of money without consideration or not. If not, then a receipt for the amount thereof exceeding Rs. 20 is an instrument chargeable with duty under Section 3 (17), Schedule I, Article 52, and such instrument is not 'duly stamped' until a one anna receipt stamp has been affixed.

1885 Nov. 6. — Full Bench. — 9 M. 140 (F.B.).

"The Board see no reason for the exemption of such receipts from liability to stamp duty."

The Acting Government Pleader (Mr. *Powell*), for the Board of Revenue.

Mr. *Wedderburn, contra.*

It was contended, for the Board of Revenue, that the receipt being for money which was paid for consideration, the question, **[141]** whether the right of suit was barred or not, was immaterial, and, therefore, that Article 15 (*b*) of Schedule II of the Stamp Act did not apply.

A. C. Kunhammu v. *Gantz* (1) and *Kennedy* v. *Broun* (2) were cited *contra.*

JUDGMENT.

The judgment of the Court (Kernan, Offg. C.J., Muttusami Ayyar, Hutchins and Parker, JJ.) was delivered by

Hutchins, J.—A Barrister's fee for services in litigation is a gratuity or honorarium. The relation of counsel and client in litigation creates an incapacity to contract for such services. Such services are not capable of forming such a valuable consideration as will support an action on the client's promise to pay, and conversely, if the client does pay, the payment must be held to be one without consideration.

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9 M. 141 = 1 Weir 645.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan (Offg. Chief Justice) and Mr. Justice Hutchins.

The Queen-Empress *v.* Appavu.* [4th November, 1885.]

Abkari Act, Section 2—Sale—Barter—Payment of wages in liquor.

Payment of wages in liquor does not amount to a sale of liquor within the meaning of Section 2 of the Abkari Act (Madras Act III of 1864).

[R., 25 B. 696 (698) = 3 Bom. L.R. 384 ; 2 P.R. 1903 = 53 P.L.R. 1903.]

This was a case referred under Section 438 of the Code of Criminal Procedure by H. R. Farmer, Acting District Magistrate of Trichinopoly.

The facts appear sufficiently for the purpose of this report from the judgment of the Court (Kernan, Offg. C.J., and Hutchins, J.).

Counsel were not instructed.

JUDGMENT.

Hutchins, J.—The facts found are that the accused gave the tope-watcher a bottle of toddy as wages in consideration of his service in watching the trees the previous night. The question is whether this amounts to "selling" liquor.

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* Criminal Revision Case 585 of 1885.

(1) 3 M. 138. (2) 13 C.B.N.S. 677.

1885 Nov. 4. — Appellate Criminal. — 9 M. 141= 1 Weir 645.

[142] The District Magistrate's argument is that such a transfer of liquor may be included in the term "barter," and he refers to Section 2 of the Abkari Act (Madras Act III of 1864), which expressly provides that the term "selling" shall include bartering. But the section does not stop there: it says that selling shall include bartering . . . . for liquor, grain, or any other articles. It is clear that labour is not an article, so that, even if the delivery of toddy for wages could be deemed to be included in the general term "barter," it is not included in that particular kind of barter which the section mentions. On the principle *expressio unius est exclusio alterius*, any exchange of liquor for a consideration which is not an article would seem not to be a "selling."

The definition, however, is not exhaustive, and the question still remains whether a payment of wages by liquor is included in the general term 'selling.' It seems to us that it is not. Both in the Contract Act and the Transfer of Property Act a sale is defined to be an exchange of property *for a price*. Section 118 of the latter Act deals with exchanges for other considerations than a money payment, and thereby indicates that a price included money only, and that is the ordinary meaning of the word 'price.'

The point is not altogether free from doubt, but a penal statute must always be construed in favour of the subject. On the ground that the Legislature has not made it clear that the delivery of liquor in consideration of wages is an offence, we think the acquittal in this case was right, and decline to disturb it.

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9 M. 142.

APPELLAEE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

VENKATAGIRI ZAMINDAR (*Plaintiff*), *Appellant v.* RAGHAVA AND ANOTHER (*Defendants*), *Respondents.** [3rd and 27th August, 1885.]

Landlord and tenant - Unregistered lease—Proof of tenancy ejectment—Occupancy rights.

If a contract of lease is, for want of registration, ineffectual, the landlord is not debarred from giving other evidence of a tenancy, and requiring the Court to adjudicate on his right to eject.

Dictum in *Nangali* v. *Raman* (I.L.R., 7 Mad., 226) observed upon.

[**Appr.**, 9 O.C. 296 (298); **R.**, 17 M.L.J. 469 (471); **D.**, 13 M. 281 (286).]

[143] THIS was an appeal from the decree of L. A. Campbell, District Judge of Nellore, in suit No. 2 of 1883.

The plaintiff, Unidi Rajaha Raja Velugoti Sri Raja Gopala Krishna Yachendra Bahadur, zamindar of Venkatagiri, sued the defendants, Duvur Chinna Raghava Reddi and another, to eject them from certain land. He alleged that defendants held the land, which was styled "nagari iduva," under a muchalka executed in 1876 by the father of defendants which contained a condition that the land was to be returned whenever wanted, and that due notice to quit had been served on them.

The defendants denied that the lands were "nagari iduva" and alleged they were "izara iduva." They also relied on the terms of the muchalka, under which, they contended, they were bound to deliver

* Appeal 76 of 1884.

possession if the lands were leased out by the plaintiff on izara to a third party, but not otherwise. 1885 AUG. 27.

The District Judge held that, on the construction of the muchalka, the defendants could not be ejected unless the land was let on izara by the plaintiff to a stranger. APPELLATE CIVIL.

Plaintiff appealed.

Hon. *Rama Rau*, for appellant.

Mr. *Wedderburn*, for respondents. 9 M. 142.

For the respondents it was contended that if the judgment of the District Court could not be supported, yet the decree might stand, because the lease on which the plaintiff claimed to eject reserved an annual rent above Rs. 50 and was not registered, and the plaintiff had proved no right to eject, apart from the muchalka—*Nangali* v. *Raman* (1).

JUDGMENT.

The judgment of the Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.) was delivered by

TURNER, C.J.—The Judge has, in our judgment, misunderstood the condition in the muchalka of fasli 1285. If the lands held by the defendants are what are known as "home-farm" lands of the zamindari, they are lands, which, according to a very general custom of the country, the zamindar reserves for his own cultivation when he thinks fit to resume them and on which a right of occupancy does not accrue. The zamindar, when he lets such lands, has ordinarily a right to resume them at the end of any agricultural year on giving due notice.

[144] The condition to which the Judge alludes was intended to secure to any person, who might take a farm of the village, the same rights as the zamindar himself would enjoy. If the farmer desired to have the lands, they were to be surrendered to him: if a lease was made, the lands were to be at once vacated. But the condition on the part of the tenant for the surrender of the lands would not imply that the landlord deprived himself of the right to resume the lands when he thought fit. But in this Court, it is contended that the muchalka cannot be accepted as evidence of any contract affecting the land, inasmuch as it is not registered.

This plea was not raised in the Court of First Instance because both parties relied on the terms of the muchalka. Let it be granted that the muchalka cannot be received in evidence for want of registration and is, on that account, inoperative. With all respect for the learned Judges by whom *Nangali* v. *Raman* (1) was decided, we cannot altogether agree with them. We are unable to hold, that if a contract of lease is, for want of registration, ineffectual, the landlord would not be able to give other evidence of a tenancy, and to require the Courts to adjudicate on his right to eject on the footing of a tenancy, for instance, where, as in this case, the defendants admit they are tenants and that they had paid rent. There is ample proof of the existence of a tenancy, and if the written contract cannot be looked at to establish or limit the rights of one party, neither can it be looked at to establish or limit the rights of the other. These rights must be ascertained independently of the abortive contract. In the view we should take of the muchalka, if admissible, it would matter little whether it was admitted or not. For while, on the one hand, we understand it to confer on the tenant no right

(1) 7 M. 226.

1885 AUG. 27. — APPELLATE CIVIL. — 9 M. 142.

against the zamindar with regard to the duration of the tenancy, neither, on the other hand, does it impose on the tenant an obligation to resign the land to the zamindar which would not have attached to the tenancy independently of the contract.

The main questions which must be determined are—(1) Whether, by the custom of the zamindari, such a right can be acquired in any land; (2) Whether, the lands were of such a character that the tenants could acquire a right of occupancy therein; and (3) Whether, if it could be acquired in the lands in suit, it has been acquired by the defendant.

[145] The zamindar maintained that the lands were home-farm lands in which no right of occupancy could be acquired—the defendants that they were ordinary visabadi lands on which such a right could accrue and had accrued to them. Lands which the zamindar may have held as home farm might be so treated by him as to lose their distinctive character. If it is shown that certain lands were home-farm lands and that a right of occupancy could not be acquired on such lands, it would nevertheless be open to the tenant to show that the zamindar had consented to change their character and to treat them as ordinary lands.

As the issues we have indicated were not specifically raised, we shall remit them for re-trial on the evidence on the record and such further evidence as the parties may adduce.

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9 M. 145.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

LAKSHMANA (*Auction-purchaser*), *Petitioner v.* NAJIMUDIN AND ANOTHER (*Judgment-debtor and Creditor*), *Respondents.**
[24th November, 1884, and 28th August, 1885.]

Civil Procedure Code, Section 622—*Jurisdiction—Section* 311, *Sale set aside on account of irregularity only.*

Where a Court, professing to act under Section 311 of the Code of Civil Procedure, set aside a sale in execution of a decree without proof of substantial injury having been suffered by the applicant:

Held, that such order was passed without jurisdiction within the meaning of Section 622 of the said Code.

[R., 24 M. 311 (315).]

THIS was an application to the High Court under Section 622 of the Code of Civil Procedure to set aside an order of J. H. Nelson, District Judge of Chingleput, cancelling a sale in execution of a decree in Suit No. 4 of 1882 in the District Court under Section 311 of the Code of Civil Procedure.

The District Judge found that there had been manifold irregularities in the conduct of the sale, and held that the existence of such irregularities was of itself sufficient to prove **[146]** substantial injury within the meaning of Section 311 of the Code of Civil Procedure.

Mr. *Branson* and *Ramanujacharayar*, for petitioner.

Sadagopacharyar, for respondent No. 1, objected that the High Court could not interfere under Section 622.

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* Civil Revision Petition 360 of 1884.

The Court (MUTTUSAMI AYYAR and PRAKER, JJ.) delivered the following 1885 AUG. 28. — APPELLATE CIVIL. — 9 M. 145.

JUDGMENT.

The finding now returned by the Judge is, in substance, that no substantial injury has been sustained. Upon this finding, the order of the Judge, setting aside the sale, cannot be supported. It is then contended that this is not a case in which we ought to interfere under Section 622 of the Civil Procedure Code; but under Section 311, no sale ought to be set aside unless substantial injury as well us material irregularity is proved, and the Judge who set aside the sale in this case, though no substantial injury was proved, clearly exercised a jurisdiction which the law did not vest in him.

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9 M. 146 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kernan (Offg. Chief Justice), Mr. Justice Muttusami Ayyar, Mr. Justice Hutchins, Mr. Justice Parker and Mr. Justice Handley.

REFERENCE FROM THE BOARD OF REVENUE UNDER SECTION 46 OF THE INDIAN STAMP ACT, 1879.* [6th November, 1885.]

Court Fees Act, Schedule II, Article 10 (*a*)—*Stamp Act, Schedule I, Article* 50 (*b*)—*Power to vakil to obtain copies from Collector's office*—*Stamp.*

A document authorizing a vakil to apply for copies of records from the Collector's office is properly stamped with a Court-fee stamp under Article 10 (*a*) of Schedule II of the Court Fees Act, 1870, and does not require to be stamped as a power-of-attorney under Article 50 (*b*) of schedule I of the Indian Stamp Act, 1879.

[D., 9 M. 358 (359) (F.B.).]

THIS was a case referred, for the decision of the High Court, by the Board of Revenue under Section 46 of the Indian Stamp Act, 1879.

The Resolution of the Board of Revenue, dated 27th May 1885, was as follows:—

"A difference of opinion having arisen in the Board as to the [147] proper stamp duty leviable on the document submitted in this case, they resolve to refer the question for the decision of the High Court under Section 46 of Act I of 1879.

"The document purports to appoint one Chittur Sundara Rau as vakil for the executant, and authorizes him to obtain for the latter copies of certain papers from the Collector's record; and the question for consideration is whether the document is properly stamped as a vakalatnama with a Court-fee stamp of the value of eight annas under Article 10 (*a*), Schedule II of Act VII of 1870, or whether it should be stamped with stamp of the value of one rupee as a power-of-attorney under Article 50, Clause (*b*), of the schedule to the Stamp Act I of 1879.

"In support of the former view, it is urged that an application for copies of records in a Collector's office must bear a Court-fee stamp of one anna under Article 1 (*a*), Schedule II of the Court Fees Act, and that a document authorizing a person to make such application on behalf of another and obtain copies falls under Article 10 (*a*) of the same schedule. A

* Referred Case 4 of 1885.

1885 Nov. 6. — Full Bench. — 9 M. 146 (F.B.).

majority of the Board, however, do not consider that making an application, such as that referred to, can be regarded as conducting a 'case' within the meaning of the above article, and that the document in the present case is really a power-of-attorney and should be stamped as such under the Indian Stamp Act.

"The decision turns upon the construction placed on the phrase 'conduct of any one case.' On the one hand it is held to be a term of special and restricted meaning, within which an act of the kind under reference cannot be included; on the other, it is argued that the phrase includes all transactions connected with the conduct of any one case in the Court or executive office where presented, and must necessarily cover authority to apply for any papers connected with the case, such, for instance, as a copy of the decision; but in the case under reference there is nothing to show that the application for copies of records was connected with any case, or if it was so, that the application was made by the same person who conducted the case.

"The case is of considerable public importance; hence the expediency of a reference to the High Court."

The Acting Government Pleader (Mr. *Powell*) appeared to support the opinion of the majority of the Board.

[148] The Court (Kernan, Offg. C.J., Muttusami Ayyar, Hutchins, Parker and Handely, JJ.) delivered the following

JUDGMENT.

A case need not necessarily mean a suit or judicial proceedings, but would include any petition or application to a Court or officer. A power to a vakil authorizing him to present an application for copies falls under Article 10, Schedule II, of the Court Fees Act, and does not require to be stamped under Article 50 of Schedule I of the Indian Stamp Act, 1879.

The party must apply to the Collector and affix an anna Court-fee stamp on the application. The Collector may, perhaps, consider he ought not to give a copy. The person holding the vakalatnama may have to conduct *the case* for his client before the Collector and satisfy him, if he saw that the party it entitled to the copy. The matter is inquired into and the right of the party is investigated. Does not, therefore, the matter become a *case*? If there is a doubt in the matter, we are bound to decide in favour of the applicant, as the subject cannot be taxed except by clear language.

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9 M. 148 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, and Mr. Justice Muttusami Ayyar.

Viraragava (*Plaintiff*), *Appellant v.* Ramalinga and others (*Defendants*), *Respondents.**
[19th March, 1883, and 1st May, 1885.]

Hindu Law—Adoption after upanayanam of sagotra—Brahmans—Custom—Proof.

According to the custom obtaining amongst Brahmans in Southern India, the adoption of a boy of the same gotra, after the upanayanam ceremony has been

* Second Appeal 434 of 1879.

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(F.B.).

performed, is valid—*P. Venkatesaiya* v. *M. Venkata Charlu* (3 M.H.C.R. 28) overruled.

[R., 18 M. 145 (149); 11 C.P.L.R. 56 (61); Cons., 13 M. 128 (130).]

THIS was an appeal from the decree of R. Vasudeva Rau, Subordinate Judge at Negapatam, confirming the decree of A. Sami Ayyar, District Munsif of Tirutarapundi, in suit 242 of 1877.

On the 19th March 1883, after two remands for fresh evidence, [149] the case was heard by a Full Bench of five Judges (TURNER, C.J., INNES, KERNAN, KINDERSLEY, MUTTUSAMI AYYAR, JJ.).

Hon. *Rama Rau,* for appellant.

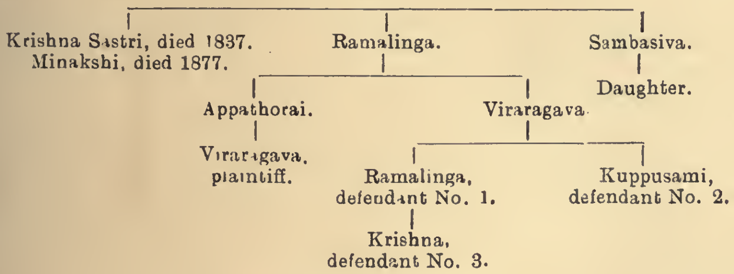
Ramanujacharyar, for respondent No. 4.

The facts and arguments appear from the judgment.

JUDGMENT.

On the 1st May 1885, judgment was delivered by

TURNER, C.J.—The following pedigree illustrates the relationship of the persons whose respective claims to the property of Krishna Sastri form the subject of these proceedings:—



Krishna Sastri, Ramalinga and Sambasiva were three Brahman brothers and were divided.

Krishna Sastri died about 30 years before suit without issue, but leaving a widow who obtained possession of his property and died in 1877. Sambasiva left no male issue. Ramalinga left two sons, Appathorai, the father of the appellant, and Viraragava, the father of the respondents Nos. 1 and 2.

The appellant, alleging that the property in suit was the property of Krishna Sastri, sued to obtain a moiety alleging it to be the share to which he is entitled as the grandson of Krishna's brother, but of which the respondents refused to deliver possession to him. Respondent No. 4, the maternal uncle of respondents Nos. 1 and 2, was impleaded as in joint possession with the respondent No. 3, of a house forming part of the estate which he claimed to hold under a sale-deed executed by Minakshi and the respondent No. 3, and the respondent No. 5 is a stranger who claimed to hold certain plots of lands Nos. 24 and 25 under a sale-deed from the respondent No. 3. Respondents Nos. 1, 2, 3, did not appear to contest the claim; Nos. 4 and 5 put the appellant to proof of the title he asserted and alleged that the respondent No. 3 had been adopted by Minakshi.

[150] The appellant denied the adoption.

Three issues were framed—

(1) Whether the plaintiff (appellant) and defendants (respondents) Nos. 1 and 2 stood to Minakshi in the relationship alleged?

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(2) Whether the defendant (respondent) No. 3 had been adopted by Minakshi with the authority of her husband ? and

(3) Whether the plaintiff (appellant) was entitled to the relief claimed by him?

At the trial, three witnesses were called by the appellant to prove the relationship which subsisted between the appellant and Krishna Sastri. Of these, the first, a son of the daughter of Sambasiva, spoke of the respondent No. 3 as the adopted son of Minakshi, and deposed that respondent No. 3 had lived with that lady for some years before her death and had performed her funeral ceremonies. The second witness, who owned a house in the street in which Minakshi resided, admitted he had heard of the adoption about the time it is alleged to have been made, and that he knew of his own knowledge that respondent No. 3 had subsequently performed the annual ceremonies of Krishna Sastri, and had also performed the funeral ceremony of Minakshi. The appellant's third witness deposed that Minakshi celebrated the marriage of respondent No. 3, and that the respondent No. 3 had performed her funeral ceremony. Respondents Nos. 4 and 5 examined respondents Nos. 1 and 3, whom the Munsif describes as unwilling witnesses. Respondent No. 1 admitted that respondent No. 3 had been adopted by Minakshi. Respondent No. 3 deposed that he had been adopted by Minakshi as a son to her husband about ten years before suit; that the ceremony took place in the house of Krishna Sastri and in the presence of a large number of persons; that he had, thereafter, performed the funeral ceremonies of Krishna Sastri, had dealt with the estate and had performed the funeral ceremony of Minakshi. It transpired, on his cross-examination, that he was between twelve and thirteen years of age when he was adopted, and that his upanayanam ceremony had been performed before the adoption. Respondent No. 3 admitted also that he had joint Minakshi in dealing with Krishna Sastri's property.

[151] The Munsif, himself a Brahman, found the fact of adoption proved and, although he did not distinctly express any opinion as to the validity of the adoption, he gave effect to it and dismissed the suit. An appeal was preferred to the Subordinate Judge on two grounds, namely—(1) that the adoption of a Brahman after the performance of the upanayanam ceremony was invalid, and (2) that there was no proof that the widow of Krishna Sastri had received from her husband authority to adopt.

The Subordinate Judge held that, inasmuch as the boy was of the same gotra as Krishna Sastri, his adoption after the performance of the upanayanam ceremony was not invalid. He also held that, although the authority to adopt was not proved, the consent of respondent No. 1, a sapinda, evidenced by his gift of the boy was sufficient. On second appeal the grounds of objection taken in the Lower Appellate Court were repeated.

The learned Judges by whom the appeal was heard dealt with the first only of these questions. They observe that on the authority of the Dattaka Chandrika, which obtains in Southern India, such an adoption ought not to be recognized; that in 1838 the Pandit of the Sadr Court had declared that the period for adoption among the regenerate classes was prior to upanayanam; that this opinion was followed by the Sadr Court in 1853 and 1859 and adopted by the High Court in 1865—*P. Venkatesaiya* v. *M. Venkata Charlu* (1). They explained that, according to a text of Vasistha, filial relation in a religious sense proceeded from initiatory rites

(1) 3 M.H.C.R. 28.

and that a son initiated by his natural father was regenerated and born a second time to his father by virtue of his consecration to the obsequies to be performed in the family and stood in the place of a post consecrated for a sacrifice and thereby rendered unfit for other similar purpose—Dattaka Mimansa, ch. iv, Sections 39 and 41.

They thought it clear from the text of Vasistha, which speaks of the eight initiatory rites that directly the investiture of the characteristic thread was made, the son became the twice-born son of his father, and, by reason of the consecration to the performance of religious obsequies in his father's family implied by the investiture, ceased to be a competent subject of affiliation by another. With regard to the argument that, where the adoption was in the [152] same gotra, it was no bar to adoption that the upanayanam had been performed on the proposed boy, they observed that, as pointed out by Mr. Justice Holloway, the very writers who fix the maximum of age also enjoin the invariable adoption of one of the same gotra. They noticed that in the *Travancore case* (1), the point actually decided was only that a brother's son could be adopted after upanayanam. They, however, considered it desirable to remit an issue as to the usage, obtaining among Brahmans in Southern India, and framed and remitted the issue accordingly.

On the trial of the issue, the respondents Nos. 4 and 5 examined six witnesses; the appellant examined none. Of the six witnesses examined by the respondents, five were Smartha Brahmans and one Madhava Brahman. Sami Sastri, a Vakil of the District Munsif's Court at Trivalur, deposed that his uncle Raju Sastri of Mannargudi had adopted his (witness') younger brother Nilakandan five years after the upanayanam had been performed, and that the young man was living with Raju as his adopted son, and that Raju was a Pandit of reputation for Vedic learning and of some substance.

On cross-examination, he admitted that Raju had actually recited the Bramavupatheisam to Nilakandan at the time of his upanayanam and had then expressed his wish to take the boy in adoption, but he explained that the ceremony of upanayanam was being performed on two brothers simultaneously, and that his father was performing it on the other, and he asserted that the adoption took place five years after upanayanam when a datta homam was performed. Krishnasamy Sastri, a professional alms-seeker, having also a small quantity of land, deposed that when he was eighteen years of age, he had been adopted by his undivided paternal uncle, and that his upanayanam had been performed when he was seven or eight years of age; that his natural and adoptive father had made a partition between them, and that after their deaths his elder brother and the witness took their shares respectively. The witness had but one brother, consequently each of the brothers would have taken precisely the share they received had there been a partition and no adoption. The witness could not recollect whose son he was called at the time of his marriage.

[153] He admitted that he performed the annual ceremonies of his natural as well as of his adoptive parents and still addressed them as his parents.

He deposed to the adoption mentioned by Sami Sastri as having been made by Raju with whom he was connected by marriage, and gave as other instances the adoption of Pichikaruppan by his uncle Nanu Ayyan, one of three brothers, two years after the performance of upanayanam;

(1) 8 Mad. Jur. 115.

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the adoption of Venkata Ramayyan by his uncle Punju three days after upanayanam had been performed by his natural father under the advice of the Pandit that the latter ceremony should be performed by a married man; the adoption of Krishna by his uncle Krishna Sastri, and an adoption by Aiyathorai Sastri, of a boy on whom upanayanam had been performed.

Venkata Rayar of Mannargudi deposed that he was adopted after upanayanam by the widow of Appu Rayar, his father's dayadi in the first degree with the consent of a dayadi; that the lady celebrated his marriage and that he performed her funeral and annual ceremonies and had taken possession of his uncle's property without objection on the part of other dayadis who were equally entitled if no adoption had been made. This witness produced a deed registered on the 15th June 1865 which contained the following recital:—"I and my husband having been living since the last 68 years and not having had any issue and having therefore intended to adopt a boy, resolved to select you for our adopted son, although upanayanam has been performed upon you, on the ground that you are the son of one of our dayadis, and on the ground that such an adoption of a competent boy of such an age being consistent with Dharma Sastras." The deed further recites that as the husband had died before the boy could be brought down from Madura he could not adopt him and that the widow had adopted him under her husband's orders. The recital in this deed suggests that the propriety of the adoption had been considered.

Muttu Ayyan of Mannargudi, a relative of respondent No. 4, deposed that his uncle Nanu Ayyan had a son who died, and that thereafter he adopted Kumarasami Ayyar, a son of his younger brother then 12 years of age, and after upanayanam; that he, the witness, was present at both ceremonies, that Nanu was dead and his funeral and annual ceremonies were performed [154] by Kumarasami—the witness asserted he knew of many other instances in which adoption had followed upanayanam, and that although he had not been present when the ceremonies were performed, he knew that the adopted sons were living in their adoptive fathers' houses. He mentioned the adoptions by Aiyathorai, Raju, and Punju, which were spoken to by the witness Krishnasami. Krishna Sastri of Mannargudi, who described himself as related, he knew not how, to respondent No. 4, and whose adoption was spoken to by Krishnasami, deposed that when he was of the age of 22, his elder brother (his father had died) gave him, as an adopted son, to their uncle Krishna who had no issue—he stated he was nine years of age when his upanayanam had been performed, and that at the time of his adoption his younger brothers had been married. Lakshmana Ayyan of Negapatam deposed that his father Krishnayyan had given him in adoption to Kylasayyan, his father's younger brother—that the adoption took place fifteen years ago when he was thirteen years of age, and after his upanayanam had been performed, he had been instructed in the Brahmavupatheisam by his natural father. He stated further that his adoptive father was dead and that he had performed his funeral rites and was performing his annual ceremonies. He stated on cross-examination that Kylasayyan's wife was alive and had made no objection to his adoption, and that there were also other dayadis in the family.

Upon this evidence, the Subordinate Judge found that the adoption of a Brahman after upanayanam was customary, when the adoption was made of one in the gotra by an uncle or great uncle.

On the return of this finding, the learned Judges pointed out that the enquiry was to extend to the usage in Southern India—they intimated their opinion that the evidence was insufficient to establish a usage so general, uniform and certain as that contemplated by the issue. But seeing that the appellant had called no evidence to rebut that of the respondents and they considered it desirable that the inquiry should be extended further so as to ascertain what was the usage in the southern districts of the Presidency, they remitted the issue for further trial. This inquiry was accordingly re-opened, seven witnesses were examined on the part of the respondents under a commission issued to the Subordinate Judge of Madura.

[155] Chandrasekara Vathiar deposed that he had been adopted by his father's younger brother when he was fifteen years of age and after upanayanam; that the adoption had not been disputed; that he was married in his eighteenth year; that his natural father had performed Brahmavupatheisam on him; that his natural and adoptive fathers lived in commensality when the adoption was made, but had since separated, and that he was living at Madura where he was performing the functions of purohit.

Venkatarama Sastri, an old man, deposed that he had heard of adoptions after upanayanam, and then withdrew his statement and professed he had not cared to inquire whether they had taken place or not.

Pachi Ayyan deposed that his father's younger brother, a widower, living with his elder brother, adopted the elder brother's son after upanayanam and when the lad was of the age of eighteen. That the lad so adopted was married on the same day, the adoptive father performing the functions of parent—the witness added that he himself would have been selected for adoption had he not been married.

Subramanya Sastri asserted that he was adopted in his twelfth year (his upanayanam ceremony having been performed in his seventh year) by his senior paternal uncle's widow; that his elders consulted several authorities and performed the adoption; that at the time of the adoption his natural and adoptive fathers were undivided; that his uterine brothers had lately effected a partition and had offered him a share but that he had declined to receive it as he had enough property from the father of his adoptive mother. The witness added he had looked for authorities in books but could find none—that with respect to usage even married men had been adopted by dayadis. He admitted he could not cite instances in support of this assertion.

Muttu Krishna Rau deposed that he had adopted a boy, the son of a gnati on whom upanayanam had been performed by his natural father after he had consulted the purohits who advised him that the adoption could be made and that all his brothers and relations agreed to the adoption.

He asserted that there were 1,000 cases of such adoptions though he remembered only one—he also asserted that even married men could be adopted among gnatis though he could mention no other case. He considered that the prohibition against **[156]** adoption after upanayanam was valid only in the case of persons of different gotras.

Venkata Rau deposed, that he had adopted, after upanayanam, his uncle's son; that the boy had died and the witness had made a provision for the boy's widow; that his uncle was his nearest dayadi and his

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property was all self-acquired. He also stated that one of his distant relations, Muttu Krishna Rayar, had made a similar adoption.

Ranga Subbayyar deposed that one of his relations, Vethalagundu Ramayyan, adopted Melmungalam Subrayar's son after upanayanam, and that the brothers of Ramayyan consented to the adoption—the witness did not mention whether Ramayyan and the boy were of the same gotra or not.

Narayana Sastri, schoolmaster, examined by the Subordinate Judge of Negapatam, deposed that he had been adopted after upanayanam by his uncle, whose property he had inherited; that his natural father's father and his natural father had died; and that the property of his natural father had been taken by another adopted son; that his natural father was the only near dayadi; that there were distant dayadis who made no objection. The witness asserted that adoptions after upanayanam were customary, though he could not specify instances.

Sitaramayyar, petition writer of Negapatam, deposed that his younger brother had been taken in adoption by his uncle after upanayanam.

Chinna Ramayyan, village headman of Kolimani in the District of Trichinopoly, deposed that after upanayanam he gave his son in adoption to his dayadi, Visvanathayyan; that the adoptive parents had died and his son had performed their funerals and succeeded to their estate. He also stated that he was aware that similar adoptions had taken place in the District of Trichinopoly; and that among his dayadis, Subramanya Ayyan, taken in adoption by Visvanathayyan after upanayanam, performed Visvanathayyan's funeral ceremonies and inherited his estate; and that Aiyathorai Ayyan took Narainayyan of the same gotra in adoption after upanayanam; and that Dorasami Ayyan's wife, with the permission of her husband and his dayadis, adopted Sami Ayyan after upanayanam, and Sami Ayyan had taken his adoptive father's property.

On cross-examination the witness admitted that the adoption [157] of his son was contested by the mother of the adoptive father who filed a suit, but withdrew it on receiving some property and allowed the validity of the adoption. He also admitted that the brothers of the other Visvanathayyan had contested the adoption made by Visvanatha, and that one of them, Rangasami, filed a suit, but afterwards compromised it allowing the adoption, as it was thought a question might arise as to the validity of the adoption of one of Rangasami's sons.

Narainappayyan of Kolimani, who appears to be the same person as was mentioned by the preceding witness as Narainayyan, deposed that he was adopted after upanayanam by his uncle Aiyathorai Ayyan, and had inherited his property maintaining the widow. He spoke to the instances mentioned by the preceding witness—the adoption by Visvanathayyan, one of his gnatis, the adoption by Dorasami Ayyan and the adoption of the witness Ramayyan's son. Tirumalai Ayyangar of Tinnevelly deposed he had given his son in adoption to his uncle Ramanuja Ayyangar three months after upanayanam had been performed—that he had acted on an opinion he had received from Peria Sastrial. He also mentioned that one Krishna Ayyangar had adopted his dayadi, Ponnu Ayyangar, after upanayanam and that one Alwar Ayyangar had similarly adopted his brother's son Appana. On cross-examination this witness stated that he had been present at the adoptions he had mentioned which took place in the temple street and he admitted that in these cases there were no dayadis competent to object.

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Kuppusami Ayyan of Mannargudi deposed he had been adopted by his paternal uncle Nanu after upanayanam, and that he had after his uncle's death received the estate, 5 velis of land, without opposition on the part of any dayadi, but he did not mention whether there were any dayadis who would object.

Srinivasa Ayyangar of Mannargudi deposed that he had given his son Krishnasami Ayyangar after upanayanam in adoption to the son of his paternal uncle—that the boy had performed the funeral ceremony and succeeded to the estate of his adoptive father. He also mentioned, as instances of similar adoptions, the adoption of his brother-in-law's son, Krishna Ayyangar, by his paternal uncle Savari, who had succeeded to Savari's property without opposition, and the adoption of Chinnasami by the widow of his uncle in [158] accordance with her husband's permission. He admitted, in cross examination, that there were no dayadis to contest the adoption of his son.

Ten witnesses were examined on the part of the appellant.

The 1st, 2nd and 3rd witnesses, who were called to speak to the circumstances of the family, gave no evidence as to custom. They admitted that the defendant No. 3 had been adopted by Minakshi; that he had, thereafter, performed the annual ceremony of her husband; that she had arranged his marriage, and that he had performed her funeral rites and subsequently lived in the house she had occupied.

Appu Sastri of Idayathamangalam, who professed to have studied the Sastras and Rigveda and was a nephew of the late Pandit of the Sadr Court, denied that the custom of the adoption, after the upanayanam ceremony had been performed, was recognized as valid in the Districts of Tanjore and Trichinopoly, even when the parties to the adoption were of the same gotra. He asserted that such an adoption had been set aside in the Trichinopoly Court, and no appeal had been preferred. He mentioned that, at Tirupalathurai, in the District of Trichinopoly, one Rangasami Ayyan had adopted a boy after upanayanam, and his dayadis had interfered and the adoption was set aside, but he could not say what relationship existed between Rangasami and the boy. He knew of the adoption made by Raju, to which the witnesses for the respondents spoke. He gave it as his opinion that an adoption would be invalid in which the adoptive father did not perform, at least, the ceremony of upanayanam.

Rama Sastri of Tanjore, a Brahman mirasidar, an officiating priest for 50 years, deposed that he had seen many adoptions by Brahmans—he had not seen, generally, an adoption made after upanayanam. One or two had been made, but they had been set aside—that in Tirupalathurai Venkataramayyan's house his brother had adopted a boy after upanayanam and the adoption had been set aside in a suit that went up to the High Court. Natal Nandu Kaveri Vasudeva Sastri adopted his paternal uncle's son after upanayanam, and the adopted boy sued to recover a debt, but failed, as the Sadr Pandits, whom the Munsif consulted, pronounced the adoption invalid, and the widow recovered the estate. In his opinion no adoption of a Brahman could be made after the [159] performance of the upanayanam, and after a person had attained that stage in his religious life his father could not give him away.

Vythinatha Sastri, a mirasidar and priest of Kurambal who professed he had officiated at several adoptions among Brahmans, declared that in not one of them was the adoption after upanayanam. In all the cases a boy of a certain gotra had been given to a boy of the same gotra. He was not examined as to whether an adoption after upanayanam would

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be valid if made in the gotra. Gurusami Sastri, officiating as priest in Samimalai near Kumbakonam, deposed he had officiated at 4 or 5 adoptions all made before upanayanam. He considered an adoption after upanayanam forbidden by the Sastras even to persons of the same gotra and that the usage coincided with the law.

Sitarama Dikshatar, priest residing at Palmanari in Tanjore, deposed he had officiated at ten or twelve adoptions in some of which the boys were, and in others in which they were not, of the same gotra as the adopter, and that all were made before upanayanam. He was not examined as to whether such an adoption as we are considering, if made, would be valid.

Vythinatha Sastrial of Negapatam, priest of seventy or eighty families had seen no instances in which adoption had taken place after upanayanam. He knew only one adoption which took place and the parties were then of different gotras. He had heard of one case in which an adoption after upanayanam had been set aside in a suit though the parties were dayadis, but he added that he knew the adopted boy had nevertheless been performing, up to the time when he was examined, the annual ceremonies of his adoptive father and mother. Rajappayyan of Idayathamangalam in Trichinopoly had attended about ten adoptions in all of which the boy had not undergone upanayanam. He had heard of an adoption at Tirupalathurai after that ceremony and that it was set aside. This is possibly the same instance as was mentioned by other witnesses. The witness did not state what was his own opinion as to the validity of an adoption among dayadis after upanayanam.

Upon this evidence the Subordinate Judge, himself a Brahman, again returned a finding that the adoption was valid and the learned Judges, before whom the case came for hearing, considering that there were grounds for doubting the correctness of this **[160]** Court's decision in *P. Venkatesaiya* v. *Venkata Charlu* (1), referred the appeal to the Full Bench for disposal.

The general rule that the adoption of a Brahman, after upanayanam, is invalid is not, I understand, questioned, but it is alleged that this general rule is subject to exception when the person taken in adoption is of the same gotra as the adopted, and the question, which is presented to us for decision, is whether the evidence in this case is sufficient to warrant the Subordinate Judge in arriving at the conclusion that the exemption is a part of the customary law of the Southern Provinces of this Presidency, while it has been ruled that "under the Hindu system clear proof of usage will outweigh the written text of the law." We have been warned that "it is of the essence of special usages modifying the ordinary law . . . . that they should be ancient and invariable, and that they should be established to be so by clear and unambiguous evidence."

English Judges in this country have been placed at some disadvantage in ascertaining the laws and usages accepted by the people. The treatises, which have commanded the highest and most extensive authority, were composed some centuries before the introduction of British Courts. With the reverence for antiquity characteristic of Hinduism, they are not, nor were they intended to be, records of law obtaining in practice, but commentaries on the text of treatises accepted as inspired. Although now and again they refer to existing practice, they do so as

(1) 3 M.H.C R. 28.

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corroborating a subtle exposition of a text. At the same time they disclose that the law had undergone changes, that considerable variety obtained between the practice of the present and the practice of the past, and that the opinion even of the learned was still in many points unsettled. Between these principal treatises and the institution of Courts, with proceedings regularly conducted and recorded, we have a long interval, during which one or other of the controverted opinions must have found more or less general acceptance. But there has been no living authority commonly recognised as decisive and coercing to uniformity. Hence, local divergences of practice necessarily ensued. But while it is not impossible to detect these divergences when they can be traced to the influence of a school of Pandits which has accepted the teaching of a [161] particular commentator, it is especially difficult to do so when the views of the commentator locally accepted as authoritative have been modified by practice. In a country in which property is greatly subdivided and the written law obscure and available but to few, many causes conduce to bring about partial deviations even from such portions of the law on which educated opinion had attained more or less unanimity. The influence of natural affection may have induced the head of the family to dispose of the family wealth otherwise than in strict conformity with the precepts of the law, and the good feeling of the members has led them not to be too exact in vindicating their legal rights. Of this we have an instance at the present day in the very usual abstinence of Muhammadan ladies from insisting on their claim to share in their husbands' estate in competition with their children.

The ignorance of the local Pandits may have led here and there to an unintentional deviation from the law—and in places where the influence of the Muhammadan has for a season prevailed, the absence of an authority to constrain obedience to the personal law of the conquered cannot have been altogether without effect in unsettling the law. Lastly, there are the great changes which changed circumstances must operate in the legal conceptions of the persons subject to a personal law and which probably have never been more active than in this century.

In the case before us there is considerable evidence that, notwithstanding the ruling of the High Court, the practice of adopting dayadis after upanayanam obtains, and seeing that no less than three Brahman Judges, the Munsif, the Subordinate Judge and our learned colleague, have pronounced in favour of the usage, I should be reluctant to hold that the Subordinate Judge was not justified in finding it sufficiently established to have the force of law. The evidence as to present practice appears to me to be supported precisely where it requires support to justify us in accepting the alleged usage as customary law. Our learned colleague has shown us that filiation is not constituted by upanayanam but by the gift and acceptance of the youth—that adoption within the gotra and çaka works no necessary change on what is fixed by upanayanam, the gotra, the çaka and the çama. The introductory words of the text of Vasistha "Sprung from one following a different gotra" permitted the opinion that the rule [162] which has been inferred from it applied only to those born out of the gotra. And we have been shown that this opinion was entertained by the author of the Datta Kaustabam. It is said, that when one of the same gotra is adopted, the rules as to initiatory rites do not apply, and one may be adopted after upanayanam, and this author, indeed, goes further and maintains, in reference to the instance of Somaseka in the Ramayana, that adoption, after upanayanam, is permitted, even when the

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youth is of a different gotra. Then we have the text of Prajapati—The acceptance of a son in adoption is good if in 12 days, middling if after tonsure, and inferior if after upanayanam. The adoption of one who is married will become a cause of distinction to the family. So also in the Smriti Sangraha we find the injunction "Do not give one who has entered on an Asramam (period of life), give one who is not invested when there is no distress. In distress give though he is even a Brahmachari (*i.e.*, a person who has been invested with the sacrificial thread) if a second son."

The passage in Daksha has also been brought to our notice. "A wife may give in distress a younger son, though he is a Brahmachari and 12 years of age as in the case of Somaseka."

These texte are cited in Vythinadha Dikshatar, a writer of authority in the Tamil Districts, who approves of them. Here, it appears to me, we have a foundation for the existence of a local custom at variance with what is now recognized as the more general rule. It may, I think, be shewn that the exception had at one time more general acceptance than is now admitted.

It must always be a task of some difficulty to ascertain how far an apparent deviation from the text of the law is unintentional, and how far it is due to some temporary circumstances. And the difficulty is increased when the investigation must be conducted on materials supplied by suitors who have not the means to defray the cost nor in many cases ability to suggest the course it should pursue. It is not, therefore, matter for surprise that, in their anxiety to act on such information as appeared to them the more reliable, the Courts of British India should have exposed themselves to the criticism that they have guided their decisions too much by the treatises of ancient commentators, and have disregarded existing usage. There has not been any unwillingness on the part of the Courts to undertake inquiries into custom, but there has been absence of material which would enable them to ascertain the **[163]** existence of usage sufficiently proved to be accepted as law, and a reluctance to introduce confusion into the law and uncertainty as to their rights among those who are governed by the law by the recognition of a deviation from the texts of the law which has been unintentional or would be explicable if the circumstances were more fully known.

I cannot admit that these considerations ought not greatly to influence the Courts, but on the other hand, I am compelled to admit that they have in some instances been accorded somewhat too much weight and that it is possible that in view of fuller information it may be necessary to modify in some few instances the conclusions at which the Courts have arrived. I say in some few instances because I do not think much difference will be found to exist between the established usage and the written law on the points on which the circumstances accepted in the locality have pronounced themselves explicitly.

The earliest recorded precedent under British rule relating to this Presidency is mentioned in *Veeraperumal Pillai* v. *Narain Pillai* (1).

"Sir Archibald Campbell, in consequence of opinions given him by the Pandits of Tanjore, had placed Ameersing on the musnud of that Kingdom in derogation of Serfogie (the present Rajah) claiming as an adopted son. The integrity of the opinion being suspected, there was a reference to Lord Cornwallis who got Sir William Jones to state the substance of the questions in Sanskrit to some of the most learned Pandits in

(1) 1 Strange's Notes of Cases 83.

Bengal and Benares which that eminent person took pains to do in such a manner as to render it impossible for those persons to guess who were the interested parties." 1885 MAY 1.

The learned Judge proceeded to say that being actuated by similar jealousy and solicitude he had prepared and circulated a string of questions pertinent to the points before him and was in possession of answers from Kasi (Benares) to Ramesvaram from various parts of India in every direction. FULL BENCH. 9 M. 148 (F.B.).

One of the questions that called for decision was the limitation of age, and the learned Judge, after noticing the distinction between Brahman and other castes, observed "with regard to the age of five as agreed to have been limited by the Sastra for **[164]** adoption, the result of a careful perusal of all the texts in the digest and commentary was found to be consistent with, if not to confirm, the law as declared by the Pandits of the Sadr Dewani Adalat in the Tanjore case." He cited the answer of the Pandits as follows :—"That the restrictions as to purification and age are to be observed only in instances where adoption takes place of those who are not sagotras. That no Muni or divine legislator has positively said so, but that in a number of books of high authority the rule is understood to be that, in case of filiation by adoption, provided the adopted be a sagotra, the adoption is valid and the right to inheritance will attach though he have passed his fifth year and undergone the purification by tonsure." He added "The strict interpretation of sagotra is one who has descended in a direct male line from one common ancestor."

The opinion of the Benares Pandits was also cited as follows :—

"In the central region the inhabitants adopt children who are advanced more than five years in age and have undergone the tonsure and other modes of purification among the lineage of their natural father, and sons, so adopted, inherit the estate of their adoptive fathers. That in the Deccan, when adopting from their own lineage, if they do not find a child who has not undergone the tonsure, they take a child who has undergone it."

Sir Thomas Strange inferred from this opinion that the limitation as to age was inapplicable, not only where the person to be adopted was a sagotra, but connected with the adopter through a female. It is obvious that the terms of the translation do not necessitate this conclusion, and it is not supported by any authority which we have as yet discovered. It would appear from the rest of the judgment that Sir Thomas Strange was not at the time fully informed of the supposed reason for the rule respecting the limitation of age, and of the grounds on which it was considered inapplicable where the person to be adopted was a sagotra.

The judgment is, nevertheless, important—although the opinions cited are those of the Pandits of Benares and of the Sadr Dewani Adalat of Bengal, it is certain that, if Sir Thomas Strange had discovered any discrepancy between those opinions and the opinions he had collected from the Southern Presidency, he would not have failed to mention it.

We have then authority for the position that as early as the **[165]** commencement of this century there was a *consensus* of opinion among Hindu lawyers that the rule prohibiting the adoption of a Brahman after the performance of tonsure or the other purificatory ceremonies was not understood to apply in the case of an adoption of a sagotra. We have also authority for the position that, although it was admitted that this doctrine was not expressly declared by the leading authorities

1885 MAY 1. — FULL BENCH. — 9 M. 148 (F.B.).

on the law of adoption, it was known to be declared in treatises recognized as authoritative.

The judgment to which we have referred was delivered by Sir Thomas Strange in 1803 when he filled the office of Recorder. His work on Hindu Law was published in 1830. He there recognizes the grounds on which the rule respecting adoption prior to the completion of the initiatory ceremonies was founded, but he observed "The question (of age) varied according as the adopted is taken from a family nearly related or from strangers," chapter iv, and again "that they" (the ceremonies of tonsure and upanayanam) "should so remain (to be performed) is of less consequence in proportion as the adopted is nearly related to the adopter," and finally he leaves the question, as to the eligibility of a boy for adoption after the performance of the ceremonies, an open one.

In *Prayaga Venkana* v. *Lachsmi* (27th July 1809) (1), the question was raised whether a brother's son was eligible for adoption. The Pandit replied that according to the Dattaka Mimansa the sons of brothers invested with the sacrificial thread might be adopted. and Mr. Ellis observed that the more correct because the more reasonable opinion appeared to be that a person on whom upanayanam had been performed was eligible "if of the same gotra ; ineligible if of a different gotra from the adopter."*

In *Sadasiva Pillai* v. *Vadaganadha Pillai* (2), the Pandit certified that the adoption of an adult being a brother's son was valid. Mr. Colebrooke observed that a difference of opinion prevailed in regard to the adoption of adults or persons for whom certain ceremonies (Samskara) had been performed, the prevalent doctrine in **[166]** most parts of India being adverse to it. He added "the objections are less forcible in the instance of a relation on the male side than in the case of a stranger." Mr. Ellis considered the Pandit's opinion correct. In *Kerutnaraen* v. *Mussummaut Bhobinesree* (September 1806) (3), where the person adopted was apparently not a sagotra, Mr. Colebrooke observed "in other provinces, and even in Bengal, if the adoption be of a near relation on the paternal side no difficulty would occur, as the adoption of a brother's son or other nearest male relative would be unquestionably valid at an age much exceeding that specified."

We can find no ruling on the point before us in the reported decisions of the Sadr Court of this Presidency. It was, however, taken in *P. Venkatesaiya* v. *Venkata Charlu* (4), but it appears from the report that the question was imperfectly argued. No reference seems to have been made to *Veeraperumal* v. *Narain Pillai* (5), *Prayaga Venkana* v. *Lachsmi* (1), and *Sadasiva Pillai* v. *Vadaganadha Pillai* (2), nor were the learned Judges referred to the passages in the unprinted commentaries which have been collected by our colleague.

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* In a note which will be found in Strange's Hindu Law, 3rd edition. 169, Mr. Ellis refers to the chapter in the Madhaviyam on religious rites to be performed on adoption, and observes "This Pracarana concludes thus: Etadaswagotra putra grahana vishayum Dattaurasa." Thus is particularized the ceremonies required on adopting a son not of the same gotra. Whence it is inferred that the performance of the Datta Homam ceremony, of which the effect was to change the gotra of the adopted son was not necessary in the case of an adoption within the gotra.

(1) 2 Strange's H. L. 102.
(2) 2 Strange's H. L. 109.
(3) 1 Sel. Rep. 161=6 I.D. (O.S.) 157.
(4) 3 M.H.C.R. 28.
(5) 1 Strange's Notes of Cases 83.

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In *Ramasami Iyen* v. *Bhagati* (1), decided by the High Court of Travancore, the Chief Justice referring to the text from the Kalika Purana—"Sons given and the rest though sprung from the seed of another, yet being duly initiated under his own family name, become sons" &c. Dattaka Mimansa, Section 4, para. 22, and to the commentary—"Although sprung from the seed of another, sons given and the rest when 'duly initiated under his own family name' (that is, by the adopter according to the form prescribed by his own code under the family name of himself) into the different rites commencing with that for a male born, then became sons of the adopted parent, not otherwise," *Ibid.*, para. 23, observed in the case of a brother's son it cannot be said that, by the upanayanam already performed in the united family, he had been initiated under a family name different from that which he would have to take if he had to be adopted by the uncle or uncle's wife. The distinctive family name (tribe or gotra) would be identical, and the code or branch of the Veda which the boy and the uncle follow would be also the same, and he held the reason of the prohibition [167] ceasing the prohibition would not apply and that the said prohibition is clearly directed to a case where the gotra of the adopter is different from that of the natural family of the boy adopted. For there might be cases in which adoption from a different family (gotra) may become necessary, that is, in the absence of nearer relatives and it is to such cases clearly the case applies. The other learned Judges concurred.

In view of the support which the evidence in this case receives from the circumstances that the usage was regarded as sanctioned by some writers of authority, that it was accepted by a more recent writer held in esteem in the Tamil Districts and that evidence of its recognition is afforded by the earlier cases to which we have referred, I consider we should not be justified in holding that the Subordinate Judge ought not to have accepted the usage as sufficiently established by the evidence to be received as a part of the law.

This being the only question referred, the case will be sent to the Division Bench for disposal.

KERNAN, J.—I concur.

MUTTUSAMI AYYAR, J.—I concur.

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9 M. 167.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

THE QUEEN-EMPRESS *v.* APPATHORAI.*
[17th and 23rd November, 1885.]

Act XXIV of 1859 (*Madras*), *Section* 48 (5)—*Act I of* 1885 (*Madras*)—*Dung-heap kept in a town, no offence.*

By Clause 5 of Section 48 of Act XXIV of 1859 (Madras), as amended by Act I of 1885 (Madras), any person, who within the limits of a town "throws or lays down any dirt, filth, rubbish or any stones or building materials; or who constructs a cow-shed or stable within the bounds of any thoroughfare; or who causes any offensive matter to run from any dung-heap into the street" is punishable.

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* Criminal Revision Case 565 of 1885.

(1) 8 Mad. Jur. 151.

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APPELLATE CRIMINAL.

9 M. 167.

A was convicted and fined for having kept a manure-heap in a town but not in a street:

Held, that the conviction was bad.

[168] THIS was a case, referred for the orders of the High Court, under Section 438 of the Code of Criminal Procedure, by H. P. Gordon, District Magistrate of South Arcot.

The facts were stated as follows:—

"In this case the Magistrate has convicted the accused under Section 48 of Act XXIV of 1859, of Clause 5, for keeping a manure-heap in a vacant spot near the public street.

"The Joint Magistrate refers the conviction as illegal, on the ground that it is not shown that the heap was within the bounds of a thoroughfare, or that offensive matter ran from it into the street.

"I am of opinion, looking to the effect of Act I of 1885, which came into force on the 1st July, that the conviction is good; but having regard to the collateral results which would attend that construction, have thought it better to refer the question for the decision of the High Court. It seems to me that the effect of the repeal by Act I of 1885 of the expressions in the body of Section 48, as applied to Clause 5, is to render penal, not only the deposit of dirt or rubbish, but also that of stones or building materials in any place within the limits of the town. It is impossible to suppose that it could have been the intention of the Legislature to prohibit the deposit of building materials in convenient places within the town, but it is possible that the concluding words of the first part of Clause 5, were overlooked when the words limiting the provisions of the section to thoroughfares, &c., were repealed. The object of the amendment is known to have been to afford facilities for the prevention of ill-usage of animals.

"The punctuation and the grammatical construction of Clause 5, as printed in the authorized edition of the Madras Code, would appear to prevent the application of the words 'within the bounds of any thoroughfare' occurring in the second paragraph of Clause 5 to the first paragraph of that clause."

Counsel were not instructed.

The Court (MUTTUSAMI AYYAR and PARKER, JJ.) delivered the following

JUDGMENTS.

MUTTUSAMI AYYAR, J.—In this case the accused kept a manure-heap in a vacant spot *near* his house and a public street, intending to remove it ultimately to his field for use. The Second-class Magistrate convicted him of an offence punishable under Clause 5, Section 48 of Act XXIV of 1859, and sentenced him to pay a [169] fine of eight annas. The Joint Magistrate considered that the conviction was illegal because the dung-heap was not kept *in* any public street, nor was any offensive matter permitted to run from it into such street. The District Magistrate is, however, of opinion that, under Section 48, as amended by Madras Act I of 1885, it is no longer necessary that the manure-heap should be kept *in* any street. The amendment consisted in the omission in the body of Section 48 of the words "in any street or thoroughfare or passage," and the words "to the obstruction, inconvenience, annoyance, risk or damage of the residents and passengers." The amending Act, however, does not alter Clause 5. It is in these terms:—"Any person who throws or lays down any dirt, filth, rubbish, or any stones or building materials; or who constructs any pial, cow-shed or stable, or the like within the

bounds of any thoroughfare; or who causes any offensive matter to run from any house, factory, dung-heap, or the like into the street." I am unable to adopt the construction suggested by the District Magistrate. It could never have been intended by the Legislature to make the deposit, either of rubbish or building materials, in convenient places within the limits of a town penal. The last sentence in Clause 5, which makes it penal to cause any offensive matter to run from a dung-heap into the street, contemplates the deposit of a dung-heap near a street or within the limits of a town as otherwise than penal. If the District Magistrate's construction is right, there was no necessity for retaining the word "dung-heap" in this sentence. The omission to insert the words, "in any street," in the first part of Clause 5 is an oversight; but the latter part of the clause sufficiently indicates the intention of the Legislature, and the construction we place should be such as is consistent with that intention. I would set aside the conviction and the sentence referred to us and direct that the fine be refunded.

PARKER, J.—It was certainly not the intention of the Legislature to make it penal to lay down a heap of dirt or materials for building *anywhere* within a town, but only in such places where those acts might cause public inconvenience or annoyance.

I observe that in some editions there is only a comma and not a semicolon after the word "materials" in clause 5, and looking at the context, it appears to me probable that the Legislature intended to make the words "within the bounds of any thoroughfare" apply to both classes of acts spoken of, *viz.*, the throwing **[170]** or laying down of certain substances, or the construction of certain buildings. It will be seen that the third class of acts spoken of in the same clause, *viz.*, the causing any offensive matter to run from any house, &c, is only made penal when the offensive matter is allowed to run "into the street," and not in any other case.

In the decision before us, as there is no evidence that the heap of rubbish was deposited in a public thoroughfare, I would set aside the conviction and direct that the fine be refunded.

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9 M. 170.

APPELLATE CIVIL.

Before Mr. Justice Kernan (Officiating Chief Justice) and Mr. Justice Parker.

VIRARAGAVA (*Plaintiff*) v. RAMUDU (*Defendant*).*
[17th November, 1885.]

Army Act, 1881, *Section* 151 (3)—*Civil Procedure Code, Section* 266, *expl.* (*b*)—*Debtor subject to military law*—*Attachment of moiety of salary under Rs.* 20 *per mensem.*

Section 151 of the Army Act, 1881, not being affected by the provisions of Section 266 of the Code of Civil Procedure, the attachment by a Civil Court of a moiety of the monthly salary of a debtor subject to military law, not exceeding Rs. 20, is legal.

THIS was a case stated under Section 617 of the Code of Civil Procedure by B. Ramasami Nayudu, District Munsif of Bellary.

The facts necessary for the purpose of this report appear from the judgment of the Court (KERNAN, OFFG. C.J. and PARKER, J.).

* Referred Case 8 of 1885.

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Counsel were not instructed.

JUDGMENT.

In this case, after decree against the debtor, who is a person subject to military law, but not a soldier of the regular forces, the judgment-creditor put in an execution petition, asking for a special order under the Army Discipline Act, 1879, Section 144, and Army Circular thereunder, No. 66, for the attachment of half the salary of the judgment-debtor, and obtained a special order granting the relief prayed for.

The Executive Commissariat Officer objected to the attachment, [171] on the ground that the judgment-debtor's salary, being less than Rs. 20 per mensem, was exempt from attachment under clause (*h*) of Section 266 of the Code of Civil Procedure.

The last proviso of that section, however, enacts that nothing in the section shall be deemed to affect the Army Act, 1881, or any similar law for the time being in force; Section 151 of the Army Act, 1881, which corresponds to Section 144 of the Army Discipline Act, 1879, on which the Army Circular of March 1882 quoted by the District Munsif was issued, enacts that a Court may direct specially that the whole or any part of the sum decreed shall be paid by instalments out of any pay payable to the debtor, and the amount named in the direction not exceeding half of such pay shall, while the debtor is in India, be stopped and paid in conformity with the direction.

The effect of that section is, that in no case shall the pay of a person subject to military law, but not a soldier of the regular forces, be liable to stoppage to a greater amount than one-half, but the stoppage is not confined to pay of Rs. 20 or upwards. Clause (*b*) of the proviso to Section 266 of the Civil Procedure Code provides that nothing in that section affects the Army Act, 1881, or any similar Act.

Our reply, therefore, is that the attachment of half the judgment-debtor's salary is valid and in accordance with law.

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9 M. 171=10 Ind. Jur. 98.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

KOTTAM ZAMINDAR (*Plaintiff*), *Appellant v.* PITTAPUR ZAMINDAR (*Defendant*), *Respondent.** [16th and 27th November, 1885.]

Act XXVII of 1860, *Section* 2—*Bond given to secure debt due to the estate of deceased Hindu—Suit by heir—Waiver of right to protection implied.*

R being a debtor to the estate of a deceased Hindu, executed a bond promising to pay the debt to V, the divided brother of the deceased, as his heir.

A suit having been filed against V by the widow of the deceased, who claimed his estate, R offered to pay the debt to V on production of a certificate under Act XXVII of 1860, but not otherwise.

Held, that, as R had executed a bond promising to pay the debt to V, he could not rely on the protection afforded by Act XXVII of 1860.

[172] THIS was an appeal from the decree of T. Ramasami Ayyangar, Subordinate Judge at Cocanada, in suit 1 of 1884.

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* Appeal 78 of 1885.

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APPELLATE
CIVIL.

9 M. 171=
10 Ind. Jur.
98.

The facts necessary for the purpose of this report appear from the judgment.

Hon. *Rama Rau*, for the appellant, contended that Section 2 of Act XXVII of 1860 did not apply, and that there had been no proper tender by the defendant.

Mr. *Wedderburn*, for the respondent, urged that no question of tender arose; that under Act XXVII of 1860, the defendant was entitled to demand that plaintiff should produce a certificate before he could claim payment of the debt sued for, and that, as he declined to do so, he absolved defendant from the duty of tendering. The fact that the debt was secured by a bond did not alter the nature of the debt. There was no consideration to support any promise to pay the plaintiff otherwise than as his brother's representative.

JUDGMENT.

The judgment of the Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.), which was reserved till the 27th November, was delivered by

MUTTUSAMI AYYAR, J.—The appellant, Sri Raja Vatchavaya Venkata Simhadri Jagapathiraju, is the zamindar of Kottam, and the respondent, Sri Raja Rau Venkata Mahipathi Gangadhara Rama Rau, is the zamindar of Pittapur in the Godavari district. The appellant had a divided brother, and, upon his death, a certain sum of money was paid to his widow, and a release was obtained from her of her claim to her husband's property. The respondent owed to the deceased a large sum of money on account of certain hundies, and executed the bond (Exhibit A) to the appellant, as his heir, for Rs. 83,679-1-1 on the 12th November 1880. This document provided for the re-payment of the debt at Tuni, where the appellant resides, in two instalments, the first on the 20th November 1881 and the second on the same date in 1882.

In 1881 the appellant's brother's widow instituted a suit to set aside the release which had been obtained from her. Whilst this suit was pending, in March 1882, the respondent appointed the Official Trustee of this Court to pay off his debts and entrusted to him six lakhs of rupees for that purpose. The debt now in dispute was one of the debts which the Official Trustee was authorized to pay. On the 3rd April 1882 the Official Trustee addressed the letter (Exhibit I) to the appellant on respondent's behalf. It stated that, owing to the litigation between the appellant and his sister-[173]in-law, he was not in a position to give a valid receipt, and that as the respondent was ready to pay off the whole debt, the appellant should produce a certificate under Section 2, Act XXVII of 1860. It further intimated to the appellant that the principal and interest due under the bond would be lodged in the Bank at Cocanada on the 12th April 1882, that the respondent would not pay interest after that date, and that the money to be lodged would be paid to the appellant on his furnishing to the Official Trustee at Madras a copy of the certificate which he was required to obtain. The appellant at once sent a reply, declining to produce a certificate and calling attention to the fact that the bond was in his name and payable at Tuni.

In February 1883, the appellant was informed that the amount mentioned above, *i.e.*, the principal and interest up to 12th April 1882, would be paid if he gave an indemnity. The appellant declined to give an indemnity, adding that he would accept the amount, which the respondent offered to pay, as a part-payment, without prejudice to his right to institute legal proceedings to recover the balance.

The Official Trustee was examined as a witness, and proves that on

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the 12th April 1882 he had funds in the Bank at Cocanada to his credit from which the appellant might have obtained payment if he had produced a certificate. It does not appear that there was any attempt or offer to remit the money to Tuni. The appellant having declined to produce a certificate, the money lodged in the Bank was shortly after paid to other creditors.

In December 1882 the suit instituted by the widow was dismissed, but she appealed from the decision to the High Court and the present suit was instituted whilst her appeal was pending. The respondent paid into Court the sum formerly lodged in the Bank, which includes interest up to 12th April 1882 only, and denied his liability for subsequent interest and costs. The Subordinate Judge upheld this contention and decreed that the plaintiff (appellant) is entitled, on producing a certificate that he is the legal representative of his deceased brother, to receive the amount paid into Court by the respondent, and dismissed the remainder of the claim with costs. A certificate has since been obtained and the money in Court has been paid to the appellant. His appeal is against only so much of the decree as disallowed costs and interest from the 12th April 1882.

[174] The suit having been brought upon the specific contract (Exhibit A) any defence available to the debtor must arise out of the contract, and he cannot be permitted to rely on the prior state of things which had merged into it, in order to add to its terms. It was open to him to have inserted a provision in document A that the debt would be paid only on the production of a certificate, but this he did not choose to do. On the contrary, he waived the right which he had under Act XXVII of 1860 and contracted a new obligation. It is not alleged that he was induced to do so by fraud, or that document A was executed otherwise than with full knowledge of the material facts.

The institution of a suit by the appellant's sister-in-law was a contingency which was not foreseen and provided for by the debtor; and such default on his part could not operate to make his obligation, which was unconditional, conditional. If the widow had succeeded in her suit, no doubt, he might have pleaded a failure of consideration. If the litigation excited a reasonable apprehension, his proper remedy was, perhaps, an inter-pleader suit, but he had no right to vary, of his own choice, the contents of the obligation created by the bond. The Official Trustee was clearly right in himself refusing to pay, and advising the respondent not to pay, otherwise than into Court, so long as there was any doubt as to the widow's title, but when once the respondent had accepted appellant as his creditor, he was not entitled to require either a certificate or indemnity bond; and even assuming that he could demand an indemnity, his liability to pay interest would not cease unless he tendered payment at Tuni according to the terms of the document. There is no evidence that a specific sum was set apart in the Bank to the appellant's credit and to be appropriated in liquidation of his debt. This is not a case of reciprocal promises in which the mere offer of performance on one side may be accepted as a fulfilment of the obligation.

We must reverse so much of the Subordinate Judge's decree as disallowed the claim to interest from the 12th April 1882 and costs, and direct that the respondent do pay interest at the contract rate, *viz.*, 12 per cent. per annum up to the date of the plaint, with further interest at 6 per cent. until the date of payment into Court, and the appellant's costs throughout.

9 M. 175.

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APPELLATE CIVIL.

9 M. 175.

[175] APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Plaintiff*), *Appellant v.* VIRA RAYAN AND OTHERS (*Defendants*), *Respondents.** [14th September, 1880 and 2nd May, 1885.]

Forest lands, Malabar—Presumption as to ownership—Rights of Crown and of occupier of waste land under Hindu law—Suit by Crown for declaration of title and possession—Plaint—Cause of action within Statutory period not alleged—Burden of proof—Limitation—Regulation II of 1802*—Remedy suspended, Right surviving—Act XIV of* 1859*—Claim by Crown not affected—Limitation Act,* 1871*—Effect on subsisting rights—Limitation Act,* 1877, *Sections* 2-28*—Construction.*

In the district of Malabar and the tracts administered as part of it, there is no presumption that forest lands are the property of the Crown.

According to the Hindu law a right to the possession of land is acquired by the first person who makes a beneficial use of the soil, the right of the Sovereign being to assess the occupier to revenue.

Assuming that the Crown has the right to oust any person who, without sanction, occupies waste land which has not been appropriated for any public purpose, it cannot by a suit brought for a declaration of title, or for ejectment, the date at which the cause of action arose not being stated in the plaint, compel a defendant to prove possession for 60 years.

As a general rule, a plaintiff must not only show he has a title, but that he has a subsisting title, which he has not lost by the prescriptive sections of the Limitation Act.

The probable explanation of the ruling in *Radha Gobind Roy's Case* (Suth. P. C. Cases 809) is, that when a plaintiff proves title and possession, it is to be presumed that his possession continues till the defendant proves that the possession was interrupted, but that where the plaintiff can prove title only, and not possession, he must prove that the adverse possession of the defendant or the acts of which he complains as impugning his title, occurred within the period prescribed by the Limitation Act.

In a suit instituted in March 1879 by the Crown for a declaration of title, to certain forest land and for possession of a portion thereof, the defendants alleged that the land has been in their possession for more than 60 years.

Held, that it was incumbent on the Crown, under Article 149 of Schedule II of the Indian Limitation Act, 1877, to show possession of the proprietary rights claimed [176] within 60 years, or, if the defendant proved possession, that such possession commenced, or became adverse within such period.

The District Court having held, that up to April 1, 1873, when the Limitation Act of 1871 came into force, the limitation for such a suit was 12 years from the time when the cause of action arose, and that the suit was barred by adverse possession for 12 years prior to April 1, 1873:—

Held, that, even if Regulation II of 1802 applied to claims by the Crown, inasmuch as the Regulation only barred the remedy and did not extinguish the right, and Act XIV of 1859 did not extend to such a claim, the right subsisted when the Limitation Act of 1871 came into operation, and as long as that Act was in force, and that the Crown, being entitled under that Act to sue within 60 years from the date of the cause of action, and under Section 28 of the Limitation Act of 1877, to sue within 2 years from the 1st of October 1877, the suit was not barred, provided it could be shown that the cause of action arose within 60 years from the date of its institution.

[**F.**, 19 M. 165 (166); **R.**, 13 M. 89 (109); 15 M. 315 (318); 20 M. 299 (302); 25 M. 457 (495); 33 M. 1=20 M.L.J. 66 (69)=7 M.L.T. 128; 14 C.L.J. 292=16 C.W.N 351 (354)=11 Ind. Cas. 465 (468); 3 M.L.J. 231; 105 P.R. 1901; **D.**, 28 M. 257 (288)=15 M.L.J. 147.]

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* Appeal 100 of 1879.

1885 MAY 2. — APPELLATE CIVIL. — 9 M. 175.

THIS was an appeal from the decree of H. Wigram, District Judge of South Malabar, in suit No. 15 of 1879.

The facts and arguments appear from the judgment of the Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.).

The Acting Government Pleader (Mr. *Shephard*), for appellant.

Mr. *Branson*, Mr. *Johnstone*, *Bhashyam Ayyangar* and *Sankaran Nayar*, for respondents.

JUDGMENT.

This suit was brought by the Secretary of State against nine persons, of whom Nos. 8 and 9 were described as holding under No. 2 to obtain a declaration that the lands, hills and forests forming part of the upper water-shed of the Bhawani river and known as the Attapadi valley are the property of Government, and that no one of the defendants had any right or title thereto, to obtain an injunction restraining the defendants Nos. 1—7 from cutting timber on the lands, hills, forests, and to recover possession from defendants Nos. 8 and 9 of 500 acres of land described in the 2nd schedule to the plaint as "To be selected from out of the lands on the Elamala hills, being a part of the hills before mentioned."

The plaint avers that lands, &c., of which the extent is estimated at about 232 square-miles are the property of Government, and that no private persons have any proprietary rights therein : that the Government always received and still receives plough dues and spade dues and formerly received grazing rent in respect of some of the lands : that the defendants Nos. 1-7 claim jenm or proprietary rights over the lands or portions of them, but that the plaintiff does not know what portions of them are respectively [177] claimed by the defendants : that the defendants Nos. 1—7 or some of them have of late years been granting leases of the said lands to various persons : and that in particular defendant No. 2 has granted to defendant No. 9 a lease of the lands described in the 2nd schedule attached to the plaint, dated September 11, 1877, for 25 years, and that defendant No. 9 has entered into possession of the lands so leased, and cleared some of them : that defendant No. 8 has some interest in the lease: and that the defendants Nos. 1—7 have of late years been granting leases to cut timber in the said lands to various persons and have in various ways been attempting to exercise acts of ownership over the lands. It will be seen that the plaint in many respects violates the requirements of the Code of Civil Procedure. It does not state any common ground of action against the defendants Nos. 1—7. It asserts a claim to 232 square miles of country without specifying of what lands the defendants Nos. 1—7 severally claim possession. The reason assigned for this omission was not sufficient unless it had been shown that application had been made to the several defendants to state in respect of what lands they claimed rights and they had refused to give it or had laid claim to the whole extent. And although want of information on the part of the plaintiff's agents might have excused the presentation of the plaint in this form if reasonable diligence had been used to procure better information, yet when the defendants had been summoned, they should have been examined and the plaint amended and made more precise.

Again, the plaint contained no statements of the date when the cause of action arose except in respect of 500 acres leased by defendant No. 2 to defendant No. 1. This defect should, if possible, have been corrected, especially when it was found that the contesting defendants set up a plea of limitation. At the hearing of the appeal we were unable to understand

the bearing of much of the evidence adduced, as the maps which were before the Court did not show the names of the hills nor could we ascertain precisely what portions of the valley were claimed by the several defendants. We therefore adjourned the further hearing and directed that maps should be prepared and that the respondents (defendants) should point out what lands they severally claimed. A map was prepared and produced in compliance with our order. It shows that a large block of land on the west and a small block on the east marked green are claimed by neither party ; **[178]** that some lands are claimed by respondent No. 1 only, some by respondent No. 2 only, some by both, and some by these respondents and by respondent No. 8, Colonel Scott, who claims under the respondent No. 2. Of the original defendants, Nos. 3, 4, 5, 6 and 7 averred they had some ancestral rights in the tract, but expressed their willingness to surrender them, and No. 9 alleged he had relinquished his rights to No. 8. The suit proceeded against the defendants Nos. 1, 2 and 8 who are the respondents to the appeal. Respondent No. 1 is Vira Rayan, Eralpad, or holder of the second stanam in the family of the Zamorin. He objected to the frame of the plaint, denied that the Government has ever taken possession of the lands which he claimed, and asserted he had enjoyed them as part of his ancestral domain for a period of upwards of 60 years adversely to the claim made by Government. Respondent No. 2, who is the Mannargat Mupil Nayar, also took exception to the frame of the plaint, and averred that the Government had not held the jenm right in the lands claimed by him, though it had collected revenue from some of his tenants : that the lands to which he laid claim formed a part of Malabar and had, before British rule, been held by petty Chiefs of the Vallavanad family as part of the property attached to their stanam: that he and his ancestors had held jenm rights throughout the whole period of British rule : that, with the knowledge of Government officials, he had spent large sums of money on improvements : and that he had granted subordinate tenures to persons who ought to be made parties.

Respondent No. 8, Colonel Scott, set up a title under the respondent No. 2 and alleged that he was induced to acquire a lease from defendant No. 2 by reason of the representations of the officers of Government, and that he had expended moneys in obtaining the lease and in effecting improvements.

We have allowed the case to stand over for some time, as we were informed that the parties contemplated a compromise, but we have recently been informed that the negotiations have failed, and we must therefore dispose of it.

The tract of country known as the Attapadi valley lies to the east of the Western Ghats through which a stream has worked its way and formed a pass by which access is afforded to Malabar. On the east it is bounded by Coimbatore. A question was raised as to whether it formed a part of the District of Coimbatore or of **[179]** that of Malabar. We agree with the Judge that there is no proof that it ever formed part of Coimbatore. On the other hand, there is evidence that it was dependent on, if it was not a part of, Malabar before British rule. Dr. Buchanan, who visited Malabar in 1800, described it as having been ruled by an hereditary chief from whom the Zamorin exacted tribute in order that the residents of Attapadi might pass through the ghat and trade in Malabar. It cannot be ascertained whether the Attapadi valley was ceded with Malabar by the treaty of 1792. It is known that certain of the adjoining territories were claimed by the British as forming part of

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Malabar, and that the claim was disputed by Tippu. The Attapadi valley appears in Sartorius's map of 1793 as forming part of Malabar. It was regarded by Buchanan, who would have gained his information from the Collector, as part of Malabar, and the earliest official acts of which we have information were executed by Malabar officials. Mr. Ward in 1826 describes it as included in Malabar, and it has throughout been administered as part of the Malabar District. The question is important, because it is argued that there is a distinction respecting the right of the Crown to question the occupation of waste in Malabar and its right to question the occupation of waste in raiyatwari districts: and it was probably in reference to this presumed distinction that there is an argumentative statement in the plaint that the land formed part of Coimbatore. According to what may be termed the Hindu common law, a right to the possession of land is acquired by the first person who makes a beneficial use of the soil. The Crown is entitled to assess the occupier with revenue, and if a person who has occupied land omits to use it and the claim of the Crown to revenue is consequently affected, the Sovereign is entitled to take measures for the protection of the revenue. Whether the practice which has obtained in certain districts of requiring a person who desires to cultivate waste to apply to the local revenue officer for permission to do so has abrogated in those districts the Hindu law, or whether it may be justified by the establishment in those districts before British rule of the analogous doctrine of the Muhammadan law, we consider it unnecessary to determine in this suit, for we have found that the land appertains to the district of Malabar, and we agree with the Judge that there is no presumption in that district and in the tracts administered as a part of it, that forest lands are the property of the Crown. At the commencement **[180]** of the century it was the policy of the Government to allow all lands to become private estates where that was possible. Despatch of Lord Wellesley quoted in *Baskarappa* v. *The Collector of North Canara* (1). The Despatch and Order of the Governor-General in Council on the annexation of Malabar, dated the 31st December 1799 and the 18th June 1801, have not been adduced, but their purport appears from the Despatch of the 19th July 1804, quoted in *Vyakunta Bapuji* v. *Government of Bombay* (2). It was intimated that it never could be desirable that the Government itself should act as the proprietor of the lands and should collect the rents from the immediate cultivators of the soil. When in 1808 the Board of Revenue suggested that an augmentation of revenue might be derived from waste-lands reserved, they were informed that the Government did not look to any advantage of that nature beyond the benefit of increasing the amount of the public taxes in proportion to the existing taxes of the country (Fifth Report, Appendix 30, page 902; Revenue and Judicial Selection, Volume I, p. 842). It will be seen that at that time the Government, so far from abrogating the Hindu law, intended to assert no proprietary right to the waste, but limited itself to its claim to revenue. At the time Malabar came under British rule, all the forests were claimed as private property (I.L.R. 3 Bom. 586). In their Despatch of 17th December 1813, relating to the settlement of Malabar, the Directors observed that, in Malabar, they had no property in the land to confer, with the exception of some forfeited Estates (Revenue Selection, Volume I, p. 511). Although a different policy was subsequently pursued in other districts, and especially in

(1) 3 B. 452 (550). (2) 12 B.H.C.R. App. 1 (144).

more modern times, rules have been framed for the scale of waste-lands, there is nothing to show that any such change was notified in Malabar up to a period much later than that at which there is considerable evidence to show that the respondents Nos. 1 and 2 were in possession of and recognized as proprietors of the lands they claim by Government officials. But assuming that even in Malabar the Crown had the right to oust any person who without its sanction occupied waste-land which has not been appropriated for any public purpose, the question that presents itself for determination at the outset of this case is whether it is competent for the Crown by instituting a suit for a declaration of right or ejectment without **[181]** specifying a date at which the cause of action arose to compel a defendant to prove possession for 60 years.

The proposition appears unreasonable. We apprehend that the Crown must, as other suitors, disclose in its plaint a cause of action and aver that it arose within the period of limitation or the existence of some of those circumstances which extend the period allowed by the Limitation Act, and that the rule respecting the burden of proof where the existence of a subsisting title in the plaintiff is challenged by a plea of limitation, is the same whether the suit it brought by the Crown or by a private suitor.

The Courts have hitherto regarded *Maharajah Koowur Baboo Nitrasur Singh* v. *Baboo Nund Loll Singh* (1) as the leading case on the subject. In that case the Privy Council observed: "The appellant is seeking to disturb the possession, admitted to have existed for about 11 years, of defendants who insist on a possession of much longer duration as a statutory bar to the suit. It clearly lies on him to remove that bar by satisfactory proof. that the cause of action accrued to him (for that is the way in which the Regulation puts it) or a dispossession within 12 years next before the commencement of the suit, and therefore that he or some person through whom he claims was in possession during that period. No proof of anterior title . . . . . can relieve him from this burden or shift it upon his adversaries by compelling them to prove the time and manner of dispossession." It will be noticed that this case fell to be decided under the Regulation which prohibited the Court from entertaining a suit if it was instituted more than 12 years after the cause of action had accrued: but the rule it declared was held to apply equally to cases governed by Act XIV of 1859, where the words are "No suit shall be entertained. . . unless the same is instituted within the period of limitation." *Pandurang Govind* v. *Balkrishna Hari* (2). In *Gossain Doss Koondoo* v. *Seroo Koomaree Debia* (3) Couch, C.J., observed, "The plaintiff must show that he or some one through whom he claims has had possession within twelve years before the suit. If he sues for the recovery of immoveable property on the ground of having been dispossessed from it, he must show that he has come within 12 years from the time when his cause of action arose, the time when he was dispossessed. It is not enough for him to prove his title to **[182]** the property which is the subject of the suit and leave it to the defendant to show that the suit is barred by the Law of Limitation, by proving when the plaintiff was last in possession."

Notwithstanding the rulings to which we shall presently advert, the Courts have held that, as a general rule, a plaintiff must not only show that he has a title, but that he has a subsisting title, which he has not

(1) 8 M.I.A. 199 (220). (2) 6 B.H.C.R. 125. (3) 19 W.R. 192 (193).

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lost by the prescriptive sections of the Limitation Act. *Mano Mohun Ghose* v. *Mothura Mohun Roy* (1).

The Code of Civil Procedure recognizes the rule, in that it declares that the plaint must contain a statement of the circumstances of the cause of action and when it arose [Section 50 (*d*)] and that if the cause of action arose beyond the period ordinarily allowed by law for instituting the suit, the plaint must show the ground upon which exemption from such law is claimed (Section 50). It is, however, contended that the rule, which had been thus generally received, is impugned by the decision of the Privy Council in *Radha Gobind Roy* v. *Inglis* (2). In that case, the plaintiff proved a title to the soil of a lake which afterwards became dry and culturable: the defendant denied the plaintiff's title and relied on adverse possession for more than 12 years. Their Lordships observed: "The question remains whether the disputed land had or had not been occupied by the defendant for 12 years before the suit was instituted, so as to give him a title against the plaintiff by the operation of the Statute of Limitation. On this question, undoubtedly, the issue is on the defendant. The plaintiff has proved his title: the defendant must prove that the plaintiff has lost it by reason of his (the defendant's) adverse possession."

This decision does not appear in the Law Reports, Indian Appeals, and we have no note of the argument so as to ascertain whether the ruling in *Maharajah Nitrasur Singh* v. *Baboo Nund Loll Singh* (3) was quoted or discussed at the hearing. The absence of any reference in the judgment to this leading case has led the High Court of Calcutta to the conclusion that their Lordships did not intend to reverse the earlier ruling, but that the circumstances of the particular case warranted an apparent departure from it. Mr. Justice Wilson considers that the facts established shifted the burden of proof by warranting the presumption that the possession of the plaintiff continued until the contrary was shown (p. 232). **[183]** Mr. Justice Field considered that it was the intention of the Privy Council to graft an exception on the general rule where the property in dispute is not susceptible of actual and visible possession (pp. 238, 241). While upholding the rule of law declared in *Maharajah Nitrasur Singh's case* (3) the High Court of Calcutta has in some cases held that the burden of proof is shifted if the land in dispute is *chur* land, land formed by alluvion or jungle or waste land. *Mahomed Ibrahim* v. *Morrison* (4). We must express our concurrence with the observation of the learned Chief Justice of Calcutta in *Kally Churn Sahoo* v. *The Secretary of State* (5) that there cannot be one principle applicable in the case of jungle land and another principle applicable in the case of other lands. The owner of jungle land is as much bound as the owner of any other kind of land to watch his property, and if he omits the necessary precautions and a person enters and holds adverse possession of a piece of jungle for 12 years, he has obtained a title by prescription. The circumstance that the property was of such a character that it was more or less easy for the owner to discover the intrusion of a stranger is immaterial, unless there has been such fraud as to bring the case within the provisions of Section 18 of the Act. The ignorance of the owner will not prevent the accrual of a title by prescription. *Rains* v. *Buxton*(6). Of course the enjoyment necessary to create a title by prescription must not be a mere succession

(1) 7 C. 225.
(2) 3 Suth. P.C. cases 809=7 C. 232.
(3) 8 M.I.A. 199 (220).
(4) 5 C. 36.
(5) 6 C. 725.
(6) 14 Ch. D. 537.

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of independent trespasses—it must be, if not continuous, at least of such a character that an intention to assert a right as owner may be inferred from it. We find nothing in the judgment of their Lordships in *Radha Gobind Roy's case* to intimate an intention to lay down an exception to a general rule founded on the peculiar character of the disputed property, and we therefore agree with Mr. Justice Wilson that the probable explanation of the ruling in *Radha Gobind Roy's case* is that when a plaintiff proves title and possession, it is to be presumed that his possession continues till the defendant proves that the possession was interrupted, but that where the plaintiff can prove title only and not possession, he must prove that the adverse possession of the defendant or the acts of which he complains as impugning his title, occurred within the period prescribed by the Limitation Act.

This suit was instituted on the 27th March 1879 and is **[184]** governed by the Limitation Act, 1879, which prescribes (Article 149) that a suit in the name of the Secretary of State must be brought within 60 years from the date when the period of limitation will begin to run against a like suit by a private person.

It is therefore incumbent on the Crown either to show possession of the proprietary rights claimed within 60 years, or if the respondents prove possession, it is incumbent on the Crown to show that the possession of the respondents commenced or became adverse within the period of limitation.

The Judge has gone further, and has held that, up to April 1st, 1873, when the limitation sections of Act IX of 1871 came into force, the period of limitation for a suit of this nature was 12 years from the time when the cause of action a rose; and that inasmuch as the suit was not brought until Act XV of 1877 had come into force, and that Act provided that nothing therein contained should be deemed to revive any right to sue barred under the Act of 1871 or under any enactment thereby repealed, (a provision which was absent, it may be observed, from the Act of 1871), if the right to sue was barred by more than 12 years' adverse possession on March 31st, 1873, it cannot now be revived; and holding that the Crown had failed to prove its title and that the respondents had held adverse possession for considerably more than 12 years prior to the 1st April 1873, the Judge has held the suit barred by limitation. A question is raised as to the propriety of the ruling that the right of the Crown to sue (if it otherwise could maintain suit) would have been lost by adverse possession on the part of the respondents for a period of 12 years prior to the 1st April 1873.

It has been a much vexed question whether, in this Presidency, suits by the Crown for the enforcement of public rights were affected by any Law of Limitation prior to the enactment of Act IX of 1871. It is true that Regulation II of 1802, Section 18, Clause 4, prohibited the Courts of Adalat from hearing, trying or determining the merits of any suit whatever against any person . . . if the cause of action should have arisen 12 years before any suit should have been commenced on account of it, and that in Bengal, where a similar prohibition was laid on the Courts by Regulation III of 1793, Section 17, Regulation II of 1805 was enacted to declare that the condition of 12 years was not to be considered applicable to any suits for the recovery of the public revenue, or any public right or claim. But it is apparent from the **[185]** preamble and probably from the form of the late Regulation that doubts were already entertained

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as to whether Regulation III of 1793, Section 17, applied to suits in respect of public rights.

On the one hand, it is argued that a Regulation of the local Government could not bind the Crown, and that no enactment would bind the Crown unless the Crown was then expressly mentioned in it. On the other hand, it is argued that, although the East India Company enjoyed delegated Sovereign rights, it did not claim them in matters of litigation, and that the Crown, on resuming the rights it had delegated, voluntarily placed itself in such matters in the position of the Company. It is, however, unnecessary for us to determine the question whether the Regulation II of 1803, Section 18, did or did not apply to suits to enforce public rights; for the Regulation did not provide that when the period of limitation had expired, the right should be extinguished. It simply prohibited the entertainment of a suit after a certain period: the right subsisted but could not be enforced by being put in suit. Act XIV of 1859 did not extend to any public property or right, Section 17. The right then, if it had at any time subsisted, was in force when the limitation provisions of the Regulation were finally repealed by Act IX of 1871. By this repeal the prohibition, if it affected public rights, was removed and a period of limitation of 60 years was prescribed for suits by the Crown.

We have noticed that Act IX of 1871 contained no provision similar to that contained in Section 2, Act XV of 1877, declaring that nothing therein contained should be deemed to revive any right to sue barred under an earlier Limitation Law, and therefore between the time when Act IX of 1871 came into operation and the time when Act XV of 1877 came into operation, the Crown was, in our judgment, entitled to sue at any time within 60 years from the date of the cause of action even in cases in which the exercise of the right may have been suspended by the Regulation. But the clause of Act XV of 1877, which precluded the revivor of a right to sue barred was not confined to that Act but was extended to Act IX of 1871. The words are " All references to the Indian Limitation Act, 1871, shall be read as if made to this Act and nothing herein or in *that Act* contained shall be deemed to revive...any right to sue barred under that Act or under any enactment thereby repealed." Had this stood alone and had we come to the conclusion that Regulation II of 1802, Section 18, applied to public rights, we should have agreed with the Judge that 12 years' **[186]** adverse possession would have barred the right of the Crown to sue, and that the right would, under Section 28 of the Act, have been extinguished, but the clause to which we have referred is followed by another which declares that " Notwithstanding anything therein contained . . . . any . . . suit for which the period of limitation prescribed by that Act is shorter than the period of limitation prescribed by the Indian Limitation Act, 1871, may be brought within two years next after the said first day of October 1877, unless where the period prescribed for such suit by the same Act shall have expired before the completion of the said two years.

The words " Where the period of limitation prescribed is shorter " have received a liberal interpretation and been held to apply to cases where a change of the date from which the computation is to be made operates to effect a shortening of the period of limitation, and on the same principle we consider it may be contended, that when the effect of the provision prohibiting the revivor of suits operated to shorten the period of limitation, the provision we are considering takes effect and preserves a right of suit

which subsisted under Act IX of 1871 for the period of two years from the 1st October 1877, and that as this suit was brought not on the 1st March 1879, the provisions of the preceding clause will not apply to it. The right of the Crown then to maintain suits had not been lost by adverse possession for 12 years before 1st April 1873, and if it could be shown that the causes of action asserted in this suit had arisen within 60 years before the date of the institution of this suit, the suit would not be barred by limitation, nor would the respondents be entitled to rely on prescription.

Taking the evidence for the Crown, we find no sufficient proof of possession on the part of the Crown and no proof that any cause of action has arisen against any of the defendants within 60 years before suit. The evidence adduced by the Government is extremely meagre.

It is customary in Malabar to collect the revenue more generally from the tenants than from their landlords, and it is also the occasional practice of Government to grant kauls to strangers for the cultivation of waste-lands of private owners which the owner is considered at liberty to allow or disallow as he thinks fit, the kaul being regarded as a mere revenue engagement. This appears from Mr. Logan's recent report. Care must be taken then to distinguish between payments made as revenue and payment made to the Government as the sole superior. There is evidence to show that [187] the Government has collected dues on certain lands and that the payment varied according to the use made of the lands, but we are not able to contradict the conclusion of the Judge that these payments were revenue payments and consistent with the proprietary right of the respondents. It is shown that the land has throughout been regarded as jenm land and it is not shown that the Government has at any time held possession of the jenm rights. The parol evidence adduced on the part of the Government has been deemed by the Judge untrustworthy, and it was not relied on at the hearing of the appeal.

It is not shown that the respondents or those from whom they claim have ousted the Government or for the first time entered on the lands now in their possession or for the first time exercised rights over them within the period of limitation, and had they produced no evidence, we should have to hold that the suit failed on that ground.

We may add that a declaratory decree could not have been given in respect of lands of which it is proved the respondents are in possession.

But the respondents have adduced considerable evidence to prove their possession of the lands claimed by them . . . . . .

[After discussing the evidence, documentary and oral, the judgment proceeded as follows :—]

The evidence adduced by both the respondents is no doubt greatly wanting in precision, but this is due in a great measure to the defects in the plaint and also the nature of the property in dispute. The Attapadi Valley has never been properly surveyed nor boundary marks fixed. The rights of the different proprietors are known to the people of the country more or less imperfectly by natural features. But it is not shown that the Judge who had before him the headmen of the villages and could therefore have obtained better information as to localities than has been available to this Court has erred in finding that the respondents have long been in possession of the lands they severally claim. On the whole, we do not find ourselves at liberty to interfere with the decree of the Judge

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and must dismiss the appeal with costs in proportion to the value of the property claimed by the defendants severally. We observe that this judgment leaves unaffected the right of the Crown to revenue or the rights of inferior proprietors.

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[188] APPELLATE CIVIL.

Before Mr. Justice Kernan, Offg. Chief Justice, and Mr. Justice Muttusami Ayyar.

SIVAGANGA ZAMINDAR (*Plaintiff*), *Appellant* v. LAKSHMANA AND ANOTHER (*Defendants*), *Respondents*.*
[4th and 23rd September, 1885.]

Hindu Law—Impartible zamindari—Money decree against zamindar—Attachment and sale of estate—Suit by son to recover after father's death—Rights of purchaser.

In execution of a money decree obtained against the holder of an impartible zamindari, the creditor attached certain immoveable property—portion of the zamindari—which he described as the property of the debtor.

This was sold by the Court and purchased by L.

A suit having been brought by the son of the judgment-debtor, after his father's death, to recover the property from L:

Held, that all that L acquired was the life-interest of the judgment-debtor in the property, and therefore the plaintiff was entitled to recover.

[F., 22 M. 312 (313); 23 M. 89 (91); R., 27 M. 300=13 M.L.J. 398 (411) (F.B.); D., 20 M. 207 (219).]

THIS was an appeal from the decree of C. Ramachandra Ayyar, Subordinate Judge of Madura (East) in suit No. 1 of 1884.

The facts and arguments appear from the judgments of the Court (KERNAN, OFFG. C.J., and MUTTUSAMI AYYAR, J.).

Bhashyam Ayyangar, *Kalianaramayyar*, and *Krishnamacharyar*, for appellant.

Hon. *Subramanya Ayyar* and *Sankara Menon*, for respondents.

JUDGMENT.

KERNAN, OFFG. C.J.—This is an appeal by the zamindar of Sivaganga, the plaintiff in suit No. 1 of 1884 in the Subordinate Court of Madura, against a decree of that Court made on the 30th of September 1884, whereby that suit was dismissed with costs. The relief sought by the plaintiff is to have a declaration that a sale (in favour of the defendant Lakshmana Chetti) of the Sivaganga palace and some devastanam offices made on the 9th of April 1884 is invalid against the plaintiff and his right in the properties and that the defendant is not entitled to enforce the sale against the plaintiff and his interest in the properties, through process of Court or otherwise.

[189] The facts are these:—Chidambaram Chetti on the 22nd of January 1876 obtained a decree against Dorasinga Tevar, the late zamindar, for payment of Rupees 33,500 at the times and in the manner thereby specified. Dorasinga Tevar succeeded as zamindar in 1877 on the death of Kattama Nachiar, his aunt. In May 1881 he was, by the decree of the Privy Council, following the decision of this Court, declared entitled to the

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* Appeal 18 of 1885.

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zamindari of Sivaganga as the heir, daughter's son of his maternal grandfather Gouri Vallaba Tevar, a former zamindar.

The plaintiff was born several years before his father succeeded in 1877.

To execute the decree of the 22nd of January 1876, a petition was, on the 14th of September 1882, presented (by the parties entitled to execute it) to the Court, praying for the attachment of the building of the palace of Sivaganga, inclusive of the devastanam and head-office buildings described in the list; and on the 11th of April 1883 the palace and other buildings were sold by auction to Lakshmana Chetti for Rupees 18,050, and on the 24th of June 1883 the sale was confirmed (Section 312 of the Code); and on the 12th of August 1883 a certificate (Section 316) was given by the Court stating that the purchaser purchased the immoveable property of the defendant out of those immoveables thereunder specified.

The particulars specify the palace buildings, aiyan and devastanam head-offices, giving the boundaries.

On the 19th of July 1883, Dorasinga Tevar died, leaving appellant, plaintiff, his eldest son, in possession of the properties attached and sold. On the 31st of August, the plaintiff was made party to the suit No. 2 of representative of his father under Section 367.

On the 9th of October 1883 the respondent here, the purchaser in No. 2 of 1875, applied for possession of the palace buildings. The plaintiff resisted an order for possession on the ground that the property sold was the joint ancestral property of himself and his father, and that he became, on the death of his father, entitled to the possession, and that the sale was invalid against him and his interest in the zamindari. The Court, however, made an order for possession and referred the plaintiff to a regular suit to establish his claim. The plaintiff, thereupon, while in possession, filed this suit for a declaration of his title. It has been found that the debt **[190]** contracted by Dorasinga Tevar to the plaintiff in No. 2 of 1875 was not contracted for illegal or immoral purposes.

The Subordinate Judge in his judgment, referring to the decision in *Muddun Thakoor* v. *Kantoo Lall* (1), says: "In this case the first defendant is a perfect stranger to the parties to the suit, and he was not bound to have made any inquiry beyond what appeared on the face of the decree and proceedings." Again, referring to the case of *Hardi Narain Sahu* v. *Ruder Perkash Misser* (2), and to appeal suit No. 102 of 1883, High Court, Madras, he says that in those two cases the decree-holder was the purchaser. He thus distinguishes the two last cases from the present, and says the zamindari of Sivaganga was inherited by plaintiff's father from his maternal grandfather, and was not, therefore, his ancestral property, and the plaintiff could not restrain him from dealing with it. He says: "I am of opinion that the first defendant as purchaser *bona fide* for value in Court sale of the plaintiff's father's property is entitled to be protected against the plaintiff."

The Subordinate Judge, therefore, decided first, that the zamindari was not ancestral property of plaintiff's father and plaintiff; secondly, that it was the property of plaintiff's father, and that plaintiff had no power of restraining him in the disposal of it; thirdly, that the decision of the Privy Council in *Hardi Narain Sahu* v. *Ruder Perkash Misser* (2) did not apply, because in that case the decree-holder was the purchaser; and also

(1) 11 I.A. 321. (2) 10 C. 626 (635).

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because what was sold in this case was the property, and not the right, title, and interest of the plaintiff's father.

The first and second questions are exactly the same as two of the questions discussed and decided by this Court in the case of *Muttayan Chetti* v. *Sivagiri Zamindar* (1). There the plaintiff was a creditor who obtained a decree for money and against hypothecated property and against the zamindar of Sivagiri alone, who inherited the zamindari as daughter's son of his grandfather. The zamindari was attached under the decree for instalments, and portions of it were sold in the lifetime of the zamindar. He died in 1873, leaving the defendant, his son, surviving, who thereupon went into possession of the zamindari. After the death of the defendant's father, applications were made to the Court to execute [191] the decree as against the hypothecated property and portions of the zamindari not hypothecated. These applications were refused, and the plaintiff, the execution creditor, filed the suit. The Judge dismissed it, and, on appeal before this Court, there were several grounds of which only one need be referred to, *viz.*, No. 3. "That the zamindari was either self-acquired property of the late zamindar, or was at any rate not property in which the defendant acquired any right by reaon of his birth or any independent title."

It was contended for the plaintiff that when the estate vested in the late zamindar on the death of his mother, it became his self-acquired property. The Court after going through the arguments on this point says: "It is clearly erroneous to say that property inherited through a mother is self-acquired as between her son and grandson."

Again, the question was there discussed whether the estate was ancestral between the son and grandson, and the Court says: "It may not be ancestral in the sense in which property, inherited by the father from the paternal grandfather, is liable to partition under the Mitakshara law at the instance of the son; but it is not self-acquired property on that ground for purposes other than partition." The Court referred to the list which classes property as ancestral, paternal, and self-acquired, and says: "It is contended that ownership by birth is restricted to the property of the paternal grandfather, and that paternal or maternal property is not ancestral. Here again the purpose of the classification seems to be mistaken." After further discussion it is observed: "The conclusion we come to is that ownership by birth is not, as alleged, confined to ancestral or paternal grandfather's property, but extends also to paternal, *i.e.*, father or mother's property, and that, in the former case it is a vested interest and equal to and co-ordinate with that of the father, while in the latter, it is inchoate, and consists in a chance of succession and in a power of prohibition where the father alienates immoveable property for other than authorized purposes. In this view the theory of ownership by birth has nothing to do with the question before us, which relates to the father's power to alienate immoveable property, and not to partition. The texts which seem to us to govern it are those that restrict the power of alienation, and define the son's liability to pay the father's debts." The Court then proceeds to refer to the [192] decisions which recognized the right of the father to alienate property acquired by himself, and observes: "This, though no doubt resting on equitable considerations, is a departure from the strict Mitakshara law, and the question we have now to decide is reduced to this, *viz.*, whether

(1) 3 M. 370.

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we should sanction a similar departure from the Mitakshara law in the case of immoveable property descending on the father through his mother from his maternal grandfather."

Again the Court says: "We do not, therefore, think that the contention that this zamindari should be treated, for purposes of alienation, as if it was acquired by the late zamindar, is well founded."

That decision was the subject of appeal by the plaintiff in the suit to the Privy Council, and is reported in I.L.R., 6 Mad., p. 1. The Privy Council in their judgment say: "It was contended on the part of the plaintiff, first, that the zamindari having descended to the defendant's father from his maternal grandfather, was his self-acquired property, or, at any rate, that he was not, as regards his son, under the same restrictions as to the alienation or hypothecation of the property as he would have been if it had descended to him from his father or paternal grandfather; secondly, that the whole zamindari......was liable as assets by descent in the hands of the defendant as the heir of his father for the payment of his father's debts. Their Lordships are of opinion that the appellant is entitled to succeed upon the second ground, and they therefore think it unnecessary to express any opinion upon the first. Indeed, as the case has been argued before them on one side only, and the same question may hereafter be raised in some other case, they consider it right to abstain from expressing any opinion upon it, except that they concur with the High Court in holding that the property was not the self-acquired property of the defendant's father."

Applying the principle of those decisions, it is clear that the zamindari was not the self-acquired property of the late zamindar of Sivaganga. He was not, therefore, absolute owner of the zamindari. What estate or interest then did he acquire as heir of his maternal grandfather? The zamindari is impartible and the present plaintiff is his son. The zamindari plainly was the joint estate of the late zamindar and his son the plaintiff. Though the plaintiff could not insist on partition, it does not follow that the estate of the father and son was not ancestral, inasmuch as in [193] the case of impartible zamindaries, though the zamindari is the ancestral family property, it is incapable of partition. No doubt, the zamindari may be in the hands of his son liable to pay the debts of the late zamindar, but that liability does not prove that the late zamindar was the owner of the property, nor does it prove what his interest in the estate was. In like manner, the late zamindar might have alienated the whole or part of it for purposes properly binding on his son; but neither does such power of alienation prove that his estate or interest was absolute, nor what his estate was. The question in this case between the purchaser under the execution and the plaintiff is, what interest or property had the late zamindar in the zamindari. According to the decision of this Court in the *Sivagiri case*, the zamindari inherited by the late zamindar was ancestral property of him and of the plaintiff his son; I am unable to see what other decision could be legally made upon the facts. The late zamindar was, therefore, at the time of the attachment under the execution and of the sale, entitled to the property in the zamindari during his life, and the plaintiff, his son, had a clear right of interdiction in case of any waste or anticipated waste by his father. With the life of the zamindar his interest and property in the zamindari ceased, and the plaintiff became entitled to the property in the zamindari not as heir of his father, but as survivor in the co-parcenary estate.

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The third question is whether the principle of the decision of *Hardi Narain Sahu* v. *Ruder Perkash Misser* (1) applies to the sale in this case.

It is contended it does not, because of the circumstance that the purchaser in that case and in the case of *Deendyal Lal* (2) was the decree-holder. No doubt, there is that circumstantial difference between those cases and this, but that circumstance is of no importance, and neither of the above decisions turned on it, although it was referred to in the judgment.

The Privy Council say: "The next and the principal question in the case was, what right or interest in the property, which is the subject of the suit, was acquired by the appellant Hardi Narain by his purchase at the sale in execution of a decree which he had obtained against the father of the respondents, Shib Perkash Misser? It appears that Shib Perkash Misser was indebted [194] to Hardi Narain, partly on account of a mortgage and partly for further advances . . . . The decree was the ordinary one for the payment of the money; and this case is distinguishable from the cases where the father, being a member of a joint family governed by the Mitakshara law, had mortgaged the family property to secure a debt, and the decree had been obtained upon the mortgage and for a realization of the debt by means of the sale of the mortgaged property. It is a simple money decree.........The property was attached on the 1st of April 1873" (by an order prohibiting the sale of the whole property), "but what was attached and subsequently sold really was the right, title, and interest of the father against whom the decree was obtained, and it is clear from the terms of the sale certificate." . . . . The sale certificate stated the proclamation, and that the property was sold, and whatever right and interests the judgment-debtor had in the said property were purchased by Hardi Narain, decree-holder, auction-purchaser. "Therefore, what was purchased on that occasion were the rights and interests of the father, the person against whom the decree was had, and this is precisely like the case of *Deendyal Lal* v. *Jugdeep Narain Singh* (2) where their Lordships held that the purchase being, as it was here, by the person who had obtained the decree only that passed which the father, the person against whom the decree was obtained, had......According, therefore, to the authority of *Deendyal Lal* v. *Jugdeep Narain Singh* (2) the present appellant became entitled only to one-third (the debtor's interest), treating it as if the sale was to operate as a partition at that time."

Referring to the decision in *Deendyal Lal* v. *Jugdeep Narain Singh*(2) in the Judgment, the Privy Council say: "The appellant cannot be taken to have acquired more than the right, title, and interest of the judgment-debtor. If he had sought to go further and enforce his debt against the whole property and the co-sharers thereon, who were not parties to the bond, he ought to have framed his suit accordingly and made the co-sharers parties to the suit. By the proceedings which he took he could not get more than what was seized and sold in execution, *viz.*, the right, title, and interest of the father." The fact that the decree-holder was the purchaser did not in the least affect the decision in *Deendyal Lal's* [195] case according to the report. I cannot see how such circumstance could affect the decision in *Hardi Narain Sahu* v. *Ruder Perkash Misser.* The essence of this latter decision is that it draws a distinction between sales in execution in suits on mortgages where decrees were made directing

(1) 10 C. 626 (635). (2) 4 I.A. 247=3 C. 198.

the sale of property specified in the mortgages, and mere money decrees, which do not direct the sale of any property, but direct payment of the money by the defendant to the plaintiff.

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For a long time after the report of the cases of *Girdharee Lal* v. *Kantoo Lal* and *Muddun Thakoor* v. *Kantoo Lal* (1), followed up by *Suraj Bunsi Koer's case*, (2) and other cases decided by the Privy Council, it was considered by many of the Judges in India that there was a conflict between the cases of *Deendyal Lal* and the subsequent cases, and it was considered that the Privy Council intended to decide, on a mere money decree against a father, and on sale of his rights and interests in execution, the decree-holder could sell, and the purchaser at auction could acquire, not only the rights and interests of the father, but also the shares, rights, and interests of his sons in ancestral property. This Court, however, did not adopt that view. See *Venkataram Ayyan* v. *Venkata Subramaniya Dikshatar* (3). On looking at the cases decided by the Privy Council it seemed to me that the principle of the decision and the decision supposed to be in conflict with *Deendyal Lal's case* were really not so. In all those cases it appeared to me that the Privy Council either were dealing, or believed they were dealing, with sales under decree on foot of mortgages in which the property was specified, and was directed to be sold. In *Muddun Thakoor's case* it is said: "A purchaser is surely not bound to go beyond the decree to ascertain whether the Court was right in giving it, or having given it, to put up the property for sale under an execution on it. It has already been shown that if the decree was a proper one, the interest of the sons as well as of the father were liable to the father's debts. The purchaser under the decree was not bound to go further back than to see if there was a decree against the fathers, that the property was liable to satisfy the decree if the decree was properly given against them, and having inquired into that, and *bona fide* purchased the estate under the execution, and *bona fide* paid for the property, [196] the plaintiffs are not entitled to come in and set aside all that has been done under the decree and execution, and recover back the estate from the defendant."

Now this judgment clearly contemplates that a purchaser, referring to the decree, would find that there was a decree for sale of the property; see the words "the purchaser is not bound to go back beyond the decree, to ascertain whether the Court was right in giving the decree, or, having given it, in putting up *the* property for sale in execution on it."

A purchaser could learn nothing from a money decree as to *the property*, but he could, in the case of a mortgage decree, see what property was directed to be sold, and could ascertain whether the property set up for sale was "liable to satisfy the decree," *i.e.*, by inquiring if it was the property directed by the decree to be sold. Sir Charles Turner, the late Chief Justice, upon investigation, came to the conclusion that *Muddun Thakoor's case* was not on foot of a mortgage. Mr. Justice Field, in *Ramphul Singh* v. *Deg Narain Singh* (4), states that it was on foot of a mortgage, and I agree with him, and I think the Privy Council acted on that view. In *Suraj Bunsi Koer's case* (2), it is expressly stated the decree directed a sale, and in that case, as stated in *Hardi Narain Sahu* v. *Ruder Perkash Misser*, the case of *Deendyal Lal* was

(1) 1 I. A. 321. (2) 6 I. A. 88 = 5 C. 148. (3) 1 M. 358.
(4) 8 C. 517 (522).

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cited, and it was not then said to be in conflict with *Muddun Thakoor's case*.

The result of *Hardi Narain Sahu* v. *Ruder Perkash Misser* is to remove the misunderstanding by the legal profession and the different Courts in India as to the effect of sales in money decrees against a father, and of sales made under mortgage decrees against a father, when the mortgaged property was either specifically set out by descriptions, or referred to as contained in the mortgage instrument, and was thereby directed to be sold. The Subordinate Judge says further that *Hardi Narain Sahu* v. *Ruder Perkash Misser* does not apply, as the sale in this case was not of the rights and interests of the late zamindar. The description of the property to be sold in the application under Section 235 of the Code is "The four boundaries of the place to which the defendant is entitled (it set out the boundaries). The said buildings, &c., are at present in the possession and enjoyment of the defendant."

[197] The certificate of sale under Section 316, Civil Procedure Code, states that at an auction on the 11th of April 1883, in execution of the decree in No. 2 of 1875, Lakshmana Chetti purchased the immoveable property of the defendant of the said suit out of those immoveables hereunder specified, and that the sale was duly confirmed by the Court on the 24th of June.

In the application for sale, the property is described as the palace to which the defendant is entitled, and in the certificate for sale the property sold is described as the immoveable property of the defendant. In reality, what was attached and set up for sale was the property of the zemindar, the defendant in the suit, in the palace buildings. There is no substantial or practical difference between a sale of the buildings, the property of the defendant, and a sale of the right, title, and interest of the defendant in the buildings.

Nothing could be sold, or was purported to be sold, than the property of the defendant in the buildings.

In strictness the proclamation and certificate should have stated what interest in the property the defendant, the zamindar, had.

It was the business of the purchaser to satisfy himself what the property of the zamindar in the buildings was. But if they were sold as the absolute property of the zamindar, that fact would not interfere with the right of the plaintiff or protect the purchaser from being ejected by the plaintiff who proves that his father was only entitled to the zamindari during his life.

The purchaser contended that as his purchase money was applied to pay off debts on the estate for which the zamindari and the plaintiff were liable, that he is in equity entitled either to the possession of the property bought, or to hold the property until he shall be recouped the purchase money. This view is now suggested for the first time, and I do not see how it can be taken advantage of. If the question had been raised in the Court below, there might have been answer to it either in fact or law.

I do not see what equity the purchaser can have. He did not get an assignment of the decree; he was a volunteer in buying against the plaintiff, He made a bad speculation as it turned out on account of the death of the zamindar, but if he had lived, the purchaser probably by having possession of the zamindar's residue would be able to make money from his bargain.

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[198] I would reverse the decree of the Subordinate Judge and make a decree for the plaintiff, in the terms of the prayer of the plaint, with costs in the lower Court and of this appeal.

MUTTUSAMI AYYAR, J.—The appellant is the zamindari of Sivaganga. His father succeeded to the zamindari in December 1877 and died in July 1883. The estate descended to him as the eldest son of the eldest daughter of the istrimirar zamindar, on the death of Kattama Nachiar, a junior daughter. On the 10th August 1868 the appellant's father executed a simple bond for Rupees 40,000 in favour of one Chidambara Chetti. The creditor instituted original suit 2 of 1875 upon that bond, alleging that though it had been executed for Rupees 40,000, he had lent thereon only Rupees 15,417-10-9. The suit terminated in a compromise which provided, *inter alia*, that Rupees 33,500 should be paid by the zamindar to the creditor, with interest at 6 per cent. per annum, in six months after Dorasinga Tevar acquires either the whole of the zamindari or more than a moiety of it. A decree was made in accordance with the compromise (exhibit ii), and Chidambara Chetti made an attempt to execute the decree when Dorasinga Tevar's claim to the zamindari was still pending before the Privy Council. By an order dated the 27th October 1878, the then District Judge rejected the application for execution, observing that the result of the appeal to the Privy Council was not known, and that the possession obtained by Dorasinga Tevar was not such an acquisition of the zamindari as entitled the creditor to take out execution (exhibit iii). This order was confirmed by the High Court on appeal in December 1879. On the 10th May 1880 a decree was passed by the Privy Council in favour of Dorasinga Tevar. Chidambara Chetti died, and a creditor who had obtained a decree against him in original suit 471 of 1880 on the file of the High Court, attached the razi decree and executed it by attaching the property now in suit in August 1882 under Section 273 of the Code of Civil Procedure. In the list of attachment, the property attached is described as the palace of the zamindar in his possession, inclusive of a devastanam, kacheri, and other head offices. The proclamation of sale was issued in these terms: "Notice is hereby given that, on the application for execution of the decree passed in the said suit, the immoveable property of the first defendant described below, having been attached, will be sold by this Court in public auction on the 10th January 1883 next, if the sums **[199]** mentioned below be not sooner paid into this Court, or if steps be not taken to satisfy the amount of decree. In so doing the undermentioned right of the first defendant in the said property will be sold:—

Decree amount ...	Rs.	33,500	0	0	½ per cent. interest on the decree amount from 13th August 1882 is also to be collected.
Interest ...	„	13,902	8	0	
Court costs ...	„	...			
Cost of execution	„	226	8	0	
Total	Rs.	47,629	0	0	

Respondent No. 1, who was not connected with original suit 2 of 1875, became the purchaser, the sale was confirmed, and a sale certificate (exhibit xii) was issued: this document described respondent No. 1 as having purchased the immoveable property of the defendant (in original suit 2 of 1875) out of the immoveables specified in the certificate. The purchaser applied for possession, and the appellant contended that his own interest in the property, as contradistinguished from that of his father, did not pass by the sale. He was referred to a regular suit. Thereupon,

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he sought to obtain a declaration to that effect in this suit. The Subordinate Judge of Madura held that what was purchased was the entire property, and not merely the right, title, and interest of the late zemindar in it. The plaintiff appeals.

It was not seriously contended that the debt was immoral, or that the transaction was tainted with fraud, or that the sum of Rupees 10,000 and odd was not originally advanced as alleged, and I concur in the opinion expressed by the Subordinate Judge in regard to those matters. The substantial question raised for decision on appeal is, what interest passed by the Court-sale. The sale notice proclaimed that the right of the first defendant, the late zamindar, in the said property will be sold, and the sale certificate described the purchase as the immoveable property of the late zamindar in "the undermentioned" immoveables. In the view that more than the late zamindar's interest was intended to be sold, the expression "the right or property of the late zamindar in the immoveable property" was superfluous. Apart from this circumstance the decree which was obtained by Chidambara Chetti was a mere money decree, and according to the latest decision of the Privy [200] Council in *Hardi Narain Sahu* v. *Ruder Perkash Misser* (1) which we have followed in several cases, nothing more than the interest of a Hindu father would pass by a sale of ancestral property in the execution of such decree. It is then urged by the respondent's pleader that that decision would be applicable if the purchaser in this case were the judgment-creditor as in the other, and not a stranger who paid his purchase money in good faith. The only distinction between a stranger who purchases *bona fide* and the judgment-creditor who buys at an execution sale is, as pointed out in *Muddun Thakoor's case*, that the former is not bound to look beyond the decree, and that no knowledge of facts, which do not appear on its face, can be imputed to him. But this does not alter the character of the decree in original suit No. 2 of 1875 as a money decree which was passed against a Hindu father and zamindar. It does not show on its face that specific property is directed to be sold as in the case of a decree founded on a mortgage. Having regard to the observations of the Judicial Committee in the latest case and in *Muddun Thakoor's case*, it seems to me that the distinction made is between a money decree and a decree which, in substance, executes the father's mortgage, and that in one case the son's interest is not bound by the sale in execution, unless the son is made a party to the suit, whilst in the other, his interest also passes by the Court-sale. It is then urged that the appellant's father inherited the zamindari from his maternal grandfather, and that, as such, it must be treated, not as ancestral, but as his father's self-acquired property. In the *Sivagiri case*, in which I took part, it was held by this Court that it was not the father's self-acquired property in the sense that he could alienate it at his pleasure. Adverting to this part of the case, the Judicial Committee concurred in the view that it was not the father's self-acquired property, and though the Privy Council did not desire to decide the question, their *dictum*, so far as this Court is concerned, has considerable weight as that of the highest judicial tribunal. Another contention is, that if the appellant's title to the zamindari is declared, he should be declared entitled to its possession on payment of his father's debt or the purchase money. The purchaser bought the late zamindar's interest, whatever that was, [201] for the money which he advanced. If the zamindar had lived

(1) 10 C. 626 (635).

long, it would have been a profitable speculation. In the event which has occurred, it has turned out to be a losing speculation. I do not see how this can give rise to any equity in favour of the purchaser. For these reasons, I concur in the decree proposed by the learned Officiating Chief Justice.

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9 M. 201 = 10 Ind. Jur. 185 = 2 Weir 60.

[201] APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

NARASIMHA, *In re.** [29th January, 1886.]

Criminal Procedure Code, Sections 133, 137, 140.

A Sub-divisional Magistrate having made a conditional order, under Section 133 of the Code of Criminal Procedure, against a person to abate a nuisance or appear and show cause before a Second-class Magistrate why the order should not be enforced, the said person appeared as directed and the order was made absolute under Section 137. The Second-class Magistrate then issued a notice and order under Section 140, requiring the nuisance to be abated within a certain date. The District Magistrate having referred the case on the ground that the Second-class Magistrate had no jurisdiction to pass final orders in such cases; *Held*, that the order was not illegal.

[F., 25 C. 278 (281); 2 Weir 61.]

THIS was a case referred to the High Court, under Section 438 of the Code of Criminal Procedure, by A. Cruickshank, District Magistrate of Anantapur.

The facts appear sufficiently, for the purpose of this report, from the judgment of the Court (KERNAN and BRANDT, JJ.).

Counsel were not instructed.

JUDGMENT.

BRANDT, J.—In August 1884 a Sub-divisional Magistrate considering, on reports received from a Tahsildar, under him, that unlawful obstructions had been caused by two persons in a public way or place, made a conditional order under Section 133, Criminal Procedure Code, requiring them to remove the obstructions or to appear before the Second-class Magistrate, the Tahsildar, and move to have the order set aside.

They did appear and produce evidence; but the Second-class Magistrate being, it is to be presumed, satisfied that the order was reasonable and proper, issued the notice, addressed to one of the [202] two persons cited and purporting to be passed in accordance with Section 140, which the District Magistrate refers as illegal by reason of a Second-class Magistrate having "no jurisdiction to pass final orders in such cases."

The question is whether the conditional order made under Section 133 can be made absolute in the events specified in Section 137 by a Second-class Magistrate before whom the parties have been ordered to appear under Section 133, or by the First-class Magistrate who makes the original order alone; whether, after the reference is once made, it rests with a Second-class Magistrate to pass a final decision and thereon issue the consequential order, or whether the reference contemplated is only for the purpose of local inquiry and report with opinion, or finding by the officer making the report?

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* Criminal Revision Case 678 of 1885.

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The words "the Magistrate" in the first two clauses of Section 137 can only mean the Magistrate empowered and directed to take the evidence, as it provides that, after the Magistrate takes the evidence, if he is satisfied that the order is not reasonable, no further proceedings shall be taken in the matter. No reference to the Magistrate who made the order is required. Presumably the same expression used in the three clauses should refer to the same person; it would also seem reasonable to infer that "the Magistrate" who is to issue notice under Section 140 is the Magistrate indicated in Section 137.

At the same time the impersonal form of the concluding part of Section 137 is to be noted, and it might perhaps have been expected and might be preferable that the superior Magistrate making the order in the first instance should decide in any case whether the order should be made absolute or not.

On the other hand, in the case of appointing a jury there is no ambiguity, Section 135 (*b*); the application is to be made "to the Magistrate by whom the order was made." We are then of opinion that the order referred in revision is not illegal, but it appears to us undesirable, as a rule, for First-class Magistrates to call on the officer who reports on a nuisance in his administrative capacity to decide judicially whether it is a nuisance or not.

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9 M. 203.

[203] APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

KARUTHAN, *Plaintiff* v. SUBRAMANYA AND ANOTHER, *Defendants.**
[6th July, 1885, and 9th January, 1886.]

Civil Procedure Code, Section 268—Decree—Execution—Attachment—Deposit by servant of railway company—Rights of attaching creditor.

Where money deposited with a railway company by one of its servants as a guarantee for the due performance of his duties was attached by a judgment-creditor of such servant under Section 268 of the Code of Civil Procedure:

Held, that the creditor was not entitled to have his decree satisfied out of the deposit, but was entitled to a stop order under cl. (*c*) of Section 268, and also to payment of the interest, if any, due by the company on such deposit to the servant.

THIS was a case referred under Section 617 of the Code of Civil Procedure by R. Vasudeva Rau, Subordinate Judge of Negapatam.

The case was stated as follows:—

"Plaintiff obtained a Small Cause judgment against both the defendants jointly and severally, and having applied for execution, moved the Court for attaching about Rs. 300, being the guarantee amount deposited by the defendant No. 1 with the South Indian Railway Company for the faithful performance of his duties. The attachment was made under Section 268 of the Code and the usual notice was duly served upon the Agent on the 27th August 1885; but the Agent addressed to me a letter on the 4th September 1885, inviting my attention to subsidiary orders accompanying Government of India circular No. 13, Railway, dated Simla, 7th August 1884, and informing me that the Honorable the Advocate-General of Bengal had therein represented to Government that compulsory

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* Referred Case 16 of 1885.

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deposits made by railway employees in India cannot be attached by judgment-creditors. I have not been able to find a copy of the order, but on a reference to the additional rule 3 A appended to page 130 B to be found in page 3 of the twelfth list of corrections to be made to the Civil Account Code received in this office on the 5th instant, I find that the said Advocate-General has expressed [204] his opinion accordingly. He says: 'If, as stated in this case, the deposits under notice are payable to discharged railway employees subject only to Government claims, and they can insist on having payment thereof made to them, I am of opinion such deposits can be attached by judgment-creditors. My previous opinion has been very properly limited (as the case on which I advised would) show to the case of a railway servant in actual service.'

"Upon the foregoing facts, although I see the propriety of the rule proposed to be followed by the Advocate-General, I doubt, whether I am bound to follow the said rule. On one hand, it would be very inconvenient for the railway company if the rule were otherwise. It is very seldom that a railway employee allows the guarantee amount to be attached, as he is sure that any reduction of the guarantee amount would entail the forfeiture of his appointment, and when he finds it impossible to avoid it, the attachment is effected. The moment it is effected, the railway company hands up the amount to the Court and dismisses the man for want of sufficient guarantee being deposited. At present, on an average, amounts are drawn from the railway company in the case of two employees in a month. I need hardly point out how inconvenient and difficult it would be for the railway authorities to turn out old and experienced men and go on enlisting new people who can furnish sufficient amount of guarantee; and this simply because the employees concerned have turned poor and not dishonest or inefficient. When they enter the service they entrust the amount with the authorities with a special object, and until that object is fulfilled and the guarantee amount becomes returnable, it is my impression that the authorities have virtually a prior lien over the particular amount deposited with them in preference to other simple money decree-holders.

"On the other hand, it may be urged with equal plausibleness, that the rule, if allowed to have effect, would, to a great extent, help a dishonest debtor, who, having recklessly contracted debts and spent money for improper purposes, may, as the last resource, enter the railway service, having collected and deposited all that he has in the shape of a guarantee amount, while his honest creditors could have no other means of recovering their debts but quietly to look on their debtor leading a decent life with a portion of his property quite safe in a public office which would otherwise be liable to be appropriated for some of his proper debts.

[205] "Section 266 of the Code of Civil Procedure contains a list of the property which is held not liable to attachment; but while it includes a moiety of the salary of a servant of the railway company, it does not include the guarantee amount now in question. But, considering the principle involved, it appears to me that the object of the Legislature is to see that the man is not allowed to starve, which would be the consequence if the whole of his salary is attached and taken away by his creditors, or his guarantee amount is attached and he is left without any employment whatever. Hence my impression is that such compulsory deposits by railway servants in actual service should not be attached by judgment-creditors in execution of their decrees consistently with the intention of

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the Legislature and with the despatch of public business in railway offices. There are four similar petitions now pending before me which await the decision of the question, and I feel diffident to decide the question one way or the other. Hence the reference.

"The question, therefore, that I would respectfully submit for the decision of the Honorable Judges is, whether, with reference to the opinion of the Honorable the Advocate-General of Bengal referred to by the Acting Agent of the South Indian Railway Company, compulsory deposits of Railway employees in actual service are liable to be attached and realized for satisfaction of decrees under the Code of Civil Procedure."

Mr. *Wedderburn*, for the attaching creditor.

The judgment-debtor did not appear.

The Court (BRANDT and PARKER, JJ.) delivered the following

JUDGMENT.

The question for decision, as we understand it, is whether money or other valuable securities deposited as security for the due performance of their duty by servants in the employ of a railway company can, while the depositor remains in the eervice of such company, be attached and sold in execution of decrees obtained against such servants. The learned counsel who argued the case for the execution creditor before us does not contend that more can be done than to place an attachment on such deposits so as to prevent the railway company from paying over the deposit either to the depositor or to any one else without the order of the Court; it is admitted in fact that the railway company has a lien on the deposit which is pledged to it for a specific purpose so [206] long as the relation of master and servant continues between the company and the servant.

We are of opinion that this is so, and that it is not therefore open to a Court executing a decree against a person so employed to order sale of the deposit or to direct that it be paid over to the judgment-creditor. But we see nothing to prevent an attachment being placed thereon at the instance of the judgment-creditor; indeed this appears to be a case to which the provisions of Sections 266 and 268 of the Code clearly apply.

The deposit is moveable property belonging to the judgment-debtor subject to the lien of the company; on termination of the contract of service the judgment-debtor is entitled to its return, provided that the company has no right under the terms of the contract under which it is deposited to retain the whole or a portion of it, and Section 268 provides for attachment of such property not in the possession of the judgment-debtor by a written order prohibiting the person in possession of the same from giving it over to the judgment-debtor. We answer the question then as follows: the Court may place an attachment on such deposits, subject to the lien of the company, but cannot proceed to order the sale thereof until the deposit is at the disposal of the judgment-debtor free from the lien of the company, and if the deposit carries interest, and the interest is not, under the terms of the contract between the employer and the employee, at the disposal of the employer, order may be made for payment to the judgment-creditor of the interest as it from time to time falls due.

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APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

MAHOMED KOYA (*Plaintiff*), *Appellant v.* KASMI AND OTHERS (*Defendants*), *Respondents.** [2nd November, 1885.]

Small Cause Court Act XI of 1865—*Jurisdiction—Suit to declare moveable property not liable to attachment—Civil Procedure Code, Section* 283.

Certain moveable property having been attached in execution of a Small Cause decree passed by the Court of a Subordinate Judge, a claim thereto was preferred [207] by M and rejected. M then brought a suit in the District Munsiff's Court for a declaration that the property was his and was not liable to be sold in execution.

The suit was dismissed on the ground that it was cognizable by a Court of Small Causes:

Held, that M was not bound to sue for recovery of the property and that the suit was not cognizable by a Small Cause Court constituted under Act XI of 1865.

[R., 1 O.C. 272 (279).]

THIS was an appeal against an order of W.P. Austin, District Judge of North Malabar, reversing the decree of A.C. Kannan Nambiar, District Munsif of Kavai, in suit 39 of 1884, and returning the plaint.

The plaintiff, Nalupurappattil Madathil Syed Mahomed Koya Thangal, sued to obtain a declaration that 5,205 seers of paddy attached by the defendants Nos. 1 and 2, Anakaran Kasmi and his brother, in execution of a Small Cause decree, obtained in the Court of the Subordinate Judge of North Malabar, were not liable to be sold in execution of that decree.

Defendants Nos. 1 and 2 pleaded that the Court had no jurisdiction to entertain the suit, because the value of the paddy was less than Rupees 500, the limit of the Small Cause Jurisdiction of the Subordinate Judge.

The District Munsif held that the suit, which had been brought according to the provisions of Section 283 of the Code of Civil Procedure, was not cognizable by a Small Cause Court, and referred to *Ilahi Baksh* v. *Sita* (1) and *K. I. Narainan* v. *K. I. Nilakandan Nambudri* (2). He decreed the claim.

On appeal, the District Court, referring to *Janakiammal* v. *Vithenadien* (3), *K. N. Booche Naidoo* v. *R. Lutchmeepaty Naidoo* (4), *Nathu Ganesh* v. *Kalidas Umed* (5), and *Gordhan Pema* v. *Kasandas Balmukundas* (6), held that the suit ought to have been brought in the Small Cause Court, and, reversing the decree of the Munsif, directed the plaint to be returned to the plaintiff.

Mr. *Wedderburn*, for appellant.

The Acting Advocate-General, (Hon. Mr. *Shephard*), for the respondents.

The Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.) delivered the following

JUDGMENT.

[208] The plaintiff's moveable property had been attached in execution of a decree against the defendant No. 3, and his claim having been disallowed, he brought this suit to establish his right. The relief asked is a

* Appeal against Order 122 of 1885.

(1) 5 A. 462. (2) 4 M. 131. (3) 5 M.H.C.R. 191.
(4) 8 M.H.C.R. 36. (5) 2 B. 365. (6) 3 B. 179.

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declaration that the property is not liable to be sold for the judgment-debt of defendant No. 3. The District Munsif granted the declaration prayed for, but the District Judge has held in appeal that the suit, being one for personal property, ought to have been instituted in the Court of Small Causes.

A Small Cause Court is not entitled to make a declaration, and the District Judge's order cannot be supported on the ground upon which it has been put. On behalf of the respondent it has been contended that the appellant was dispossessed by the attachment, and, therefore, could not ask for a declaration without also seeking recovery of the property ; if he had sought recovery of the property there is no doubt that the suit would be cognizable by a Court of Small Causes. But we do not think he was bound to sue for possession. Section 283 permits him simply to establish his right. The property is not in the possession of any private person, and he could not sue the Court which attached it. It is probable that, in framing Section 283 of the Code of Civil Procedure, the Legislature bore in mind that, if a suit for possession was required, the owner of property might be put to heavy expense in the way of institution fees upon his property being wrongly attached.

The decree of the District Judge is reversed, and the appeal remanded for disposal on the merits. The costs of this appeal will be paid by the respondent.

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9 M. 208.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

CHANDU (*Plaintiff*), *Appellant v.* KOMBI (*Defendant No.* 1), *Respondent.**
[18th September, 1885, and 6th January, 1886.]

Jurisdiction—Civil Courts' Act (Madras)—Court Fees Act, Section 7, *Clause* 9—*Ejectment—Mortgage set up by defendant exceeding limit of jurisdiction.*

In a suit brought in a District Munsif's Court to recover several parcels of land from the defendant, plaintiff alleged that defendant held a valid mortgage of **[209]** Rs. 206 on two parcels which he offered to redeem. As to the other parcels he alleged that if any charges had been created in defendant's favour over them by his predecessor in title such charges were invalid. The suit, as valued by the plaintiff, was within the pecuniary limit of the Munsif's jurisdiction. Defendant pleaded that he held a mortgage for Rs. 3 000 over the land and therefore the Munsif's Court had no jurisdiction to try the suit. The Munsif tried the question of the validity of the defendant's mortgage and decreed possession to plaintiff on payment of Rs. 906 due on account of mortgages and Rs. 1.647-11-9 on account of improvements. On appeal the District Judge held that the Munsif had no jurisdiction, reversed the decree, and ordered the plaint to be returned to be presented in the proper Court.

Held, that the Munsif's Court had jurisdiction.

If a suit is brought in ejectment, and the defendant proves that he holds a mortgage, a decree for redemption cannot be made without his consent.

If, in such case, defendant consents to a decree for redemption, and the amount secured by the mortgage exceeds the limit of the pecuniary jurisdiction of the Court, the Court should not proceed further, but return the plaint to be presented in a superior Court.

[F., 2 M.L.J. 48 (50); **R.,** 14 M. 169 (170) ; 15 Ind. Cas. 587=13 M.L.T. 118.]

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* Appeal against Order 62 of 1885.

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THE facts and arguments in this case appear sufficiently, for the purpose of this report, from the judgment of the Court (KERNAN and MUTTUSAMI AYYAR, JJ.)

The Acting Advocate-General (Hon. Mr. *Shephard*), for appellant.

Srinivasa Rau, for respondent.

JUDGMENT.

THIS is an appeal against an order of the Officiating District Judge of North Malabar (H. T. Ross), dated the 19th of December 1884, made in appeals 224 and 268 (in original suit 583 of 1883 on the file of the District Munsif of Badagara), whereby the Officiating District Judge reversed a decree made for the plaintiff, and directed the plaint to be returned to the plaintiff for presentation in the proper Court. The Officiating District Judge held that the subject-matter of the suit exceeded Rs. 2,500.

In the plaint, plaintiff (Valathilathil Chandu), as holder of the stanam of the Kannambalath Nayar, sought to recover possession of several properties mentioned in the schedule to the plaint. He admitted that defendant No. 1 (Kombi Poker) held kanam on the properties Nos. 1 and 2 for Rs. 206, which he offered to redeem. He alleged in the plaint that defendant No. 1 and the other defendants under him got possession of the remaining properties from No. 3 inclusive, belonging in jenm to the plaintiff as stani through means of one or other of his predecessors in the stanam, who had not delivered marupats (counterparts of **[210]** lease) or documents to him by reason of existing enmity. But, in the plaint, it was alleged that defendants were not entitled to any charge except as before stated on the properties, or to possession of the properties, inasmuch as any kanams, except as above, were not granted by his predecessors for purposes binding on the family. He prayed for delivery of all the properties on payment of Rs. 206, and for rent of all the remaining properties from No. 3, from the institution of the suit, and further relief.

He valued his suit at—

	RS.	A.	P.
(1) Value of kanam admitted	206	0	0
(2) Five times the income of the properties from No. 3.	221	5	2
(3) The rent of the properties...	425	0	0
In all ...	852	5	2

Defendant No. 1 pleaded that the suit was not properly valued, and if it was, it would be beyond the jurisdiction of the Munsif, as his kanam and other claims amounted to Rs. 3,000, besides other items. Some of the other defendants set up separate defences as to property in their possession, which it is not necessary to refer to in detail.

The issues framed were (so far as is important to the present question)—

(6) Whether the sale set up by defendant No. 1 in respect to properties Nos. 1, 2, and 17 sued for is true, and valid, or not?

(7) Whether the plaint kanam grants are true, or not?

(8) Whether the kanam set up by defendant No. 1 is true and valid and binding upon the plaint properties concerned, or not?

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(9) Whether the Court-sale set up by defendant No. 1 in respect to properties Nos. 7, 11, 17, and 21 sued for is true and valid, or not?

The Munsif having heard the case, made a decree directing restoration to the plaintiff of all the properties on payment of Rs. 906, kanam amount due to defendant No. 1, and Rs. 1,647-1-9 due for improvements due to all the defendants. Defendant No. 1 appealed on many grounds, of which one only [211] need be referred to, *viz.* the ground that he held a kanam for 2,500 rupees and other claims, and that the suit. s not within the jurisdiction of the Munsif. On appeal, the Judge decided that the suit was beyond the Munsif's jurisdiction and was not properly valued. He says that the Munsif treated the suit as one to redeem kanam, and went on trying whether the kanams set up by the defendant were valid or not, and valued the suit according to the result. This, moreover, the Judge says, is unsound, and he considers this proved by supposing the case that the kanams set up by the defendants were found valid, and he asks, what then would become of the Munsif's jurisdiction, and says, the mere accident that he found some of them not valid cannot affect the principle.

He decided that treating the suit as one to redeem kanam, the proper valuation of the suit for jurisdiction was the amount of the mortgage set up by the defendant, on whom plaintiff relied to show how the properties were held. He also decided that the proper valuation for Court-fees was, under Section 7, Clause 9, Act VII of 1870, according to the amount specified in the instrument of the mortgage, and not the amount ultimately found due. He then refers to Exhibits 1, 5, 8, 9, 10, 11 and 14, which are kanams set up by the defendant, and the sums expressed in these amount, in the whole, to Rs. 2,740, which is beyond the jurisdiction of the Munsif. He also says that the plaintiff alleged he did not know what kanams there were, and that he threw on the defendant the *onus* of proving what kanams were outstanding to be redeemed. We are of opinion that the suit should not have been valued then and there on the mortgages disclosed by defendant No. 1, before going into the question of their validity or otherwise. We do not agree that the plaintiff was bound to accept the principal amount stated in the mortgages produced by the defendant as the value of the subject-matter of the suit, unless so far that plaintiff may have admitted that the mortgages, or any of them, were binding on him, and were valid charges on the land.

If a plaintiff was bound to value the subject-matter according to the amount specified in mortgages produced by the defendant, whether he admitted them or not, the result would be to give the defendant the selection of the Court, in which the suit should be brought, if he chose to set up unfounded claims on invalid [212] kanams. Moreover, if a plaintiff filed his suit in the District Court merely because the defendant alleged kanams binding upon plaintiff which were over Rs. 2,500, and if it was found they did not bind plaintiff, then he might be in the difficulty of having his plaint returned to have the suit filed in the Munsif's Court.

In the present case, as we understood, several documents set up by the defendant were not admitted by the plaintiff and were found not to be binding on him. Why then should plaintiff accept the amount of any of such documents as any part of the value of the subject-matter of the suit? The Court Fees Act refers to suits to redeem mortgages, that is when the mortgage is admitted.

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It was contended for the defendant that the mortgages produced by defendant No. 1 did bind the plaintiff as they were made by a predecessor in office of the plaintiff, and that he could not avoid redeeming them if he claimed possession. We are not prepared to admit this, as the plaintiff, not having executed any of the documents, was not bound to file a suit to set them aside. He would be entitled, as admitted jenmi, to possession, if the defendant does not establish any title, and such title he could only establish by proving mortgage and the validity and binding effect of it on the plaintiff. If the defendant failed in so doing, as he did in some instances in this case, his alleged mortgage, even though registered, would not stand in the way of a decree for possession which plaintiff would be entitled to.

Plaintiff's case on the plaint was that he did not admit any mortgage held by defendant was binding on him except what he offered to redeem. We think the Munsif had jurisdiction. In argument of the appeal some matters were referred to, and to which, it may be of use to the parties in a future trial, that we should refer.

In the course of the trial, inquiry was made whether other kanams set up by defendant No. 1 were binding on the plaintiff. The Judge says, the Munsif varied the value of the suit according to the result. But the plaintiff could not take from the defendant possession of any land on which the latter proved a valid kanam, unless he offered to redeem. It is quite intelligible therefore that plaintiff, whenever a mortgage (not admitted) was proved and its amount fixed, to propose (*if the defendant did not object*) to redeem that mortgage. In this way, the amount of the subject-matter might become increased in value, and then further duty [213] should be payable. If the amount in value of the subject-matter at the conclusion of the trial or before that appeared to be more than Rs. 2,500, then the Judge should not proceed further in the suit, but should give back the plaint to be filed in the proper Court. It is contended that the Civil Courts' Act does not contemplate an increase in the value of the subject-matter in the course of the suit, but I do not see any objection on principle to such increase arising on the construction of the Civil Courts' Act, or the Court Fees Act. It is not always possible, before filing a suit, to fix the exact value for jurisdiction in the Munsif's Court. It is enough if it is below Rs. 2,500. If the subject-matter is valued for duty under the Court Fees Act at a fixed amount, that amount may be increased under Sections 9 to 12 in the cases there mentioned, if the amount proved exceeds the original value stated in the plaint, and thereupon the excess duty becomes payable and is directed to be levied. It does not appear that the defendants denied the right of the plaintiff to redeem any of the kanams proved, or relied on any right to continue in possession under any of them. The only question in respect of such kanams set up by the defendant was whether they bound the plaintiff, and what sum was due on foot of them. We think, therefore, that there was no objection to the course adopted by the Munsif in allowing the amount of the subject-matter to be valued at an increased amount, if defendant did not object. The question, however, of more importance, is whether the plaintiff should, in the course of this suit, be allowed to redeem any kanam proved, which he had not offered either specially or under general terms in the plaint to redeem, if the kanam-holder *objected.* We think he should not have been so allowed. The plaintiff did not admit any kanam except as specified in the plaint. Defendant No. 1 set up others; and there was an issue, whether they were true or not.

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The plaintiff did not, in the plaint, offer to redeem any of those others, but insisted on his title to the lands discharged of them. At the hearing, the Munsif treated the suit as one to redeem any kanam proved. Defendant No. 1, it is stated by the Judge, *objected* to that course. The objection, if made, was a good one, inasmuch as whether the Munsif at the hearing altered the plaint so as to make it appear that the suit was for redemption of all kanams proved, or whether without alteration he treated the [214] suit as one for such redemption, he altered the nature of the suit so far as it prayed for possession irrespective of defendant's kanams, to one for redemption of the kanams proved by the defendant. If, on appeal, the kanams set up by the defendant No. 1 are held to bind the plaintiff, he may be able to say that he did not offer to redeem them, and then the defendant would lose the advantage of the decree which, if the suit was a redemption suit, he would have been entitled to, *viz.*, that if plaintiff did not redeem within a given time his right should be barred.

The plaintiff ought to decide for himself, while framing his plaint, whether he is to sue to redeem or to eject, and value his suit accordingly. It is certainly irregular without defendant's consent, to allow a suit to eject to be treated as a suit to redeem, without amending the plaint. The right to amend cases with the first hearing, and it was again irregular to treat the plaint as amended according to the result of the findings at the conclusion of the trial.

We reverse the order of the Officiating District Judge, dated the 19th December 1884, and direct the appeal to be restored to the file of the District Judge to be disposed of *de novo*.

The costs of this appeal will be provided for in the revised decree.

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9 M. 214=10 Ind. Jur. 94.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

VENKATANARAYANA (*Plaintiff*), *Appellant v.* SUBBARAYUDU AND OTHERS (*Defendants*), *Respondents.** [27th October, 1885.]

Regulation XXIX of 1802—*Karnam—Incapacity of next heir—Minority—Appointment by landholder of successor without proof before Zila Court of incapacity of heir.*

A karnam in a zamindari village having died leaving a minor son, the landholder appointed the brother of the late karnam to the office.

In a suit brought by the son, after attaining majority, to establish his right to the office and to recover its emoluments:

[215] *Held*, that, under the provisions of Regulation XXIX of 1802, he was not entitled to recover.

Section 7 of the Regulation provides that, in filling the office of karnam, the heirs of the preceding karnam shall be chosen by the landholders except in cases of incapacity on proof of which before the Judge of the Zila the landholders shall be free to exercise their discretion in the nomination of persons to fill vacancies.

Held, that where the incapacity arose from minority about which there was no dispute an appointment by a landholder made without proof before the Court of the incapacity of the heir was valid.

[R., 10 M. 226 (228)=11 Ind. Jur. 332.]

THIS was an appeal from the decree of E. C. Johnson, Acting District Judge of Vizagapatam, in suit 19 of 1883.

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* Appeal 54 of 1885.

1885 OCT. 27. — APPELLATE CIVIL. — 9 M. 214= 10 Ind. Jur. 94.

The plaintiff, Reparti Venkatanarayana, sued (1) Reparti Subbarayudu and (2) Reparti Venkatanarayana, to have his claim established to the office of karnam of certain villages in the zamindari of Vizianagaram, and to recover the emoluments of the office. He alleged that his father was the sole mirasi karnam in 1864 when he died. Plaintiff being then a minor, his father's brother, Appaya, was appointed, and defendant No. 2 was appointed as a joint karnam by the Maharaja of Vizianagaram. On the death of Appaya, his brother, defendant No. 1, was appointed in his place. Plaintiff contended that he, being now of age, was entitled to recover the office from the defendants; he had applied to the Maharaja of Vizianagaram for the office without success in 1882. Defendant No. 1 denied plaintiff's right to sue. Defendant No. 2 alleged, *inter alia*, that his family had a joint mirasi right with plaintiff's family, and denied plaintiff's right to question the validity of his appointment.

The Maharaja of Vizianagaram was made a defendant in the suit, and pleaded, *inter alia*, that he was entitled to appoint as many karnams as were required to do the work of the office under Regulation XXIX of 1802, and that, as one of plaintiff's family was in office, plaintiff had no right to sue.

The District Judge found that the family of defendant No. 2 had an hereditary claim to the office, and had enjoyed half of the emoluments thereof, and held that the appointment of defendant No. 2 was legal.

As to the appointment of defendant No. 1, he ruled that it also was valid, citing *Oolaty Bhoopatyrauze* v. *Vuddy Putty Gaurrauze* (1).

[216] The suit was dismissed.

The facts and arguments appear sufficiently, for the purpose of this report, from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.).

Mr. *Michell*, for appellant.

Hon. *Rama Rau*, for respondent No. 2.

Mr. *Wedderburn*, for respondent No. 3.

Respondent No. 1 did not appear.

JUDGMENT.

The main question for decision in this appeal is whether the appellant has established an exclusive title to the office of karnam for the villages of of Vepada and Bakkunaidupeta.

The respondents Nos. 1 and 2 denied his exclusive title, and contended that they had joint mirasi rights with him. The Judge has upheld their contention, and we consider that upon the evidence on record he has come to a correct conclusion. It is not denied that the respondent No. 2 and his father have been in possession of about a moiety of the lands attached to the office from 1844. It is stated in the plaint that the respondent No. 2 is a distant kinsman of the appellant's family. Although the names of the ancestors of respondent No. 2 do not appear in the accounts relating to the lands in dispute prior to 1844, yet exhibit II shows that his branch of the family was in possession in that year. It appears from exhibit D that his father's name was entered in 1862 as one of the karnams who then had mirasi rights in the village of Vepada. It would seem, however, that though his father was entered as a person who had mirasi right, he had not been doing work as karnam of Vepada; but that by a family arrangement he had been doing duty as karnam of Velupati,

(1) M.S.D. (1853) 91.

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though he had been enjoying a portion of the lands attached to the office now in suit. In 1872, respondent No. 2 was appointed as a joint karnam by the Maharaja of Vizianagaram on the ground that the then working karnam, Repati Appaya, did not conduct his duties properly, and that respondent No. 2, who was in possession of a portion of the mirasi lands, should also do the duty devolving on him as a mirasidar. From 1872, the respondent No. 2 has been doing duty as one of the karnams of the villages in dispute. These facts appear to us to warrant the conclusion at which the Judge has arrived. It is urged for the appellant that the appointment of respondent No. 2 was contrary to the provisions of Section 7, Regulation XXIX of 1802. It is provided by that section that "in filling [217] vacancies in the office of karnam, the heirs of the preceding karnam shall be chosen by the landholders except in cases of incapacity, on proof of which before the Judge of the Zila, the said landholders shall be free to exercise their discretion in the nomination of persons to fill vacancies."

It is not denied that at the date of the appointment the appellant was a minor, and we must take it as finally settled by the decision of this Court in *Venkata* v. *Rama* (1) that minority is a ground on which the heir may be lawfully passed over and a selection made by the landholder from among the other members of the family. It is then said by the learned counsel of the appellant that the Regulation requires that the incapacity should be proved before the Zila Judge, and that it was not complied with in the case before us. As the incapacity arose from minority, and as it is not denied that the respondent No. 2 was then a minor, we do not think that section has any application to a case in which there could be no dispute as to the incapacity of the legal heir. Thus, it is clear upon the evidence that this respondent's branch of the family has been in enjoyment of the lands in his possession for upwards of forty years, that his father was entered as a co-mirasidar as early as 1862, and that his appointment as joint karnam was made in circumstances which renders it legal. We see, therefore, no ground to hold that the suit was not properly dismissed as against him. Nor do we consider the claim to be good as against respondent No. 1, though he has not appeared to oppose this appeal. On the death of appellant's father, Joganna, between 1862 and 1865, appellant's uncle, Appaya, was appointed as the adult male member of the family, competent to perform the duties of the office of karnam, the appellant being a minor at that time. After Appaya's death, respondent No. 1, his brother, was appointed to succeed him, and this appointment was also made during the appellant's minority. We consider that it was a valid appointment for the reasons already mentioned.

We are of opinion that this appeal must fail, and we dismiss it with two sets of costs in favour of the respondents Nos. 2 and 3.

(1) 8 M. 249.

9 M. 218=10 Ind. Jur. 182.

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[218] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

ALIBA (*Defendant*), *Appellant v.* NANU (*Plaintiff*), *Respondent.**
[19th, November, 1885, and 6th February, 1886.]

Limitation Act, Schedule II, Articles 132, 147—*Hypothecation.*

In 1884 N sued A to recover the principal and interest due on a registered bond executed in 1870. It was stipulated that the amount should be repaid with interest in 1871 and certain immoveable property was hypothecated as security for repayment of the debt :

Held, that the suit did not fall under Article 147 of Schedule II of the Indian Limitation Act, which allows sixty years to a mortgagee to sue for foreclosure or sale from the date the money becomes due, but under Article 132 of the same Schedule which allows twelve years to enforce a payment of money charged on immoveable property.

[N.F., 2 C.P.L.R. 57 (58); F., 10 M. 509 (517) (F.B.); R., 13 A. 28 (43); 13 B. 90 (95) (F.B.); 20 B. 408 (416) (F B.); 21 M. 326 (331) (F.B.); 12 C.P.L.R. 26 (30); 16 Ind. Cas. 236 (237); D., 16 Ind. Cas 209=23 M.L.J. 131=(1912) M.W.N. 1124.]

THIS was an appeal from the decree of H. J. Stokes, Acting District Judge of South Malabar, reversing the decree of U. Achutan Nayar, District Munsif of Betatnad in Suit 135 of 1884.

The plaintiff Motavangattil Nanu Panikar sued the defendant Aliba to recover Rs. 130, being 56 rupees principal and 93 rupees interest due under a bond executed in 1870 by which certain land was hypothecated by way of security for the repayment of the debt, giving credit for a payment alleged to have been made by defendant in 1872.

The bond stipulated that the principal should be paid with interest at twelve per cent. in April 1871.

The Munsif dismissed the suit as barred by limitation.

On appeal the District Judge held that the suit was governed by Article 147 of Schedule II of the Indian Limitation Act and was therefore not barred.

Defendant appealed.

Sankara Menon, for appellant.

Sakaran Nayar, for respondent.

[219] The Court (MUTTUSAMI AYYAR and PARKER, JJ.) delivered the following

JUDGMENTS.

MUTTUSAMI AYYAR, J.—The respondent instituted this suit upon a deed of hypothecation dated 1870 and asked for a money decree and for a decree for the sale of the hypothecated property. The appellant pleaded, *inter alia*, limitation in bar of the claim. On appeal the Judge overruled the contention and held that Article 147, Schedule II, Act XV of 1877 applied, and that sixty years was the period of limitation prescribed by that article. On this ground he decreed the whole claim, and the objection taken in second appeal is that the suit is barred by limitation.

I do not consider that this decision can be supported. It is at variance with *Davani Ammal* v. *Ratna Chetti* (1). That was a suit brought to recover the interest due under a mortgage-deed, such interest being charged on land. Following the decision in *Lallu Bhai* v. *Naran* (2),

* Second Appeal 654 of 1885.

(1) 6 M. 417, (2) 6 B. 719.

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this Court held that the suit might be brought under Article 132 within twelve years, though until then six or three years had been considered to be the prescribed period of limitation for mere money decrees according as the instrument was registered or not. The Bombay case was one in which the plaintiff asked for a money decree for the debt due upon an instrument of mortgage, and the High Court at Bombay held that Article 132 was applicable. It was argued in that case that under Act XIV of 1859 and Act IX of 1871, a suit for a money decree was a suit "for money lent" and subject to the three or six years' rule according as the bond was not or was registered; and that a suit for foreclosure or sale was held to be a suit "for the recovery of immoveable property or of an interest in immoveable property" and, therefore, governed by the twelve years' rule. The Court then drew attention to the words, "to enforce payment of money charged upon immoveable property," substituted in Article 132, Act XV of 1877 for the words in Act IX of 1871, "for money charged upon immoveable property" and observed that the change was not made without intention. The learned Judges further observed that Article 147 had introduced a special provision, not contained in the previous Acts, for a suit by a mortgagee for foreclosure or sale. They then referred to the provisions of the Transfer of Property Act and came to the conclusion that Article 132 applied to a suit by a mortgagee for a money [220] decree. I may also refer to *Muhammad Zaki* v. *Chatku* (1) in which the same view was taken by the High Court at Allahabad. In the case before us the claim for a money decree would be barred even under the twelve years' rule, but for the acknowledgment pleaded by the respondent. The Judge must therefore be asked to determine the question whether the acknowledgment is true or not, and if it is true, to proceed to dispose of the case on the merits.

As to the claim for a decree for the sale of the hypothecated property, the Judge's view is in accordance with the opinion expressed by the High Court at Allahabad. *Shib Lal* v. *Ganga Prasad* (2).

In that case it was held by the Full Bench of that Court that a suit by the obligee for a decree for the sale of hypothecated property was governed by Article 147, Schedule II, Act XV of 1877. The Court then said, and it seems to me very justly, that if the transaction, which is the subject of the suit, really amounts to a mortgage, and the right to pay off the encumbrance is in law a right to redeem, there is no reason why the right of the mortgagee to bring the mortgaged property to sale, and that of the mortgagor to pay off the encumbrance, should stand on a different footing in respect of limitation. The provisions of the Transfer of Property Act which were next referred to to show that the right of the obligor to pay off the debt due under a simple mortgage and to recover back the mortgage deed, is as much a right to redeem as that of the obligee to satisfy the debt payable on a mortgage with possession and to recover the mortgaged property. Section 60 of Act IV of 1882 leaves no room for doubt on this point. Such being the case, the construction placed on Articles 147 and 148 is that the right to redeem and the right to foreclose or sell are related to one another as rights arising out of the same mortgage in favour respectively of the mortgagor and the mortgagee, that the suits mentioned in Articles 147 and 148 are the remedies provided for the enforcement of those rights, and that they are both governed by the sixty years' rule. This view appears to me to be reasonable.

(1) 7 A. 120.

(2) 6 A. 551.

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There then remained for decision the further question what suits are then to be treated as suits brought under Article 132 " to enforce payment of money charged upon immoveable property." It has already been stated that a suit for a money decree upon a mortgage [221] deed would fall within those words. As pointed out by the Allahabad High Court, a suit for the enforcement of a charge on immoveable property as defined by Section 100 of Act IV of 1882, might also fall under that section. It is of importance that that Act and the Limitation Act should be read together, and that the mode in which mortgages are classified, the remedies enacted as available for each description of mortgage, and the distinction made between a mortgage and a charge should be steadily kept in view. Section 58 defines a mortgage to be the transfer of an interest in immoveable property for the purpose of securing the payment of money lent. Clause B defines a simple mortgage to be one in which there is no delivery of possession of the mortgaged property, but in which the mortgagor binds himself to pay the debt personally and agrees expressly or impliedly that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of the sale to be applied, so far as may be necessary, in payment of the mortgage money. In Section 100, a charge is defined to arise where immoveable property of one person is by the act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage. The distinction then between a simple mortgage and a charge consists in this, *viz.*, where a power of sale is conferred upon the mortgagee expressly or impliedly by the instrument of mortgage, the transaction is a mortgage ; otherwise it only creates a charge. Clause C, Section 58, defines a mortgage by way of conditional sale. Clause D defines a usufructuary mortgage as generally understood in this country. Clause E defines an English mortgage. Section 60 creates a right in the mortgagor to require the mortgagee, on payment or tender of the debt, to deliver up the mortgage deed, if any, and where the mortgage is with possession, to deliver the mortgaged property. It then enacts that this right shall be called the right to redeem, and that a suit to enforce it shall be called a suit for redemption. Section 67 creates a right in the mortgagee to obtain an order from the Court for foreclosure or sale in the absence of a contract to the contrary, but adds that nothing in this section shall be deemed to authorize a simple mortgagee as such to institute a suit for foreclosure or an usfructuary mortgagee as such to institute a suit for foreclosure or sale or a mortgagee by conditional sale as such to institute a suit for sale. It is provided [222] by Section 100 that all the provisions as to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having a charge. Section 69 specifies the cases in which alone a power to sell without the intervention of the Court may validly be conferred upon the mortgagee by the instrument of mortgage.

Having regard to these provisions the substantial question is whether the hypothecation, which is the subject of the present suit, is a simple mortgage within the meaning of Act IV of 1882, and whether that Act has application to mortgages which were executed prior to the 1st July 1882 when it came into force. The mode in which this Act affects the Act of Limitation is by creating new rights and liabilities in the mortgagor and in the mortgagee, and I do not think that such rights and liabilities can have retrospective operation.

Prior to Act IV of 1882, the obligor had only the rights of an ordinary

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debtor under a hypothecation deed. On the one hand he had no right of redemption, whilst on the other the obligee had no power of sale as inherent in the contract. If the Courts ordered a sale, they did so as it was the only mode in which a charge could be enforced. There is no doubt that Act IV of 1882 affects the Act of Limitation as to mortgages executed subsequently to July 1882, but as already remarked, it does so by creating new rights and liabilities in the obligor and obligee with reference to those mortgages.

In this view it seems to me that Act IV of 1882 could have no retrospective operation, and I hold therefore that the claim for the sale of the hypothecated property was one to enforce a charge, that it falls under Article 132, and that the hypothecation on which it is based does not possess the properties with which mortgages executed subsequent to 4th July 1882 are invested by Act IV of 1882.

I am also of opinion that the decree of the lower appellate Court must be set aside and the appeal remanded for decision upon the question whether the acknowledgment, referred to in paragraph 7 of the District Munsif's judgment is true, and, if it is found to be true, upon the merits. The costs will abide and follow the result.

PARKER, J.—This is a suit by a simple mortgagee to enforce payment of a debt by the sale of the property hypothecated. The deed was executed in May 1870, the debt being payable in April 1871. The suit was brought on 22nd March 1884, and if Article 132, [223] Schedule II of the Limitation Act applies, it would be barred unless an acknowledgment alleged to have been made by defendant's father on 24th March 1872 is genuine. The District Munsif found that the acknowledgment was not genuine; and held that the suit was barred under Article 132.

On appeal the District Judge has held on the strength of *Shib Lal* v. *Ganga Prasad* (1), that the suit is governed by Article 147 and not Article 132, and that the time of limitation is sixty years.

If this decision be held correct, the introduction of Article 147 into the present Limitation Act made a change in the law of very serious importance. From 1793 to 1877 twelve years was the period of limitation for suits of this character, and it would be indeed strange if we should find, while the English Real Property Act of 1874 reduced the period from twenty to twelve years within the United Kingdom, that the Indian legislature extended it from twelve to sixty years in 1877 for British India. We do not find however that the other High Courts in India have adopted the same construction as Allahabad. The doubt caused by the introduction of Article 147 was discussed by the Bombay High Court in *Lallu Bhai* v. *Naran* (2) and the learned Judges came to the conclusion, in a case similar to the present, that money lent on mortgage was, in ordinary legal phraseology, money charged on immoveable property, and that Article 132 would govern the suit.

This decision was assented to, with the same hesitation, by this Court in *Davani Ammal* v. *Ratna Chetti* (3).

Mahammad Zaki v. *Chatku* (4) was referred to as being somewhat at variance with the Full Bench decision in *Shib Lal* v. *Ganga Prasad* (1), but on reading the former case it would appear that the Court held that the unsatisfied balance was a debt charged upon immoveable property in contradistinction to a mortgage and hence that Article 132 applied.

(1) 6 A. 551. (2) 6 B. 719. (3) 6 M. 417. (4) 7 A. 120.

Although the words "by a mortgagee for foreclosure or sale" would under the definition of "mortgagee" given in the Transfer of Property Act, 1882, Section 58, include an hypothecatee, it must be remembered that there was no such definition of the term "mortgagee" in 1877 when the present Limitation Act was passed. For some eighty years previous to 1877 an hypothecatee (or simple mortgagee as now defined) had always been regarded as [224] one who had a *charge* upon immoveable property, and the "mortgagee" who according to the old law could be sued within sixty years of the mortgage was the party in possession. An extended technical definition given to the term "mortgagee" by legislation subsequent to 1877 will not also extend the period during which one who was not technically a mortgagee at the time of the passing of that Act can sue to enforce a claim.

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No sufficient ground has, to my mind, been shown to impugn the decision of the Division Bench of this Court in *Davani Ammal* v. *Ratna Chetti* (1), and I am fortified in this conclusion by the fact that the Bombay High Court has arrived at a similar opinion.

With all deference, therefore, to the ruling of the learned Judges of the Allahabad High Court, I would reverse the decree of the Lower Appellate Court and remand the appeal for a decision upon the other points which arise. The costs to abide and follow the result.

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APPELLATE CRIMINAL.

Before Mr. Justice Brandt and Mr. Justice Parker.

QUEEN-EMPRESS *v.* VIRAN AND OTHERS.*

[12th and 17th February, 1886.]

Criminal Procedure Code, Sections 164, 364, 533—*Evidence Act, Sections* 65, 80—*Confessions—Improper examination of accused persons by Magistrate—Record rejected.*

The Deputy Magistrate of Malabar, purporting to act under the provisions of the Mapilla Act (Madras Act XX of 1859), recorded a statement in the nature of a confession made by V, who was under arrest on suspicion of being concerned in a Mapilla outrage. This statement, which was made in Malayalam, was recorded in English in the form of a narrative and was signed by the Magistrate only.

The same Magistrate shortly afterwards, purporting to act under the Code of Criminal Procedure, before any evidence was recorded against V, examined him as to this statement which was read over and translated to him. In answer to questions, V admitted that he had made it voluntarily.

This examination was recorded according to the provisions of Section 364 of the Code of Criminal Procedure. After other evidence was recorded, V retracted his statement. He was committed to the Sessions, tried and convicted mainly on his own recorded statement and examination.

[225] The Deputy Magistrate was examined as a witness and stated that the statement recorded by him was made by V and was correctly recorded and was made voluntarily:

Held, that the record of the statement made by V to the Deputy Magistrate was not admissible in evidence against V.

Per PARKER, J.—The provisions of Section 164 of the Code of Criminal Procedure are imperative, and Section 533 will not render a confession admissible where no attempt has been made to conform to the provisions of the former section.

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* Referred Trial 61 of 1885.

(1) 6 M. 417.

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If the confessional statement of V was recorded by the Magistrate in his executive capacity, it was not receivable in evidence under Section 80 of the Evidence Act.

The action of the Magistrate in examining V as to his confessional statement before there was any legal evidence on the record against him was illegal and, therefore, the record of such examination could not be used in evidence against V.

Inasmuch as the record of the statement of V was not admissible, secondary evidence thereof could not be given.

[F., 23 B. 221 (228); 8 C.W.N. 22 (24); 7 O.C. 191; R., 17 C. 862 (870); 4 Bom. L.R. 785 (787); 2 C.W.N. 702 (708, 717); L.B.R. (1893—1900), 70 (71); D., 21 B. 495 (501).]

THIS was an appeal from the conviction and sentence of the Sessions Judge of South Malabar (H. J. Stokes).

The facts and arguments appear from the judgments.

Mr. *Wedderburn*, for appellants.

The Acting Government Pleader (Mr. *Powell*), for the Crown.

The Court (BRANDT and PARKER, JJ.) delivered the following

JUDGMENTS.

PARKER, J.—The three prisoners (Mapillas) have been sentenced to death for having taken part in the murder of one Kutti Karian and his family on the night of 2nd May 1885. Of the fact of the murder there is no doubt This Kutti Karian (a low-caste man) had become converted to Islam, but had reverted to his former condition. The Mapillas of his neighbourhood, under the impulse of religious fanaticism, resolved to revenge the insult to their religion by taking his life, and on the night of 2nd May a body of them surrounded his hut, set fire to it, slaughtered him and his wife and one child, and three other children perished in the flames. They then marched away to some distance, took possession of the house of a Nambudri where they resolved to make a stand, and there waited to be attacked. In the course of the afternoon troops arrived, and all that were in the house (eleven men and a boy) were shot.

The case for the prosecution is that the three prisoners (appellants) were members of the gang who murdered this family, but deserted their comrades before they occupied the house of the Nambudri. Prisoner No. 1 was arrested on 8th May; prisoner No. 2 at Calicut on 15th May; and No. 3 at Cannanore on 23rd May. The case against them turns almost entirely upon confes-[226]sions which they are alleged to have made, which confessions were retracted at the Sessions. Evidence has been called to corroborate those confessions, but taken by itself it is very inconclusive and meagre; and it is conceded that the convictions cannot stand unless the confessions are held admissible in evidence and reliable in character.

It is objected by the learned counsel for the prisoners that these confessions are not admissible in law as evidence.

Prisoner No. 1 made three separate statements before the Deputy Magistrate (Mr. Karunakara Menon) on 9th May; a fourth on 19th May, and a fifth on 31st May; but none of these statements were recorded under Sections 164 or 364 of the Code of Criminal Procedure. The questions put and answers given were not written down; they were not taken down in the language in which they were made, but in English; they were not signed by the prisoner or certified by the Magistrate. Similar statements were taken from prisoner No. 2 on 16th and 19th May and from prisoner No. 3 on 25th and 26th May. At the trial the Sessions Judge

held that the testimony of the Deputy Magistrate would not cure these radical defects under the saving provisions of S. 533 of the Code of Criminal Procedure since the provisions of Sections 164 and 364 had not only not been *fully* complied with, but not complied with at all; but he held that, since these statements were read over to the prisoners on 5th June, and were acknowledged by them to have been voluntarily made (which acknowledgments were duly recorded and signed), secondary evidence of the contents of these confessions could be given by the oral testimony of the Deputy Magistrate.

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The points argued in this appeal are—

I. Whether the provisions of Section 533 enable these statements to be tendered in evidence, presuming that the Deputy Magistrate was acting under Section 164, notwithstanding the neglect of the provisions of that section and of Section 364?

II. Whether if these statements were taken under any other procedure, they are admissible in evidence under Section 80 of the Evidence Act?

III. Whether the acknowledgments made by prisoners on 5th June have the effect of incorporating those statements in the acknowledgments that day made?

[227] IV. Whether secondary evidence of the contents of these documents can be and has been given by the testimony of the Deputy Magistrate?

Upon the first point I am of opinion that the provisions of Section 164 are imperative and that Section 533 will not render the confession admissible where no attempt at all has been made to conform to its provisions. We have been referred to the rulings of *Daya Anand* v. *Regina* (1),* *Regina* v. *Amrita Govinda* (2), *In re Mayadeb Gossami* (3), *Regina* v. *Shivya* (4). These rulings were given under the old Code, but the immense importance of having the exact words of the prisoner recorded in his own language has in no way diminished. I hold that the Sessions Judge rightly ruled they were inadmissible under Section 533.

It is contended, however, that when these confessions were taken by the Deputy Magistrate, he was acting not under the Criminal Procedure Code, but under the provisions of the Mapilla Act (Madras Act XX of 1859). Section 7 of that Act authorizes the District Magistrate to cause the apprehension of any Mapilla and his detention "after such inquiry as he may think necessary;" and though the Deputy Magistrate may have been acting in an executive capacity under the orders of the District Magistrate, and aiding him to make an inquiry under this section, there is nothing in the Mapilla Act authorizing the District Magistrate to examine a suspected person or to take from him any statement or confession. Such a course may not be improper and may even be advisable; but the statements as to which Section 80 of the Evidence Act says that certain presumptions shall be drawn are statements or confessions taken in accordance with law. This section does not render admissible any particular kind of evidence, but only dispenses with the necessity for formal proof in the case of certain documents taken in accordance with law. If a document has not been taken in accordance with law, Section 80 does not operate to render it admissible. The section merely gives legal sanction to

(1) 11 B.H.C.R. 44. [* is stated as *Reg.* v. *Daya Anand*.—ED.] (2) 10 B.H.C.R. 497.
(3) 6 C. 762. (4) 1 B. 219 (220).

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the maxim "*Omnia præsumuntur rite esse acta*" with regard to documents taken in the course of a judicial proceeding. In my opinion, therefore, these statements, if recorded by the Deputy [228] Magistrate as an executive officer, are not receivable under Section 80 of the Evidence Act.

I now come to the third point—whether the acknowledgments made by the prisoners on 5th June had the effect of incorporating these statements. In recording these statements of 5th June the Deputy Magistrate was admittedly acting and purported to be acting in a stage of a judicial proceeding, and not as an executive officer. He was, therefore, governed in recording these statements by the provisions of the Code of Criminal Procedure, and it is necessary to consider whether his proceedings were in accordance with that Code.

On 5th June when the prisoners were placed before the Magistrate there was no evidence on the record against them. Such evidence, as was afterwards obtained, was not obtained till later in the month and all previous proceedings appear to have been under the Mapilla Act. The statements, which they had previously given, had not been made legal evidence against them; nor, as it appears from the examination itself, had they up to that time been brought on to the record of the preliminary enquiry. Under Section 342 of the Criminal Procedure Code, therefore, the Deputy Magistrate was not justified in putting *any* question at all to the accused since it is only for the purpose of enabling an accused person to explain circumstances *appearing in the evidence* against him that a question ever can be put; and still less of course was the Magistrate justified in putting questions for the purpose of getting the accused to incriminate themselves—a procedure which Section 342 was specially designed to prevent. Had the accused on 5th June offered to confess, such confessions could no doubt have been taken and recorded *before the commencement of the inquiry* under Section 164, and after the Magistrate had satisfied himself upon questioning the accused that they were going to make voluntary confessions. Such confessions could then have been recorded with the declaration prescribed by Section 164. But these statements were not given, and do not profess to have been given under Section 164, but under Section 364 in answer to questions put by the Magistrate; and not only did the Magistrate put questions to each accused when there was no evidence on the record against him which he could be asked to explain, but he actually cross-examined each prisoner at great length with regard to the part supposed to have been taken by the other prisoners—a course of proceeding most [229] unjustifiable and which has often been noticed with censure by this Court. I am of opinion that the procedure of the Deputy Magistrate on 5th June was illegal and that the questions put to and answers then obtained from the prisoners must be excluded from the record of this trial.

And lastly with regard to the secondary evidence of the contents of these statements, I am of opinion that it is not admissible under Section 91 of the Evidence Act, since the statements recorded are in themselves inadmissible—*Regina* v. *Bai Ratan* (1) and *Queen* v. *Shivya* (2). The question does not arise whether the Deputy Magistrate could be asked to give evidence as to what was said to him as an executive officer and not as a Magistrate, using the statements to refresh his memory, since he has only stated in general terms that the prisoners "made confessional statements"

(1) 10 B.H.C.R. 166. (2) 1 B. 219 (220).

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—but was never asked what each prisoner said or to connect any one prisoner with any particular statement.

The result of the case, therefore, is that, as none of the statements made by the prisoners are admissible in evidence, and as the prisoners completely retracted all former statements at the trial, there is no evidence on which the conviction can stand.

I have found it necessary to go then minutely into the legal points, but in justice to prisoners Nos. 1 and 2 I feel bound to state that, irrespective of technical objections, I should also have held them entitled to acquittal on the merits. Had the statements taken from them been admissible in evidence, they would not have sufficed for a conviction unless the Court were satisfied that they were voluntarily made and were true in fact. On neither of these points do I feel myself satisfied.

No less than three statements were taken by the Deputy Magistrate on 9th May from prisoner No. 1. In the first two of these he certainly did not confess and manifestly had no intention of confessing. No explanation at all is given of the complete change of front executed on the same day.

Prisoner No. 2 presented himself before the District Magistrate at Calicut on 15th May. The Sessions Judge says: he "surrendered" himself and next day (16th) made a "confessional statement." This is altogether inaccurate. In the statement made on 16th May he declares that the murders took place during his [230] absence; that on his return he heard of them and for some days went about his business, but finding that he had someho wincurred the suspicion of the police he came with his wife and children to the District Magistrate—obviously for protection. There is not a word in the statement which can be construed into a confession of guilt or guilty knowledge. This is not the conduct or the language of a man who knew himself to be guilty, or of one who *intended* to confess. He was, however, given into custody, and after being three days in custody he makes—a confession (?) On the very same day (19th May) prisoner No. 1 finds it necessary to make an additional statement in which the confession (?) of the prisoner No. 2 is corroborated in due detail and he begins it as follows: I wish to make a statement. Through stupidity I made *several false statements* when examined the other day. *I did not tell the whole truth then.*"

A few days pass and the prisoner No. 3 is arrested at Cannanore on 23rd May. On 25th May he makes before the Deputy Magistrate Mr. D'Cruz a statement in which he represents himself an unwilling spectator of the murders. On the next day (26th) he is produced before the same Deputy Magistrate who has recorded the other statements, and makes a long confession in which he represents himself as having taken a very prominent part in the whole plan. After he has done this the prisoner No. 1 again finds it necessary (on 31st May) to make a long statement, correcting and enlarging his former statements and bringing them into conformity with the story as told by the prisoner No. 3.

I find it impossible, under these circumstances, to believe that the confessions of prisoners Nos. 1 and 2 were voluntarily made, and it seems also open to doubt whether that of prisoner No. 3 was untutored and voluntary. In any case great reliance cannot be placed upon a confession which requires such frequent correction, and the sequence of these statements seems far more suggestive of a concocted case than of true confessions.

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There is yet another piece of internal evidence which makes me doubt whether the story put forward by the prosecution is a true story. The prisoners represented—or were made to represent—that the Mapillas who went to murder Kutti Karian were 12 in number. This corresponds exactly with the number killed at the Nambudri's illam, and gave rise to the obvious suggestion that prisoners might not really have been there. They account for [231] this by saying that they left their comrades before they occupied the illam, and this—with the fear of the consequences before their eyes—would not be in itself improbable. What is improbable is that their places would be readily taken by three other men,—or two men and a boy—not concerned in the murders. If I understand rightly the aim of the fanatics who perpetrate outrages of this description, it is to gain eternal happiness for themselves by some signal act in vindication of their religion in the doing of which they will sacrifice their own lives, and thus die what they regard as a glorious death. But to court the death without the glory is another matter and it is not easy to imagine the frame of mind in which a man would feel attracted to sacrifice his own life and be shot down by troops merely because glory had been achieved by somebody else, and not by himself. Such an act is no doubt possible, but it is not *prima facie* so probable as to be readily accepted without clear proof.

As a matter of fact, however, I may point out that the prisoners spoke only to the gang being joined by *one* young Mapilla, and that the presence of the other man and of the boy among the dead bodies is wholly unaccounted for, and there is nothing on the record to bear out the statement in the judgment that the number shot down in the illam was made up to twelve by *two* men (one of whom brought a child with him) having voluntarily joined them.

Under all these circumstances, I cannot but regard the case for the prosecution with great distrust. On all grounds, therefore, I would reverse the conviction and direct that the prisoners be discharged.

BRANDT, J.—The three appellants, (1) Nadutodiyil Parambil Viran *alias* Viran Mohidin, (2) Vaduvan *alias* Ariparambil Kunhi Koya, (3) Edavalat Parambil Pari Mohidin, have been convicted by the Sessions Judge, South Malabar, concurring with the assessors, of murder, abetment of murder and mischief by fire with intent to destroy a dwelling house—Sections 302, 109 and 302, and 436 of the Penal Code, and have been sentenced to death subject to confirmation of the sentences by the High Court.

In the memorandum of appeal preferred by the appellants Nos. 1 and 2, the grounds stated are that the appellants were induced to make the incriminating statements recorded as given by them by promises and threats and torture on the part of the police, [232] and that the whole number of persons who committed the offences were killed by the English soldiers.

Appellant No. 3 states that, under the influence of fear, he accompanied those who committed the offences for a short way, but represents that he escaped before the murder was done.

The case has been further ably argued both on points of law and on the facts by the learned counsel appointed to defend the appellants, and in support of the conviction by the learned Government Pleader.

There is no question as to the fact of the murder of a Cheruma or low-caste man and his wife and family on the night of 1st or early morning of the 2nd May 1885; of five children only one escaped, one of those

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who died having been cut to death and three others having perished in the flames of the hut which was set fire to.

It may also be taken as proved that this terrible act was committed by a gang of men consisting of ten or twelve persons, and that the motive was revenge and fanatical rage caused by the Cheruma's apostacy from the Muhammadan religion which he had embraced for a while, only to give it up again for his former persuasion or religion: and that twelve persons (one of whom was a child) were shot down in a house in which they made a stand on the evening of the 3rd May, and that of these there is very little doubt that nine at least were some of those who had committed the murder.

It is the case for the prosecution, and the Sessions Judge finds that the other three then shot had joined the gang in the place of the three appellants, who left their comrades—appellants Nos. 1 and 3 on the evening of the 2nd May, and the appellant No. 2 on the morning of the 3rd idem.

The convictions depend almost entirely, it may be said, on certain statements or confessions recorded as made by them on various occasions between the 9th May and 5th June; there is evidence of some witnesses, which is referred to as corroborating the confessions in certain respects.

The Sessions Judge expresses himself as very doubtful whether these statements were admissible in evidence, they not having been recorded under either Section 164 or 364 of the Criminal Procedure Code; and held that, not having been recorded as required by the Code, evidence orally given by the Magistrate who recorded them [233] that they were "duly" and voluntarily made could not make them admissible under Section 533, Criminal Procedure Code; that in fact Section 533 did not apply at all, as the requirements of that section were not only not fully complied with, but not complied with at all.

He held, however, that these statements having been read over to appellants Nos. 1 and 2 on the 5th June and acknowledged by them to have been voluntarily made, and the acknowledgments having been duly recorded under Section 364 and signed by them, they constitute admissions in writing, that secondary evidence of these documents is therefore admissible under Section 65 of the Evidence Act (*Clause b*) and that "the fact that they confessed on the dates appearing on the several documents may be proved and is proved" by the Magistrate who recorded them.

I understand the same course of reasoning to be followed, and the same grounds for admitting the statements made, to apply in the case of the appellant No. 3.

Then taking the accounts of the three appellants as telling against them and showing in what respects there is independent evidence to corroborate these, and using the statements made by appellants Nos. 2 and 3 implicating appellant No. 1 as against the latter, and similar statements made by Nos. 1 and 3 as against No. 2, and a statement made by No. 2 as against No. 3, the Judge held the charges fully established.

It is contended in appeal that the statements recorded as made by appellant No. 1 on the 9th, 19th and 31st May, by appellant No. 2 on the 16th and 19th May, and by the appellant No. 3 on the 25th and 26th May are wholly inadmissible in evidence, (1) because if taken or purporting to be taken under the provisions of Section 164, Criminal Procedure Code, they are not recorded in the manner therein required, and that they cannot be admitted, all defects being cured and omissions supplied under

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the provisions of Section 533, Criminal Procedure Code, and (2) that if not taken or purporting to be taken under Section 164, they were taken without any authority at all—not in accordance with law—and that therefore Section 80 of the Evidence Act does not in any way apply to them.

To ascertain if possible the nature of the statements recorded as made by the appellants before and on the 5th June, it is necessary to note the dates on which the appellants were severally arrested, and the stages at which those statements were made, and to give an outline of the contents of those statements.

[234] Appellant No. 1 was, as appears from the register, apprehended on the 8th May; No. 2 on the 15th; No. 3 on the 22nd *idem*. The earliest date on which evidence was recorded against the appellants was the 10th June 1885; on that day the eleventh witness appears to have been examined (if the stamp date is correct, but from all the serially-numbered preceding witnesses having been examined on the 18th June there is doubt as to this): the medical witness was examined on the 11th June: the fourteenth, fifteenth and sixteenth witnesses' depositions are dated the 11th: the first to the tenth witnesses were examined first on the 18th June and they were "recalled" and further evidence taken from them in December when the inquiry was closed. There is evidence recorded on the 12th December.

On the 9th May 1885 appellant No. 1 made before the First-class Deputy Magistrate a statement, which is described at the heading as "a deposition" and the deponent as "Criminal No. 13," in which among other matters not material, he said that one Varikottil Ali Ahmed described as rebel No. 7 said to him one day "Kutti Karian (one of the persons murdered on the 2nd May 1885) was a Mapilla. He embraced our religion. Now he walks about as a Cheruma. Should we not avenge ourselves? Is it not meritorious to us? I told him I could not do it or go with him."

This statement is simply signed by the Magistrate and is recorded in English. On the same day the same appellant was again examined by the same Magistrate, and the material parts of his statements in this are that on the night when Kutti Karian's hut was set fire to the witness was at home, and that next day at about 8 A. M. he heard that Kutti Karian had been murdered and the hut burnt down by Mapillas. This statement is recorded in the same manner as the first, except that it is not headed deposition.

On the same day yet another statement, recorded in the same manner as the last, appears as made by the same appellant. This is of very considerable length. In it the deponent stated that on a Friday, nine days previously, he was aroused by certain persons named, including appellants Nos. 2 and 3, and called to join in the matter of Kutti Karian as to which he had (as they said) been previously spoken to, and to take revenge on him; that at first he refused, but then partly by persuasion and partly or eventually by [235] force, he was caused to accompany them to the deceased's hut, that then the hut was forced open and set fire to, and the Cheruma and his wife stabbed and killed; that they then went in a body, and some among them threatened to shoot any one who approached them, and then went eastwards; at daybreak his companions said "Let us go to Uragam," and they reached Urothmala hill before noon; that in the afternoon a young man of about 20 or 22 years of age came and asked them what had been done, and then, hearing the occurrences narrated, said he too was coming with them and they consented; that they reached Tirurangadi about dark, when taking an opportunity and being afraid the appellant left his comrades and went home.

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On the 19th May he made yet another statement as recorded by the same Magistrate, which begins thus "I wish to make a statement. Through stupidity I made sundry false statements when examined the other day. I did not too tell the whole truth then." He then proceeded to give details as to how, previous to the 2nd May, one Friday, he had been at a consultation at the mosque at Omachchapuzha where persons named were present, and it was arranged that ammunition should be bought; he then repeated what occurred when he was called by rebel No. 7, as he says, on the night of the 2nd May, and at the hut, and spoke of the part taken by three of the rebels specially in the murder of Kutti Karian; and he speaks incidentally of the time at which "we" killed that man.

On the 31st May he was again "recalled" and the statement commences: "I made a mistake in my former statement which I wish to correct:" and further details are given.

Then comes what is headed a "statement" made by this appellant and dated 5th June 1885, recorded by the same Magistrate at the commencement of which appears ("*N.B.*—The statements made by the prisoner on the 9th, 19th, and 31st May 1885 were read over to him"). And the following questions and answers are then recorded :—

Q.—Are these statements read over made by you ?

A.—Yes.

Q.—Are they made by you voluntarily ?

A.– Yes.

Then follows more which it is not at present necessary to set out.

[236] As regards appellant No. 2 there is first what is styled a deposition given by him as "Criminal No. 15," "Second prisoner" and dated 16th May 1885 in which he says he was away from home on the night on which (as he was informed on the day following, Saturday) the Cheruma was stabbed to death: that on the following Thursday or early next morning (Friday) he was informed by his wife that policemen had come to apprehend him and that he with his wife and children went straight to Calicut, and appeared before the Collector on the day preceding that on which he was examined, *viz.*, the 15th May.

On the 19th May this appellant was again examined; he then stated that fifteen days before the Cheruma was killed he was asked to take part in killing the Cheruma for forsaking the Mussalman faith and that he consented; that they went to the mosque on the following Friday and consulted, and certain arrangements were made and then he described the attack on the hut on the 2nd May and the murders: he then tells how the party journeyed to the Uroth hill and how the Mapilla youth joined their party; and how in the morning when they came near the Nambudri's house he took the opportunity to leave the gang and go to his home about half of a mile off.

On the 5th June these two depositions or statements were, as it is recorded, read over to this appellant, and he was asked questions similar to those put to appellant No. 1 on the same day and was further asked other questions as to which more hereafter.

The first statement recorded as made by appellant No. 3 is dated the 25th May, he was it appears produced before another Magistrate (Mr. D'Cruz), and was asked "why he was produced there by the police ?" he is said to have replied that he was produced in connection with this affair: that at first he refused to go, but when pressed he went: he then describes how the Cheruma and his wife were killed, and the hut burned, but he

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does not say that he took part in this, and he stated that he left the gang at about 6 P.M. the next day.

The next statement or deposition made by appellant No. 3 and headed in the same manner as those given by appellants Nos. 1 and 2 on the dates previous is dated the 26th May 1885.

In this the whole of the occurrences referred to by the other appellants are detailed at great length including the part taken by [237] the deponent, up to the time when as he states he left the company before they entered the Nambudri's house.

On the 5th June this appellant was again examined, and his previous statement having been read out he is asked, "Is not the statement just read out yours?"

A.—Yes.

Q.—Was it made voluntarily by you?

A.—Yes. I made it of my own accord.

Q.—Have you anything further to say?

A.—I have nothing to say.

He is then further questioned at considerable length.

On the 5th December 1885 all three appellants were questioned as follows:—

"You have heard the depositions of the prosecution witnesses. Have you anything to say now?" or to one "How say you?"

Appellant No. 1 then stated that he made the (former) statements because he was tortured by the police; that when he was asleep in his house Varikottil Ali Ahmed came and called him to go to a Nercha (feast or festival), that he declined to go, and he knows nothing more; that he did not recollect pointing out certain spots under a tree to the committing Magistrate, and that he had no witnesses.

Appellant No. 2 reverted to the account originally given by him, adding that after giving himself up to the Collector he had been tortured by the police and confessed his guilt; that he had no witnesses.

Appellant No. 3 again repeated his story in the main outlines as to being called to take part in the attack on the Cheruma's hut, but he now said he went because he feared the others would kill him if he refused, and that before they reached the hut he slipped away and went home and next day at 4 A.M. heard of the murder; that four days afterwards the police came and commenced "to seize and bind and beat," and that coming to know the police were aware he had some knowledge of the affair he went to Cannanore, through fear, and he was there apprehended.

It does not appear whether the appellants were arrested by the police under the powers conferred by the Criminal Procedure Code, or in virtue of the powers with which the District Magistrate is invested under the Malabar Mapilla Outrages Act XX of 1859, but it is assumed by the Sessions Judge that the proceedings [238] were taken under that Act, and this would appear to be the case from a note by the committing Magistrate to the effect that the delay between January and October was due to non-receipt of an order from the Governor in Council, presumably an order made under Section 7 of the Act. There is nothing in the Act authorizing the examination of accused or suspected persons, but if the police were investigating the circumstances connected with the murder of the Cheruma, and no "enquiry" had been begun by the First-Class Magistrate, Karunakara Menon, it may be assumed that it was open to him "to record any statement or confession made to him in the course of such investigation."

But whether what was said by the appellants on days prior to the 5th June was intended to be or taken as recorded by way of "statements" or "confessions" does not appear.

There is however a very clear and important distinction drawn in Section 164: a statement is to be recorded in one of the modes in which evidence is to be taken: a confession in the manner required under Section 364.

The taking of a "statement" contemplated by Section 164 appears to me to presuppose a charge or reasonable suspicion against some person other than the person making such statement. The Magistrate, Karunakara Menon, in his evidence before the Sessions Court, has deposed that none of these statements were taken on oath or solemn affirmation; but the earlier ones are headed "depositions," and for all that appears they may have been taken as recording information given respecting persons other than those making them; for it must be noted that at the time when they were made there were a number of other persons under arrest and detention under the special Act, these appellants being numbered as thirteenth, fourteenth and fifteenth "Criminals." It appears to me necessary to make these observations as bearing upon the question of the statements having been "voluntarily" made *qua* confessions, as which and as which alone they were afterwards used.

Treating them as confessions taken under Section 164 it is not pretended they were recorded and signed in the manner therein required.

As to the certificates appended to the statements dated the 5th June, from the manner in which they are worded, it would appear that they were recorded as examinations of accused persons (Section 364, Criminal Procedure Code); but power is given to Courts to [239] examine accused persons not for the purpose of causing them to incriminate themselves, but "to explain any circumstances appearing in the evidence against" them (Section 342, Criminal Procedure Code).

Can it be said that anything appeared in the evidence against the appellants at that time? The word "evidence" must be taken to be used in Section 342 in the sense in which it is defined in the Evidence Act, *viz.*, as meaning and including (1) in respect of oral evidence "all statements which the Court permits or requires to be made before it by witnesses," and (2) documentary evidence.

There was no evidence then on the record given by witnesses, and I am of opinion that it was equally impermissible to use as documentary evidence "against them" their previous statements, as to use those statements as "evidence given by witnesses against" them.

Assuming however that all the statements made prior to the 5th December were made under the provisions of Section 164, can they be admitted and treated as if recorded in accordance with law by reason of the evidence given by the Magistrate Karunakara Menon in the Session Court to the following effect:—

"I conducted the inquiry into the murder of Kutti Karian. The first, second, third, and fourth prisoners made confessional statements. They were not taken on oath. They are correctly recorded. I believe they were voluntarily made" ...... To Court, "I remember that before and after examining these prisoners on the 9th, 19th, 31st, and on the 16th, 19th and 26th May I satisfied myself by questioning them that they were making them voluntarily."

If the Magistrate was holding an inquiry in the case as against these appellants at the time when these statements were taken, they are each

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and every one of them inadmissible under Section 164, for that section applies only to statements and confessions made "before the commencement of the inquiry or trial."

I am further of opinion that the Magistrate's evidence is insufficient to show that the statements recorded as made by the several appellants on the several dates enumerated were duly made by them.

These statements were not, so far as appears, put into the hands of the witnesses one by one, nor then read out, and it does not appear sufficiently to which statements the witness was referring; [240] they are not numbered nor marked nor filed as exhibits in the Sessions trial. Some statements of the accused appear to have been read after the close of the evidence for the prosecution; which statements these were does not clearly appear. Section 533 directs that "when the provisions of such section (*viz.*, in this case Section 164) have not been fully complied with," the Court shall take evidence that the person purporting to have made a statement under the provisions of that section duly made it; but it is for the Court to determine in this respect whether the evidence given in proof of the fact is sufficient, and for the reason stated above, I am of opinion that in this case it is not sufficient.

It was then contended in appeal that the Court was bound with reference to the provisions of Section 80 of the Evidence Act to presume that these confessions were "duly taken," and that they were "taken in accordance with law." No such presumption could arise when on the face of them it appeared that they were not duly taken; the fact that the Court was obliged to have recourse to the provisions of Section 533, Criminal Procedure Code, shows this, and Section 80 can have no further application when it is a question for determination in the particular case whether the evidence recorded with reference to Section 533 is sufficient or not to show that particular statements are admissible for the purpose for which they are produced, or not.

Reference is made by the Sessions Judge to Section 65 of the Evidence Act, the words appearing in Clause (*b*) in that section being quoted; but for the reasons above stated I am of opinion that it was not open to the Magistrate to procure an admission in writing—if the affixing of his mark to the whole statements by each accused can be held to constitute an admission in writing for this purpose—in respect of the contents of the previous statements.

It remains to consider whether evidence could be given by the Magistrate of the fact that confessions were made to him by persons subsequently committed by him to the Sessions Court, irrespective of the provisions and requirements of Section 164, Criminal Procedure Code.

Evidence may be given of a confession provided that it be not excluded by an express provision of law, whether made to a private person, or to a Magistrate otherwise than in the course of an enquiry or other judicial proceedings; it may then be proved, and must be proved, if at all, like any other fact.

[241] I have already given my reasons for holding that the fact of the several statements in this case having been made by the several appellants is not sufficiently proved by the evidence of the Magistrate, the twenty-seventh witness.

We might require further evidence in this respect, but this should not be done unless in very exceptional circumstances; and, as I am not prepared to say that, even if the appellants were proved to have stated what the recorded statements show, it should be held that they voluntarily made

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those statements, I consider that no further reference should be made, especially when regard is had to the length of time the appellants have already been in custody with this charge hanging over them, and to the fact that the Judge who tried the case no longer presides over the Court.

It must not be supposed that any imputation is intended as against the Magistrate in so far as he has deposed that to his belief the statements were voluntarily made. That is a matter of belief and inference only; his evidence goes to show that so far as he is aware no pressure had been brought to bear or was influencing the appellants at the time when they made statements implicating themselves and one another. But it is quite possible that the Magistrate's impression was not well founded.

The precise circumstances in which and the objects with which the appellants were examined in the first instance are not disclosed and cannot be ascertained from the records. There is however nothing in the first statement made by the appellant No. 1 on the 9th May, but a distinct denial that he was in any way concerned in the murder: he does no doubt say he was asked to take part in wreaking vengeance on the Cheruma, but he says he refused.

Why he should have been again examined on the same day does not appear, and it is difficult to believe that he came forward voluntarily thrice on the same day, and that having twice denied participation in the affair he should on the third occasion have voluntarily gone a good deal further than admitting that he was present at the hut when it was burnt and when the Cheruma and his wife were killed; but even then he does not represent himself as a willing agent, or as taking any active part.

But in the third statement made by him that day he implicates among others appellants Nos. 2 and 3 not then in custody as having been present at a meeting at which he was called to go on the business in hand. It may well be doubted whether this [242] appellant was not then under the impression that he was giving information against others, not confessing his own guilt, and it would be extremely difficult to hold that statements made in such circumstances could properly be held to be confessions voluntarily made.

This observation applies generally, and the appellants and others being in custody and presumably in immediate charge of the police are not likely to have been wholly uninfluenced by fear, or by a hope that by giving evidence against others they might possibly be taken as approvers.

On the 19th May the appellant No. 1 supplies further information against appellants Nos. 2 and 3: then the appellant No. 3 is described as one of the two leaders—he and two others (first and seventh rebels) are described as having actually cut the Cheruma's throat: appellant No. 1 does not speak of himself as having done any particular act towards killing, or in the burning of the hut: again on the 31st May he has to correct his former statements and gives further details.

Meanwhile the appellant No. 2, whose first statement made on the 16th May is perfectly compatible with the case of a man living in the vicinity when this terrible occurrence took place, and who, whether with or without reason, might be suspected of complicity, on the 19th *idem*, makes an extremely long statement implicating the appellants Nos. 1 and 3; in this he states that appellant No. 3 was one of those who held the Cheruma while his throat was cut, and says he himself and appellant No. 3 set fire to the hut.

The manner in which the appellant No. 3 is questioned when first produced before the Magistrate (D'Cruz) on the 25th May is open to very

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serious objection: but he states that at first he refused to go, and he does not admit that he was a voluntary participator in the affair. But the next day he is prepared to make a statement of very great length—he, however, would say that he was not, as the appellant No. 2 stated, one of those who actually went into the hut.

The appellants having on the 5th June confirmed these statements then and not till then evidence is taken; and it may safely be said that except in so far as that evidence goes to prove the facts that there was a previous conspiracy on the part of a certain number of men to commit the murder, that the murders were [243] committed, and the movements and subsequent fate of those persons, it is as against the appellants insufficient and in some cases positively unsatisfactory.

The evidence of the first and second witnesses as to recognition of appellants Nos. 1 and 3 by their voices is clearly worthless; and that given by the sixth witness strikes me as equally so.

The evidence regarding the number of persons concerned and what became of them is moreover by no means clear or free from doubt. It is from the so-called confessions that the fact of the Mappilla youth having joined the company is taken: there is no other evidence as to this, and none as to the body of such a youth having been found among those killed. There is no evidence whatever as to who the other man or two men were; where they came from and when they joined; nor how the child aged 5 or 6 came to be there.

On most anxious consideration of the whole case it is impossible to avoid a strong suspicion that as regards the appellants Nos. 1 and 2 at all events their original and latest statements may be true; and that they may have been induced whether by fear or hope of pardon by implicating themselves and others to make the intermediate statements.

The Sessions Judge does not even notice the fact that all three appellants in December retracted the admissions, statements, or confessions made by them in May and June; nor that it would be by no means difficult for persons acquainted as these Mapillas may well have been with the general outlines of the outrage, and of the route taken by the gang afterwards, to give the details they did.

As regards the appellant No. 3 he did not in the first instance so distinctly deny willing participation in the affair, and his principal statement is made without the several variations appearing in those made by the others; but looking at the whole of the circumstances connected with the detention of these men in custody from May till December, and at the character of the evidence for the prosecution, I am not prepared to say that he could properly be convicted—as he must be, if convicted at all—entirely on the strength of the confession which he subsequently retracted, even if the making of that confession were proved.

I have written thus at considerable length to explain why, as it appears to me, we ought not to allow any further evidence to [244] be taken in this case. I have further to observe that there is nothing on the record to show that the appellants were questioned in the Sessions Court after the statements made by them before the committing Magistrate had been (as it is presumed) read out, with reference to their retractation of each and every statement incriminating themselves and one another and as to whether they had any evidence in support of their allegations that their confessions had been improperly obtained. They were no doubt defended by a pleader or vakil, but this is not enough to explain the absence of any record showing that the requirements of Sections 287 and 289 read in

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connection with Section 342, Criminal Procedure Code, were complied with : and in such cases the nature at least of the defence entered on behalf of the prisoners should also be indicated, and shown to have been duly considered.

The result is that, in my opinion, the appellants should be acquitted, and my learned colleague agreeing in the result, they hereby are acquitted, the convictions being set aside, and it is ordered that they be forthwith set at liberty.

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9 M. 244=10 Ind. Jur. 61.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

MADHAVA (*Plaintiff*), *Appellant v.* NARAYANA AND OTHERS (*Defendants*), *Respondents.** [5th & 23rd October, 1885.]

Limitation Act, Schedule II, Article 144—*Adverse possession of limited interest in land.*

The manager of a Nambudri family in Malabar having demised certain land on kanam in 1868, was removed from his position as manager in 1875.

In 1883 his successor sued to eject the kanam-holders.

Held, that the suit was barred by limitation.

[**F.**, 7 M.L.T. 184; **Appr.**, 20 A. 482 (487); 13 M. 467 (471); **R.**, 21 B. 509 (515); 27 B. 515 (537); 2 C.L.J. 125; 14 Ind. Cas. 168 (171)=11 M.L.T. 355 (359) =(1912) M.W.N. 445; **D.**, 13 M. 39 (40); 13 M. 402 (403); 15 M. 166 (168); 19 M. 243 (248).]

THIS was an appeal from the decree of C. Gopalan Nayar, Subordinate Judge of North Malabar, reversing the decree of A. C. Kannan Nambiar, District Munsif of Kavai, in suit No. 501 of 1882.

[245] The plaintiff, Parambathpalli Madhavan Nambudri, sued the defendants (1) Parambathpalli Madhavan Nambudri, (2) Maniyangatillath Appa, and (3) his brother, Narayanan Nambudri, to recover "with future rent and free of incumbrance," two parcels of land belonging to the illam (family) of the plaintiff and defendant No. 1 and held by defendants Nos. 2 and 3 under an alleged demise derived from defendant No. 1.

Defendant No. 1 was *ex parte.* Defendants Nos, 2 and 3 pleaded that the land was demised on a kanam of 850 rupees to their ancestor in 1868 and that the plaintiff could not recover without redemption and that the suit was barred by limitation.

The Munsif held that the suit was not barred by limitation and decreed the claim.

On appeal, this decree was reversed on the ground that, as the plaintiff treated the kanam as a nullity, the possession of the defendants Nos. 2 and 3 was adverse since 1868.

Plaintiff appealed on the ground, *inter alia*, that adverse possession began to run when defendant No. 1 was removed from his office of karnavan of the illam in 1875 and not before.

Anantan Nayar, for appellant.

Sankaran Nayar, for respondents.

The Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.) delivered the following:—

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* Second Appeal 403 of 1885.

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JUDGMENTS.

Muttusami Ayyar, J.—The appellant is the son of respondent No. 1, and they constitute together a Nambudri illam in North Malabar. In January 1868, the father demised to the ancestor of respondents Nos. 2 and 3 two items of family land on kanam for Rs. 850 and placed him in possession. Respondents Nos. 2 and 3 and their ancestor have since continued in possession; respondent No. 1 was lately (in 1875) removed from the management of his illam for misconduct, and the appellant instituted the present suit in September 1883 to recover the land free of all incumbrances, and alleged that the kanam was not granted under any family necessity, and that it was not binding upon his family. Respondents Nos. 2 and 3 contended that the appellant was entitled only to redeem the kanam, and pleaded limitation in bar of the right to eject them on the grouud that the kanam followed by possession extending now to more than twelve years was invalid. [246] The District Munsif held that the kanam was not granted under family necessity, and that possession under an invalid kanam could not support a plea of limitation though such possession extended to twelve years or more. On appeal, the Subordinate Judge considered that the right to eject without reference to the kanam was barred by limitation and that, as it was infringed at the date of the kanam, the statute began to run against such right from that date.

It is urged in second appeal that possession under an invalid kanam is not adverse possession and that the claim could not be barred. It is conceded that the appellant is entitled to redeem, and that the matter in contest is the validity of the kanam right created in 1868.

As regards an interest in immoveable property, I take adverse possession to mean possession by a person claiming that interest against the true owner who is entitled to repudiate it and to recover immediate possession. In the case before us, the appellant's father granted the kanam in 1868, and if, as is now alleged, it was granted for a purpose not binding on the family, it was an alienation to its prejudice, and the appellant's claim to recover that interest back would be barred on the expiration of twelve years under Art. 144, Sch. II of the Limitation Act. If the kanam was legally inoperative and could be treated on that ground as non-existent, the respondents would have then been in possession as trespassers, and such possession would be a sufficient answer to a claim to eject them when it has extended to more than twelve years.

It is no doubt true that a karnavan may not be able to obtain a decree declaring that a kanam granted by his predecessor is invalid, and that he may yet be able to recover the property to which it relates by showing that the kanam is not binding on his tarwad, when it is pleaded in answer to a claim to eject. But this he can only do when the kanamdar's possession does not extend to more than twelve years and his kanam right is not perfected by such possession whatever defect there was in its inception. Under the Act of Limitation, sixty years is the statutory period for enforcing a right to redeem, whilst twelve years is the ordinary period for ejecting a person from immoveable property or some interest in it when the right to redeem is admitted and the right to eject is denied. I consider that the latter right should be dealt with under the twelve years' rule. The cases of *Dinomoney Dabea* v. *Doorgapersad* [247] *Mozoomdar* (1) and *Maidin Saiba* v. *Nagappa* (2), show that a party, who cannot by his admission plead prescriptive title in regard to

(1) 12 B.L.R. 274. (2) 7 B. 96.

general ownership, may rely on it in regard to a subsidiary interest claimed by him. We dismiss this second appeal with costs.

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HUTCHINS, J.—I agree with my learned colleague that adverse possession for twelve years of a limited interest in immoveable property is a good plea to a suit for ejectment to the extent of that interest. In this case, the kanamdars have held the land under a kanam for more than twelve years, and it has not been alleged that the existence or terms of the kanam have been fraudulently concealed from the family. The transfer of possession put the family on enquiry as to the terms on which such possession was given; respondents Nos. 2 and 3 first came into possession under the demise on which they now rely. They are either trespassers or kanamdars, and their possession for the statutory period in either capacity, adversely to the family, is a bar to their ejectment.

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9 M. 247 = 10 Ind. Jur. 63.

APPELLATE CIVIL.

Before Mr. Justice Kernan (Offg. Chief Justice) and Mr. Justice Hutchins.

RAMAN AND ANOTHER (*Plaintiffs*), *Appellants v.* HASSAN (*Defendant No.* 2) AND OTHERS, *Respondents.** [4th and 10th November, 1885.]

Regulation IX of 1822, *Section* 5—*Sale of land to recover fine imposed by Collector—Title of purchaser.*

A sale of land, under the provisions of Section 5 of Regulation IX of 1822 does not convey to the purchaser a title free from prior incumbrances.

THIS was an appeal from the decree of F. H. Wilkinson, District Judge of South Malabar, modifying the decree of J. A. deRozario, Acting District Munsif of Vytheri, in suit 119 of 1883.

The plaintiffs, Raman Nayakan and his brother, sued (1) Govindan Nayar and (2) Hassan Sahib Ravuthan for a decree, declaring that plaintiffs had a lien for Rs. 1,000 over certain land **[248]** under a panayam or mortgage-deed executed by defendant No. 1 in 1881 in favour of plaintiffs and to recover Rs. 555, interest due on the bond for two years.

Defendant No. 1 having been found guilty of malversation as a public servant (*Menon*) and a judgment having been passed against him by the Collector for payment of a fine imposed under Section 5 of Regulation IX of 1822, the land was sold at auction and purchased by defendant No. 2 on the 11th of October 1882 and he was in possession.

Defendant No. 1 admitting the bond denied plaintiffs' right to recover the debt, except by sale of the land hypothecated.

Defendant No. 2 pleaded that he purchased at a Government sale without notice of plaintiffs' claim.

The Munsif decreed payment of Rs. 555 by defendant No. 1, and, in default of payment, that the land should be sold, and declared plaintiffs' right to a lien on the land for Rs. 1,000.

On appeal, the District Judge cancelled the decree so far as it directed the sale of the land and declared plaintiffs' lien.

Plaintiff appealed.

Sankaran Nayar, for plaintiffs.

Sadagopacharyar, for defendant No. 2.

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* Second Appeal 450 of 1885.

1885 Nov. 10.

Appellate Civil.

9 M. 247 = 10 Ind. Jur. 63.

The facts appear sufficiently from the judgment of the Court (Kernan, Offg. C.J., and Hutchins, J.).

JUDGMENT.

We overrule the preliminary objection that the appeal is barred by limitation. The application for a review of judgment seems to have been a *bona fide* one and not at all designed to gain an extension of the appeal time. It was made and prosecuted with reasonable diligence, and the appeal presented as soon as possible after its rejection. The appeal is within time if the days during which the review petition was pending are deducted.

The hypothecation of the property in dispute to the appellants was made in 1881, and it has been found to have been granted *bona fide* and for valuable consideration. The question is whether it is not binding on defendant No. 2, the contesting respondent who purchased in 1882 at a sale ordered by the Collector for recovery of a fine imposed under Regulation IX of 1822 on the appellant's mortgagor. The District Judge held that defendant No. 2 bought free of the incumbrance because the Collector's judgments, under the Regulation, are to be executed in the same **[249]** manner as decrees of Courts, because Section 287 of the Code expressly requires that every incumbrance shall be specified in the sale proclamation, and because the appellants' incumbrance was not so mentioned.

It is clear that this decision cannot be maintained. In the first place, all that the Regulation (Section 5, Clause 3) says is that the Collector's judgment shall be executed in the same *manner* as decrees : this merely settles the procedure to be followed. In the next place, although Section 287 requires every incumbrance to be stated as fully and accurately as possible, the non-mention of any incumbrance will not avoid it as against the auction-purchaser. The appellants had not the conduct of the sale and cannot be prejudiced by the Collector's omission or refusal to recognize and give notice of their hypothecation right.

It has been urged, on behalf of defendant No. 2, that the debt for which the Collector sold the property was due to the Crown and paramount to appellants' incumbrance. This matter was considered in the case of *Ramachandra* v. *Pitchaikanni* (1), but in this case as in that it is not necessary to decide the point. The Collector's judgment was one imposing a fine and not passed until the year after appellants obtained their hypothecation. It is not pretended that the Menon had executed any prior bond to Government, and, as observed in the case just quoted, "even in England the lien of the Crown attached only from the time when the owner of the land became a debtor to the Crown" and did not avoid prior incumbrances.

The only other point is with regard to interest, whether on the true construction of the deed of hypothecation the interest is charged upon the land pledged for the principal. The Judge held that the debtor was personally liable for the interest but not the property, and he was under the impression that the Munsif had taken the same view. But neither before the Munsif nor in his appeal did defendant No. 2 ever contend that the interest was not intended by the deed to be secured upon the property. The only contention on that point was one raised by the debtor who maintained that he was not personally liable.

(1) 7 M. 434.

The decree of the District Judge is reversed and that of the Munsif restored, except so far as it directs the sale of the property [250] for the payment of interest and costs. The principal was not due when the suit was brought, and if there is to be a sale under the mortgage, it should be for the entire debt. Defendant No. 2 must bear the costs of this appeal as well as of his own appeal to the District Court.

1885 Nov. 20. — Appellate Civil. — 9 M. 247 = 10 Ind. Jur. 63.

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9 M. 250.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

HARIHARA (*Defendant*), *Petitioner v.* SUBRAMANYA (*Plaintiff*), *Respondent.** [4th and 9th December, 1885.]

Small Cause Court - Act XI of 1865—*Jurisdiction—Civil Procedure Code, Section* 295 —*Suit for refund of assets paid in execution of decree.*

A suit under Section 295 of the Code of Civil Procedure to compel refund of assets paid in execution of a decree to a person not entitled thereto is cognizable by a Court of Small Causes constituted under Act XI of 1865.

Shahi Ram v. *Shib Lal* (I.L R., 7 All., 378) dissented from.

[R., 11 M. 269 (273).]

THIS was an application, under Section 622 of the Code of Civil Procedure, to set aside the decree of V. P. deRozario, Subordinate Judge at Palgat, in a Small Cause suit on the ground that the Court had no jurisdiction to entertain the suit.

The facts appear sufficiently, for the purpose of this report, from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.).

Srinivasa Rau, for petitioner.

Ramchandra Ayyar, for respondent.

JUDGMENT.

The question before us is whether a suit under the penultimate clause of Section 295 of the Code of Civil Procedure to compel the refund of assets paid to a person not entitled to receive the same is cognizable by a Court of Small Causes. It is pointed out to us that the Allahabad High Court has held that such a suit is not cognizable—*Shahi Ram* v. *Shib Lal* (1).

Section 295 of the Civil Procedure Code has been made applicable to Courts of Small Causes so far as it relates to the distribution of assets in the execution of decrees, but the question here is whether a suit for the refund of such assets paid to a wrong [251] person will fall under any of the classes of suits made cognizable by a Small Cause Court under Section 6, Act XI of 1865.

The obligation to repay such money is declared by Section 72 of the Indian Contract Act, and a suit to enforce such obligation will be one of those which the law regards as *quasi ex contractu.*

It has already been held by a Full Bench of this Court that the words "claim for money due on contract" in Section 6, Act XI of 1865, were intended by the Legislature to include claims to enforce obligations *quasi ex contractu—Govinda Muneya Tiruyan* v. *Bapu* (2).

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* Civil Revision Petition 290 of 1885.

(1) 7 A. 378.

(2) 5 M.H.C.R. 200.

1885 DEC. 9. — APPELLATE CIVIL. — 9 M. 250.

That suit was a suit for contribution by a debtor against his co-debtors and was held cognizable by a Court of Small Causes. The present suit is one of a very similar character.

That the word "contract" in Section 6 also includes an implied contract to discharge an obligation was held by this Court in *Gopal Kistna Sastri* v. *Ramayyangar* (1).

Notwithstanding the authority of the Allahabad case, we are concluded by the previous rulings of this Court upon the same point of law, and from these we do not differ.

The petition must be dismissed with costs.

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9 M. 251.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

KANDUNNI (*Plaintiff*), *Appellant v.* KATIAMMA (*Defendant*), *Respondent.** [10th December, 1885].

Res judicata.

In 1883, plaintiff sued to recover certain land from the defendant on a demise of 1856, which he alleged was a renewal of a prior demise of 1835. The suit was dismissed on the ground that the demise of 1856 was not proved. Plaintiff then sued to recover the same land on the demise of 1835 and on title:

Held, that the decree in the former suit was no bar to this suit.

[Appr., 22 M. 323 (326); R., 26 M. 760=13 M.L.J. 448 (458).]

[252] THIS was an appeal from the decree of V. P. deRozario, Subordinate Judge of South Malabar at Palgat, reversing the decree of S. Subramanya Ayyar, District Munsif of Chowgat.

The plaintiff, Padipurakel Kandunni Taragan sued the defendant, Rayamarakkar Vittil Katiamma, to recover certain land, portion of which he claimed as his jenm, and the rest as kanamdar (mortgagee) from a devasam. He alleged that in 1835 the land was demised to the defendant's ancestor on kanam, and that this demise was renewed in 1856. In suit 215 of 1883, he sued defendant to recover the land under the demise of 1856. The defendant then denied its genuineness and the plaintiff's title and claimed to be owner. In that suit plaintiff obtained a decree, but on appeal, the decree was reversed on the ground that the demise of 1856 was not proved. The defendant pleaded that this suit was barred as being *res judicata*. The Munsif held that as the present suit was based on title and not on contract, the plea was bad.

On appeal, the Subordinate Judge held that the claim to recover on the demise of 1835 alleged to have been renewed in 1856 was *res judicata*, and that plaintiff could not recover on title as defendant had been in possession for 50 years apparently without title.

Plaintiff appealed on the ground that his claim to recover on the demise of 1835 was not *res judicata*.

Sankaran Nayar, for appellant.

Atkinson, for respondent.

The Court (COLLINS, C.J., and BRANDT, J.) delivered the following

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* Second Appeal 579 of 1885.

(1) 4 M. 236.

1885 DEC. 10.

APPELLATE CIVIL.

9 M. 251.

JUDGMENT.

It is contended in appeal that all that was decided in the suit of 1883 was that the respondent at that date did not hold under the demise of 1856 then set up.

The appellant now sues on a demise of 1835, and we must hold that the question whether the defendant holds under that demise or in some other right has not been decided in the suit of 1883.

The second appeal 426 of 1881, to which we have been referred by Mr. Sankaran Nayar, appears to have been decided on the same principle.

We must set aside the decree of the Subordinate Judge and restore the decree of the Court of First Instance and desire the Subordinate Judge to pass a fresh decree. Costs to abide the result.

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9 M. 253=10 Ind. Jur. 59.

[253] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

ACHAYA (*Plaintiff*), *Appellant v.* RATNAVELU (*Defendant No. 2*), *Respondent.** [27th October, 1885.]

Letters Patent, Section 15—*Civil Procedure Code, Sections* 639, 622—*Indian Council's Act*, 1861, *Section* 22—*High Court's Act, Section* 9.

Section 15 of the Letters Patent for the High Court of Judicature as Madras, which allows an appeal to the High Court from the judgment of one Judge of that Court, is controlled by Section 629 of the Code of Civil Procedure, which provides that an order of a Civil Court rejecting an application for review of judgment shall be final.

[**F.**, 11 A. 375=9 A.W.N. 1889 (70); **Appr.**, 16 C. 788 (794); 9 M. 447; 20 M. 407 (408); **R.**, 20 M. 152 (154); 5 Ind. Cas. 729=20 M.L.J. 387 (390)=7 M.L.T. 292=(1910) M.W.N. 14; **D.**, 26 C. 361 (367).]

APPEAL from an order, dated 10th March 1885, made by HUTCHINS, J., in Civil Suit No. 139 of 1884, dismissing an application for review of judgment.

The facts necessary for the purpose of this report appear from the judgment.

Mr. *Norton*, for appellant.

Anandacharlu, for respondent.

JUDGMENT.

The appellant instituted a suit on the Original Side of this Court upon a promissory note C, which purported to be executed by the respondent's father and another. Mr. Justice Hutchins, who tried that suit, found that the respondent's father did not execute the document and disallowed the claim against the respondent. The appellant then applied for review of judgment on the ground that, subsequently to the decree, he became aware of the existence of a ledger and an index kept by the respondent under the direction of his father, and that those accounts contained entries which afforded strong corroborative proof of his averment that the latter was indebted to him. This application was, however, rejected, and from the order of rejection this appeal is preferred. At the conclusion of the argument, we intimated to the learned Counsel for the appellant

* Appeal 7 of 1885.

1885 OCT. 27. — APPELLATE CIVIL. — 9 M. 253 = 10 Ind. Jur. 59.

that, by the exercise of due diligence, the appellant might have acquired a [254] knowledge of the existence of the ledger and the index and produced them at the original trial and that on that ground, at all events, the appeal must fail. We reserved judgment, however, to consider the question whether an appeal lies, and we are now satisfied that it does not. It is provided by Section 629 of Act XIV of 1882 that the order of a Civil Court rejecting an application for review of judgment shall be final, and this section is declared to be applicable to the High Court by Section 632 of the Code of Civil Procedure. It is then argued for the appellant that an appeal is allowed from the order of a single Judge of this Court by Section 15 of the Letters Patent of 1865 issued by Her Majesty pursuant to Section 9 of the High Court's Act, 24 and 25 Vict., c. 104, and that the right is saved by Section 22 of the Indian Council's Act of 1861, 24 and 25 Vict., c. 67. It is true that by Section 15 of the Letters Patent, Her Majesty directs that an appeal shall lie to the High Court from the judgment [not being the sentence or order passed or made in any Criminal trial] of one Judge of that Court. It is also true that, by Section 9 of the High Court's Act, the High Court has all such Civil Jurisdiction, Original and Appellate, and all such powers and authority for, and in relation to, the administration of justice as Her Majesty by Letters Patent may direct and grant, and that, save as by such Letters Patent is otherwise directed, the High Court has all the jurisdiction and every power and authority whatsoever in any manner vested in the late Supreme Court (which was abolished by that Act), at the time of the abolition. But it must be observed that in both Section 9 of the High Court's Act and Section 44 of the Letters Patent it is distinctly stated that the provisions of the Letters Patent and that the jurisdiction and authority of the late Supreme Court vesting in the High Court under Section 9 are subject to the legislative powers of the Governor-General in Council exercised at meetings for the purpose of making laws and regulations. The question, therefore, is whether Section 629 and Section 632 were enacted in the due exercise of the legislative powers vesting in the Governor-General in Council. By Section 22 of the Indian Council's Act power is conferred upon the Governor-General, subject to the provisions therein contained to repeal, amend, or alter any law or regulation in force in Her Majesty's Indian territories and to make laws and regulations for all persons, whether British or Native, foreigners or others, and for *all* Courts of Justice whatever, &c. One of the provisions [255] contained in that statute is that the Governor-General in Council shall *not* have the power of making any laws or regulations, which shall repeal or in any way affect "any provisions of any Act passed in the then Session of Parliament or thereafter to be passed in any wise affecting Her Majesty's Indian territories or the inhabitants thereof."

As the High Court's Act was passed in the same Session of Parliament it was certainly not open to the Governor-General in Council to legislate so as to modify its provisions. But it should be remembered that it is open to the Imperial Legislature to subject any of its enactments in whole or in part specially to the legislative power of the Governor-General in Council. The general rule prescribed by Section 22 of the Indian Council's Act is that the Governor-General in Council shall have power to repeal or alter any law in force in regard to any Court of Justice in Her Majesty's Indian territories, and the section then goes on to specify certain exceptions to that rule. The effect of the words in Section 9 of the High Court's Act "subject and without prejudice to the legislative powers of the Governor-General in Council" is to take the High Court's

Act, so far as it relates to matters dealt with by that section, from the group of exceptions and to place it under the general rule contained in Section 22 of the Indian Council's Act. Unless those words are referred to the general rule they would be without meaning, for the combined effect of the general rule and the exception would be that the Governor-General in Council had no legislative power to effect the provisions of Acts passed in the same Session of Parliament or thereafter, and therefore there was no necessity for introducing a clause to save a power which did not exist. It will be noted that those words occur only in Section 9, and it follows that the other sections of the Act, which deal with several other matters relating to the High Court, are not subjected to the legislative power of the Governor-General in Council. Again the words used are "subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council." These words disclose an intention on the part of the Imperial Legislature to consider the general rule contained in Section 22 of the Indian Council's Act apart from its exceptions and to treat it as unrestricted in regard to matters specified in Section 9. The true construction then is that those words amount to a special [256] direction by the Imperial Legislature that the provisions of the High Court's Act in so far as they relate to matters dealt with by Section 9 shall be subject to the general rule regarding the legislative power of the Governor-General in Council. This view is confirmed by the subsequent course of legislation in regard to the criminal jurisdiction of Magistrates in the mufassal over European Birtish subjects, which is fully explained in *Queen* v. *Meares* (1). Here we may refer to 34 and 35 Vict., c. 62, Section 3, which adverting to certain Acts passed by the Governors of Madras and Bombay in Council in regard to criminal jurisdiction over European British subjects, enacts that the said Acts shall be deemed to be as valid *as if they had been passed by* the Governor-General of India in Council at a meeting for the purpose of making laws and regulations. Even assuming that the words in Section 9 mentioned above cannot be so construed as to give a special power to the Governor-General in Council, then Section 15 of the Letters Patent cannot be treated, as observed in that case by Couch, C.J., as part of the High Court's Act within the meaning of Section 22 of the Indian Council's Act. We are, therefore, of opinion that Section 15 of the Letters Patent does not apply to the case provided for by Section 629 of Act XII of 1882, and that this appeal must be dismissed with costs.

Solicitor for appellant: *Alasingacharyar.*

1885 OCT. 27.

APPELLATE CIVIL.

9 M. 253 = 10 Ind. Jur. 59.

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9 M. 256.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

H. H. THE NIZAM OF HYDERABAD, *In re.** [22nd February, 1886.]

Civil Procedure Code, Sections 130, 387, 591, 622—*Interlocutory orders not subject to revision.*

Under Section 622 of the Code of Civil Procedure, interlocutory orders passed under Section 387 refusing applications for the issue of a commission to examine

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* Civil Revision Petition 24 of 1886.

(1) 14 B.L.R. 110.

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witnesses, or, under Section 130, directing the production of documents, cannot be revised.

[F., 30 M. 230=17 M.L.J. 79=2 M.L.T. 88; 12 Ind. Cas. 506 (507)=256 P.L.R. 1911 =185 P.W.R 1911; Appr., 18 B. 35 (37); R., 4 Ind. Cas. 878 (881)=12 O.C. 405; 22 P.L.R (1900) 89.]

THIS was a petition, under Section 622 of the Code of Civil Procedure, [257] to set aside two interlocutory orders made by W. E. Clarke, Subordinate Judge, Nilgiris, in suit No. 57 of 1885.

The facts necessary, for the purpose of this report, appear from the judgment of the Court (MUTTUSAMI AYYAR, J.).

Morgan, for petitioner.

JUDGMENT.

MUTTUSAMI AYYAR, J.—It is stated in this petition that this Court should interfere under Section 622 to cancel two interlocutory orders made by the Subordinate Judge at Ootacamund. These orders were made in O.S. 57 of 1885 on the file of that Court. In one of them the Subordinate Judge declined to issue a commission for the examination of certain witnesses, and in the other he directed that certain documents, which were delivered to the plaintiff's solicitor for production in Court by certain persons cited as witnesses, and which still remained in the possession or power of the plaintiff, be produced. It is urged that these orders should be set aside by this Court as a Court of Revision on the ground that they were illegal, and made without jurisdiction. The order refusing the application for the issue of a commission purports to have been made under Section 387 of the Code of Civil Procedure which it is considered by the Subordinate Judge vested in him a discretion even when he was of opinion that the evidence desired to be taken was necessary. The order for the production of documents was made under Section 130 of the Code of Civil Procedure. No appeal is allowed by Section 588 from either of these orders, whilst Section 591 prescribes the course to be followed in regard to defective interlocutory orders. I do not consider that Section 622 is applicable to them and it pre-supposes a decision or an order in the nature of a decree and that no other remedy is provided for specially by the Code.

I must, therefore, decline to interfere, and I reject this application.

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9 M. 258=1 Weir 789.

[258] APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

QUEEN-EMPRESS *v.* LINGAYA.* [19th and 20th February, 1886.]

Limitation Act, Section 12, *Schedule II, Article* 154—*Criminal Procedure Code, Sections* 419, 420—*Appeal by prisoner—Limitation—Time necessary to obtain copy of judgment—Presentation of petition to officer in charge of jail.*

In computing the period of limitation prescribed for an appeal from a sentence of a Criminal Court by Article 154 of Schedule II of the Indian Limitation Act, 1877, the time taken in forwarding an application by a prisoner for a copy of the judgment and in transmitting the same from the Court to the jail must be excluded.

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* Criminal Revision Case 681 of 1885.

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9 M. 258 =
1 Weir 789

In the case of such appeals, presentation of the petition of appeal to the officer in charge of the jail is, for the purpose of the Limitation Act, equivalent to presentation to the Court.

THIS was a case referred to the High Court, under Section 438 of the Code of Criminal Procedure, by J. Grose, District Magistrate of Nellore.

The facts necessary, for the purpose of this report, appear from the judgment of the Court.

Counsel were not instructed.

JUDGMENT.

The judgment of the Court (MUTTUSAMI AYYAR and BRANDT, JJ.) was delivered by

BRANDT, J.—Two questions present themselves for determination—

(1) Whether the time taken in forwarding applications for copies on behalf of intending appellants in jail and in transmission of such copies to the jail, as well as the time occupied in actual preparation of copies in the office of the Court by which the judgment or order was passed, is to be included in "the time requisite for obtaining a copy" within the meaning of Section 12 of the Limitation Act.

(2) Whether, for the purpose of computing the period of limitation for appeals under the Code of Criminal Procedure to any Court othe than a High Court (Limitation Act, Schedule II, Article 154), time is to be calculated, in the case of appeals preferred by appellants in [259] jail, to date of presentation of the appeal to the officer in charge of the jail, or to date of presentation to the Court to which the appeal lies.

As to the first question, the answer must be in the affirmative: the intention is to exclude the time taken up in obtaining the copy otherwise than through the appellant's *laches*; and in the case of persons in jail, the officer in charge of the jail must be regarded as representing, for the purpose in hand, the Court establishment, which, in the case of appellants not in jail, is responsible for preparation and delivery of copies. Under the Jail Code convicts can obtain through the officer in charge of the jail copies of judgments and orders required by them with a view to presentation of their appeals, free of charge, and the said officer is responsible for forwarding such applications and for receiving and delivering to the applicants the copies when received.

But from the time when the copy is delivered to the applicant, the latter is responsible for representation of his appeal, with the copy of the sentence or order appealed against, either to the Superintendent of the Jail, or to the Court, at his option.

And we are of opinion that, under the provisions of Section 420, Criminal Procedure Code, presentation of the petition of appeal by an appellant in jail to the officer in charge of the jail is equivalent to presentation to the Court so far as the requirements of the Limitation Act are concerned.

Section 419 provides that "every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader;" Section 420, that in the case of an appellant in jail "he may present his petition of appeal to the officer in charge of the jail, who shall thereupon forward it to the proper Appellate Court;" and Section 421 that "on receiving the petition and copy under Section 419 or Section 420 the Appellate Court shall peruse the same" and proceed as thereinafter prescribed.

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1 Weir 789.

In the case in which this reference is made, the appeal would then appear to have been presented in time, and should therefore have been received and disposed of. The sentence has, it appears, expired, but if the appellant desires it, the appeal should now be admitted and disposed of in due course.

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9 M. 260.

[260] APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

KUMARAN (*Plaintiff*), *Appellant v.* NARAYANAN AND OTHERS (*Defendants*), *Respondents*.* [4th January and 26th February, 1886.]

Malabar Law—Nambudris—Inheritance—Sarvasvadhanam marriage—Rights of son.

Among Nambudris in Malabar the son of a daughter given in the Sarvasvadhanam form of marriage does not inherit in the family of his father so long as other heirs exist.

[R., 11 M. 157 (163); 25 M. 662 (664).]

THIS was an appeal from the decree of H. J. Stokes, Acting District Judge of South Malabar, rejecting an appeal from the decree of E. K. Krishnan, Subordinate Judge at Calicut, in suit 14 of 1883.

The plaintiff, Sri Kumaran Mussad, sued for a declaration that he was a member of the Theyancheri illam (family), and as such equally entitled with the defendants—his paternal uncle (Cheria Narayanan) and two cousins (Parameswaran and Narayanan Mussad)—to participate in the enjoyment of the property of that illam.

The defendants contended that plaintiff, who was the son of Valia Narayanan Mussad, elder brother of defendant No. 1, by his third wife, Savithri, was the issue of a Sarvasvadhanam marriage and consequently had no right of inheritance in the illam to which his father belonged, but only in the illam of his mother.

The plaintiff denied this, alleging that his mother was married in the ordinary form and that the properties of her illam of Kalliapurath and its appendage Annari were given to his father as stridhanam.

The Subordinate Judge dismissed the suit, finding that the marriage was in the Sarvasvadhanam form.

On appeal the District Judge, agreeing with the Subordinate [261] Judge on the facts, referred the following issue to the Subordinate Judge for trial:—

"Whether if plaintiff's father and mother were married in Sarvasvadhanam form, the incidents of such a marriage exclude plaintiff from inheritance in his father's illam."

This issue was found against the plaintiff.

The Acting District Judge, accepting this finding, rejected the appeal.

The plaintiff appealed, *inter alia*, on the ground that the custom was not legally established, and that under the ordinary Hindu law, he was entitled to inherit in his father's illam.

Gopalan Nayar, for appellant.

Sadagopacharyar, for respondents.

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* Second Appeal 615 of 1885.

The facts necessary for the purpose of this report are set out in the judgments of the Court (BRANDT and PARKER, JJ.).

1886 FEB. 26.

APPELLATE CIVIL.

9 M. 260.

JUDGMENTS.

BRANDT, J.—There is evidence that the marriage was in the form known in Malabar as Sarvasvadhanam, the formula used being "I give unto thee this virgin who has no brother, decked with ornaments; the son who may be born of her shall be my son," and we must accept the concurrent findings of the Courts below on this point. Nor can it be said that there is no evidence that the transfer by Kalliapurath Sri Kumaran Mussad of his jenm right in the Annari and Kalliapurath illam properties was made in connection with and in consideration for the marriage, in the special form, of Valia Narayanan Mussad, the father of the appellant, and Sri Kumaran's daughter Savithri: whether the transfer of the property was effected shortly before or after the marriage, the Courts below were at liberty to find on the evidence that it was made in consideration of the marriage, and the argument that, by reason of there being no property to transfer, there could not have been a Sarvasvadhanam marriage falls to the ground.

The question then which we have to determine is whether the conclusion arrived at, that the son of such a marriage does not inherit in the family of the natural father, is incorrect.

There was evidence as to practice, custom and general understanding on the subject, which the Subordinate Judge considered "overwhelmingly" in favour of the respondents' contention which the appellant here again assails, while the District Judge thought that of direct evidence as to the rights of such issue there was [262] little or none as distinguished from opinion, but that "the probabilities of the case and the best of what evidence there is are against the plaintiff."

On the question of law the Subordinate Judge held marriage in this peculiar form to be the same as marriage of an appointed daughter, and that the son of a daughter so appointed, inheriting the property of the sonless father of such daughter and offering the funeral cake to his mother, the second to her father, and the third to her paternal grandfather—(Manu, IX, 140)—"the issue of the appointed daughter is in fact consecrated to the use, spiritual and temporal, of the maternal grandfather," and that this being so "it is but logical to hold that he ceases to fill the same position to his natural father;" and reference is made to the work of a local authority cited in support of the respondents' contention that the son of such a marriage inherits property in the family of the natural father only in case of extinction of heirs, and then only as an Attaladakam heir.

The District Judge, on consideration of the authorities which appeared to bear on the subject, held that "there was no reason to suppose that the son of an appointed daughter inherited his father's property.

It is admitted that there is no decided case which can be cited as authority upon the particular question now before us; there have been incidental expressions of opinion in some of the cases which have been brought together in Mr. Ramachandrayyar's "Manual of Malabar Law," but the right now asserted has for the first time called for direct decision.

I am of opinion that the case of the son of an appointed daughter is closely analogous to that of an adopted son, and having regard to this principle, and to the form shown to have been used in this case "the son

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who may be born of thee shall be my son," I am not prepared to say that the decision arrived at by the Courts below is incorrect.

The weight of authority would appear to be in favour of the proposition that any brotherless daughter might become a "putrika" and her son a "putrika-putra" if "selected in thought," by the father, without any agreement or understanding at the time of marriage, "without compact, and merely by an act of the mind." (Hemadri).

But in the formula found to be recited at marriage in Sarva- [263] svadhanam form in Malabar there is the express provision contained in the formula attributed in the Mitakshara to Vasishta: "the sonof her who may be born of her shall be my son;" in Hemadri's Commentary we find the formula given in Manu (IX, 127) "the male child who shall be born from her in wedlock shall be mine for the purpose of performing my obsequies," and then a distinction is drawn between the son of an appointed daughter given in marriage in such form, and a child of a daughter given in marriage with a stipulation in the form, "the child who shall be born of her shall perform the obsequies of both."

And Balambhatta is authority for the son of the appointed daughter belonging in general only to the maternal grandfather and only by special compact to the natural father also. (Mitakshara, XI, and notes thereon, Stokes' Hindu Law Books).

The term Sarvasvadhanam and the manner in which this case was argued and conducted would appear to imply that a provision is made for the issue of a marriage in this form; and the authority of the natural father to enter into an agreement of this sort whereby the first-born son shall be the son of the bride's father would appear to be as unquestionable on the authorities as the right to give in adoption, nor would the son so begotten appear to have any better right to inherit in the family of his natural father than an adopted son would have. The fact that it is the first-born son who is to be the son of the wife's father does not escape my notice, but however this may be, the position of such son would appear to me to be settled by authority: certainly no authority has been adduced to show that the conclusion come to by the local Courts is wrong.

I would then disallow the appeal and dismiss it with costs.

PARKER, J.—It was hardly disputed in the lower appellate Court that plaintiff was the issue of a Sarvasvadhanam marriage, and we are agreed that the District Judge has not overlooked any evidence which would lead to a contrary conclusion. The sole question, therefore, is whether the legal incidents of such a marriage exclude plaintiff from inheritance in his father's illam.

The matter is one of customary law, and there is no legal impediment to a person inheriting property under two different systems of succession (*vide* I.L.R., 8 Mad., 238), though such cases are naturally rare.

The marriage called Sarvasvadhanam is admittedly peculiar [264] to Nambudris in Malabar, but it closely resembles, if it is not identical under another local name, with that called Putrikakaranam among other classes of Hindus. The object of both forms of marriage is to raise up issue to a father whose line is about to become extinct and to place the son to be begotten from a daughter in the place of a real son. The Subordinate Judge has found on the strength of a text book (exhibit VII) of a writer well versed in the customary laws of Malabar, and also on the evidence of the learned Fourth Raja of the Zamorin's family, that Sarvasvadhanam or marriage with an appointed daughter is but another

name for a Putrikakaranam marriage. It may be noted that the sloka recited at the Sarvasvadhanam marriage is identical with the text of Vasishta (XVI, 12) which declares an appointed daughter to come back as a son, and closely corresponds to the appointment of a daughter to raise up a son who shall perform obsequies—Manu IX, 127.

It is admitted that, in a Sarvasvadhanam marriage, the property of the bride does not pass to her husband, nor does he enter his wife's illam though their children do. He may hold his wife's or his wife's father's property in trust for the children to be born of the marriage, but in the event of his wife's death without issue, or by the failure of issue, such property would revert to the illam of his father-in-law.

In this respect Sarvasvadhanam is identical with Putrikakaranam marriage. The inheritance follows in the line of the funeral oblations. As pointed out by Mr. Mayne, the son of an appointed daughter offers the first funeral cake to his mother who is regarded as a son ; the second to her father, and the third to her paternal grandfather.

In both cases then the father remains a member of his natural family, though he may be taken to live in the family of his wife. Among Nambudris in Malabar where partition is not allowed, such a separation would be almost complete, and whether or no the father continued entitled himself to share in the revenue of the illam which he left, it is clear that his son, who was born into and was the son of another illam, could never have a chance of succession in his father's illam unless the line of that illam became extinct—in which case he might come in as Attaladakam heir and would then perform the funeral ceremonies of his father's ancestors. As long as members of his father's illam lived, there **[265]** could be no question of inheritance for him, being a member of another illam

The case of the plaintiff's ninth witness, Ramangiri Itteri Mussad, seems to bear out this view He contracted a Sarvasvadhanam marriage with a girl of the Panikoti illam and had four sons by her. On the death of his younger brother without issue he established his eldest son as grihasta in his own illam, but leaves his second son established as grihasta in the family of his wife. This is also in accordance with text book (VII), though it is a deviation from the ordinary practice that the eldest son of such a marriage should remain in his mother's illam.

The father, though he may for most intents and purposes merge himself into his wife's illam, does not necessarily lose either his rights in his own family, or his parental rights. There seems nothing inconsistent in the son of such a father offering funeral oblations to him as well as to his maternal grandfather if his father's illam became extinct and he thus succeeded to the property belonging to the illam of his paternal uncles and cousins.

Applying these principles to the present case the plaintiff's suit must fail, for there are still several members of his father's illam which is by no means extinct. The circumstances of the present case would go far to show that Valia Narayanan Mussad when he married plaintiff's mother in the Sarvasvadhanam form by no means intended to leave or did leave his own illam. He had two wives already in his illam married in the ordinary form, and exhibit I shows that he still remained heir to the office of adighari which was hereditary in his illam. Having begotten plaintiff, he would therefore be *functus officio* as far as the Kaliapuram illam was concerned.

The decision of the Courts below appears to me to be correct, and I would dismiss this second appeal with costs.

1885
Nov. 10.

APPELLATE CIVIL.

9 M. 266.

9 M. 266.

[266] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Hutchins.

KALLIYANI (*Defendant No.* 5), *Appellant* v. NARAYANA (*Plaintiff*), *Respondent.** [23rd October and 10th November, 1885.]

Malabar law—Sale of tarwad property—Powers of karnavan—Assent of members of tarwad, how far necessary.

There is no rule of Malabar law that the assent of every member of a tarwad is necessary to render valid the alienation of tarwad property.

[Rel., 14 Ind. Cas. 383 (385) = 22 M.L.J. 309 (313) = 11 M.L.T. 112 = (1912) M.W.N. 109; R., 20 M. 51 (56) = 6 M.L.J. 241.]

THIS was an appeal from the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, modifying the decree of the District Munsif of Kavai in suit 378 of 1882.

The facts necessary for the purpose of this report appear from the judgment of the Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.).

The Acting Advocate-General (Hon. Mr. *Shephard*) and *Anantan Nayar*, for appellant.

Sankaran Nayar, for respondent.

JUDGMENT.

This appeal relates to that part of the Subordinate Judge's decree which adjudges the sale evidenced by Exhibit VII to be invalid. The doctrine on which the Subordinate Judge proceeded is that no karnavan or any number of anandravans "can permanently alienate tarwad property against the will of any single number of the family." If that rule holds good, a single factious anandravan may bring about the ruin of the whole family, for cases may occur in which an outright sale of part of the property may be by far the most prudent course, and indeed absolutely essential for the preservation of the remainder. It appears to us that the rule that every member of the family must assent is by no means an unqualified one. Section 379 of Strange's Manual has been referred to: after quoting an authority to the effect that the written assent of the chief anandravans is necessary, the learned author mentions a judgment of the Zila Court in which it was held that the absence of concurrence of one [267] living in discord with the karnavan would not vitiate the alienation. In the two cases *Kondi Menon* v. *Sranginreagatta Ahammada* (1), *Kaipreta Ramen* v. *Makkaiyil Mutoren* (2), Mr. Justice Holloway referred, in general terms, to the rule of law as one requiring the assent of all members of the tarwad, but in both the appeal of an alleged dissentient was dismissed, and we do not find that it has ever been determined that the rule is invariable. In our opinion the factious or capricious dissent of a single anandravan ought not to be allowed to invalidate a sale made in pursuance of the decision of a family conclave, and which was either absolutely necessary, or the most reasonable and prudent arrangement for the protection of the other family property. We will, therefore, ask the Subordinate Judge to find on the evidence already recorded—

(i) whether the sale to defendant No. 5 was necessary;
(ii) whether the plaintiff openly opposed it;
(iii) whether the plaintiff's opposition was reasonable or merely frivolous and factious.

* Second Appeal 512 of 1885.

(1) 1 M.H.C.R. 248. (2) 1 M.H.C.R. 359.

9 M. 267.

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APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

PALANI (*Plaintiff*), *Appellant v.* SELAMBARA AND ANOTHER (*Defendants*), *Respondents.** [21st July, 1885, and 22nd January, 1886.]

Registration Act, Section 48—Constructive possession in pursuance of oral agreement to sell land.

Where a vendor in pursuance of an oral agreement to sell certain land directed the tenants of the land to pay, and the tenants agreed to pay, rent to the purchaser:

Held, that such possession was given to the purchaser as would satisfy the conditions of Section 48 of the Indian Registration Act and enable him to resist the claim of subsequent registered purchaser.

[Appr., 13 M. 324 (334).]

APPEAL from the decree of H. Wigram, District Judge of Coimbatore, modifying the decree of P. Narayanasami Ayyar, District Munsif of Erode, in suit 100 of 1883.

The Acting Advocate-General (Hon. Mr. *Shephard*) and *Narayana Rau*, for appellant.

[268] *Bhashyam Ayyangar*, for respondents.

The facts necessary for the purpose of this report appear from the judgments of the Court (KERNAN and BRANDT, JJ.)

JUDGMENTS.

KERNAN, J.—The appellant (plaintiff) filed suit No. 100 of 1883 against the two defendants and prayed that the defendant No. 1 should recover from plaintiff Rs. 1,400 and execute a deed of sale to him of certain lands, and that defendant No. 2 should surrender the lands to the plaintiff. The plaintiff relied on and proved exhibit A (1st March 1882), which was an agreement by defendant No. 1 to sell the land to him and execute a conveyance within the 30th April 1882. It was proved that plaintiff paid to defendant No. 1 on the 1st of March 1882 Rs. 500, and Rs. 100 on the 10th of March. The stamped agreement A was registered in August 1882. Defendant No. 2 proved that defendant No. 1, on the 27th of February 1882, agreed orally to sell the same land to him, and got a decree against defendant No. 1 in suit 228 of 1882 for performance of the agreement and got a deed of sale, 12th December 1883, executed in that cause, in default of execution of conveyance by defendant No. 1.

Defendant No. 2 alleged that the agreement sued on by plaintiff was fraudulent and was subsequent to the sale to him and to the possession obtained by him.

The Munsif dismissed the suit on the ground of misjoinder.

The plaintiff appealed, and the Judge relying partly on Exhibits II and III (unregistered documents) found that so far as possession could be given by defendant No. 1 to the defendant No. 2, it was given on the 27th of February 1882, just three days before the agreement made with the plaintiff, and dismissed the suit as against defendant No. 2, but directed the defendant No. 1 to pay the plaintiff Rs. 600 and interest.

In this second appeal the plaintiff objected that Exhibits II and III were inadmissible as not being registered, and therefore the Judge acted

* Second Appeal 356 of 1884.

1886 JAN. 22. — APPELLATE CIVIL. — 9 M. 267.

on inadmissible evidence as to the question of possession being given to defendant No. 2.

On hearing the second appeal, it appeared that the question of admissibility of Exhibits II and III depended on the value or amount of the property to which they related, and that the question of when and how the defendant No. 2 obtained possession should be further inquired into.

[269] By order, dated the 21st July 1885, we directed the following issues to be tried :—

(1) Are Exhibits II and III admissible in evidence?

(2) If not, upon the other evidence already on record, did defendant No. 2 obtain possession before plaintiff's registered agreement?

The Judge has returned a finding that Exhibits II and III were inadmissible, and no question is now made on this point.

He also finds that defendant No. 1 made over possession on the 17th of Masi, corresponding to 27th February 1882, and that he did so by asking the tenants of the lands in occupation thereof to pay their rents to the defendant No. 2, and he finds that defendant No. 2 obtained possession before the date of A, and long before the registration of it in August 1882.

In his return on the issue, the Judge referred to the evidence given by one of the witnesses for defendant No. 2, in which he says that before the day on which he signed Exhibit III he agreed to pay rent to the plaintiff. It was contended that the reference to the inadmissible Exhibit III rendered the evidence illegal. But we do not think so, as the exhibit was not thereby used in respect of any transaction therein referred to concerning the property in it. It was referred to merely to fix a date for another fact.

It was objected that on the evidence the Judge should have found that no possession either actual or constructive was given by defendant No. 1 to defendant No. 2 either accompanying or following the oral agreement with defendant No. 2. There was no evidence that actual possession of the lands was given to defendant No. 2 by delivery of the lands into his possession. The only possession alleged was constructive possession, that is, by defendant No. 1 directing the tenants is actual occupation to pay their rents in future to defendant No. 2 and by the tenants agreeing to do so.

The Judge believed that such constructive possession was so given on the 27th of February 1882, and that defendant No. 2 has since been in receipt of his share of the crop. No doubt defendant No. 1 denied that such constructive possession was given, and alleged that defendant No. 2 took possession forcibly, but the Judge disbelieved defendant No. 1. We accept the **[270]** finding of the Judge that defendant No. 2 did receive such constructive possession.

The Registration Act in Section 48 refers to possession accompanying or following the oral agreement, but does not confine such possession to "actual possession" by delivery of possession of the land. The section would receive its full meaning if the possession intended thereby was possession, according to the circumstances of the interest in the property sold and the agreement of the parties. If the vendor was at the time of sale in actual possession and sold the property with actual possession, such possession would accompany or follow the sale. If, however, the property was in actual possession of tenants, then as the tenants could not be put out so as to give the

1886 JAN. 22. — APPELLATE CIVIL. — 9 M. 267.

purchaser actual possession, the possession to be given should be constructive possession, by the vendor procuring the tenants to attorn to or accept new leases or agreements from the purchaser.

I would dismiss this second appeal with costs.

BRANDT, J.—There is evidence of attornment of the tenants under the defendant No. 1 to the defendant No. 2 at the request of the former, which evidence it was open to the Judge to accept as proving such attornment, irrespective of exhibits ii and iii, or at least having reference to those documents for purposes not directly affecting the right to the property in suit, and we must, I think, accept the finding of the Judge on this point.

Was there then such delivery of possession as is required by the Registration Act? That is to say, is such constructive possession as is held proved in this case insufficient for the purposes of that Act? Is physical delivery of possession alone sufficient?

I am of opinion that the words used in Section 48 of the Act do not exclude such constructive possession, and that oral agreements accompanied by such delivery of possession are sufficient to prevail against subsequent registered documents relating to the same property, when capable of proof by evidence accepted as sufficient to establish the fact of transfer of ownership and the reality of the transaction.

I would then confirm the decree appealed against and dismiss this appeal with costs.

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9 M. 271.

[271] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

MACKENZIE AND OTHERS (*Plaintiffs*), *Appellants* TIRUVENGADATHAN AND ANOTHER (*Defendants*), *Respondents*.*
[15th and 23rd February, 1886.]

Limitation Act, Section 20—*Part-payment of principal of debt—Endorsement of cheque by debtor.*

Where the only evidence in the handwriting of the debtor of the part-payment of the principal of a debt was the endorsement of a cheque to the creditor:

Held, that such endorsement did not satisfy the conditions of Section 20 of the Indian Limitation Act so as to give rise to a new period of limitation from the date of such endorsement

[F., 19 A. 307; R., 84 P.R. 1904; **Disappr.**, 6 C.W.N. 218 (222).]

APPEAL from the decree of Parker, J., in Civil Suit No. 214 of 1885.

The Advocate-General (Hon. Mr. *Shephard*), for appellants.

Anandacharlu and *Sundaram Sastri*, for respondents.

The facts of this case appear sufficiently from the judgment of the Court (MUTTUSAMY AYYAR and BRANDT, JJ.).

JUDGMENT.

On the 6th September 1881 the respondents (B. Tiruvengadathan Chetti and G. Venkaya Chetti) executed a promissory note in favour of the appellants (Arbuthnot & Co.) for Rs. 4,000. It provided that the

* Appeal 27 of 1885.

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debt was to be repaid by monthly instalments of Rs. 500 each, commencing on the 6th September 1881, and that in case any instalment was in arrear, the whole debt then due was to be paid on demand. The respondents paid on twelve different dates small sums aggregating Rs. 1,799-14-3, but these payments were not made according to the tenor of the bond either in respect of the amount of instalment or the date on which it was to be paid. The last of such payments was a sum of Rs. 100 paid on the 4th September 1882, and the other payments were made more than three years before suit.

But the last instalment payable according to the terms of the promissory note became due on the 6th April 1882, and the [272] appellants brought this suit in August 1885. The respondents pleaded, *inter alia*, limitation in bar of the claim. It was shown by the appellants that Rs. 100 was credited in their books on the 4th September 1882, and that it was a part-payment made on account of the principal, but the only writing which they produced in evidence was exhibit B. This document purports to be a cheque drawn on the Agra Bank by one Haji Mahomed in favour of G. Venkaya Chetti or order, and endorsed to Messrs. Arbuthnot & Co. by G. Venkaya Chetti. No evidence was, however, produced to show that the respondent No. 2 was the person who endorsed the cheque, or that the signature which the endorsement bore was his. It was contended before the learned Judge who tried the suit in the Court below that it was brought in time on the ground that the last payment was made in September 1882, whilst the plaint was presented in August 1885. Mr. Justice Parker held that three years ought to be reckoned from the date on which the last instalment fell due, and on this ground, and on the further ground that there was no evidence that the respondent No. 2 endorsed the cheque B, or that respondent No. 1 authorized him to do so, he dismissed the suit with costs. It is argued in appeal that the claim is not barred by limitation and that permission should be given to produce further evidence, in case we consider that the signature of respondent No. 2 to the endorsement on the cheque B is not sufficiently proved.

This case is governed by Article 75, Schedule II of Act XV of 1877. It provides that the time shall run from the period when the first default is made, unless where the payee waives the benefit of the provision, and then when fresh default is made in respect of which there is no waiver. In effect it creates a case of election as each instalment becomes overdue, and after the last instalment becomes overdue there can be no election for the obvious reason that there are no two obligations to elect between. The learned Judge was right in holding that time began to run under Article 75 from the 6th April 1882, after which there could be no waiver. As to the contention that permission should be given to produce further evidence, we do not consider that such evidence would save the limitation. Assuming that respondent No. 2 endorsed the cheque B, it does not satisfy the requirements of Section 20 of the Act of Limitations. The proviso to that section requires that the fact of the part-payment should appear in the handwriting of [273] the debtor or his agent. The cheque is only an order for payment, and it does not evidence any payment at all. Nor does it show for what purpose the payment was made. There is, no doubt, some parole evidence as to the payment, but the Act requires that the fact of payment, and that such payment was a part-payment, should appear in writing signed by the debtor or his agent authorized to make the payment.

It is not urged that there is such writing, and the appeal must therefore fail. It is next urged that no double set of costs should have been awarded, but the respondents had distinct defences in respect of the question of limitation and appeared by different pleaders, and we cannot say that they were not entitled to separate costs.

We dismiss the appeal with costs.

Solicitors for appellants: *Barclay & Morgan.*

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9 M. 273.

APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

PONNUSAMI (*Plaintiff*), *Appellant* v. THATHA AND OTHERS (*Defendants*), *Respondents.** [1st and 8th February, 1886.]

Hindu law—Gift of undivided share by a co-parcener invalid.

The rule of Hindu law which forbids voluntary alienations of the family estate by a Hindu co-parcener applies as well to gifts to relatives as to gifts to strangers.

[R., 14 M. 459 (462); 18 M. 73 (84).]

APPEAL from the decree of D. Irvine, District Judge of Trichinopoly, in Suit 9 of 1884.

The plaintiff, Ponnusami Pillai, sued Thatha, Shanmugam, and Thangathammal, infant children of the daughter of plaintiff's deceased brother Chidambaram, to cancel a deed of gift executed by Chidambaram in favour of defendants and to recover possession of certain land held by virtue of such gift.

The plaintiff alleged that Chidambaram was his co-parcener and died undivided, and that the land sued for was part of the family estate.

[274] The defendants pleaded, *inter alia*, that the gift was valid to the extent of the donor's half share.

The Court held that the plea was valid and decreed accordingly.

Plaintiff appealed.

Sadagopacharyar, for appellant.

Hon. *Rama Rau*, for respondents.

The Court (BRANDT and PARKER, JJ.) delivered the following

JUDGMENT.

The question to be decided is whether a gift of joint family property by a deceased undivided co-parcener can be supported as against the surviving co-parcener, a brother. The gift was in favour of the sons of a daughter of the donor.

The case of *Baba* v. *Timma* (1), a Full Bench case, was brought to the notice of the District Judge, but he distinguished it on the ground that in that case the gift was made by a father of ancestral estate to a stranger to the detriment of the son's right, while in this case the donor was the brother of the surviving coparcener and that "an alienation by a brother of his own share in undivided property is," as he believes, "valid so long as the gift is complete, and is on the same footing as any other alienation," and moreover that "the donees in

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* Appeal 133 of 1885.
(1) 7 M. 357.

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this case are not strangers, but persons for whom the donor might reasonably and fairly make provision."

In the Full Bench case the authorities were considered and the question was argued on the broad grounds that the Mitakshara did not allow alienation except for necessity, that alienations in favour of *bona fide* purchasers for value had been upheld in recent decisions as an exception to the rule, and that no such equity exists in favour of a volunteer claiming under a gift; that the doctrine should not be carried further nor the equity extended in favour of a volunteer under a deed or a will. On the other hand, it was asked why should not the principles of compelling an alienor, who could have himself obtained a partition, to give his creditors all the remedies to which he would be entitled to be applied in favour of a donee also?

Reference was made by the late learned Chief Justice to observations made by him respecting the right of a coparcener to make an alienation of his share, which will be found in *Ponnappa* [275] *Pillai* v. *Pappuvyyangar* (1). It is there observed that with the exception of one case, *Vencatapathy Reddy* v. *Lutchmee Ammal* (2) there appears to be no case in which an alienation has been supported except where it might have been supported on the principle above stated; and as to the case of *Venkatapathy Reddy* it is pointed out that no authority is cited for the decision therein arrived at, and that it does not appear that the decision in *Atchama* v. *Ramanadha* (3) was brought to the notice of the Judges who decided it; again in *Baba* v. *Timma* (4) it is said that on the one side there is "the unanimous consensus of the commentators accepted in Southern India, and the opinions of the most eminent English writers on Hindu Law" against, on the other side, one decision of this Court, already held in *Ponnappa Pillai's* case to be no authority for the proposition stated in it, while "the principle on which alienation was permitted to satisfy a judgment-debt or to give effect to a contract made with a purchaser for value implies that ordinarily the power to alienate is absent," and that "what was intended as the justification for an exception to the rule cannot be recognized as a rule."

The validity of an alienation to a purchaser for value has been upheld "on the equity which such a purchaser has to stand in his vendor's shoes and to work out his rights by means of partition;" but with the exception of the case of *Vencatapathy* v. *Lutchmee* above referred to we are not aware of any instance in which a voluntary alienation by gift of joint family property by an undivided coparcener unless permitted by an express text—and it is not pretended that there is any such text to cover the case of this gift—or an alienation by will has been given effect to against an undivided coparcener. We entertain no doubt that that case decides the general question therein raised and considered, and is not to be restricted to the simple proposition that a gift to a stranger is ineffectual or that it is authority for the proposition that a gift of affection generally, to any relative, is effectual.

The appeal must be then allowed and decree made in the appellant's favour for the relief sought in the plaint together with costs in both Courts.

(1) 4 M. 56. (2) 6 Mad. Jur. 215. (3) 4 M.I.A. 1. (4) 7 M. 357.

9 M. 276=10 Ind. Jur. 217.

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APPELLATE CIVIL.

9 M. 276=
10 Ind. Jur.
217.

[276] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

JAGANADHAM (*Plaintiff*), *Appellant v.* RAGUNADHA AND ANOTHER (*Defendants*), *Respondents.**
[22nd and 23rd February, 1886.]

Contract—Instalment bond—Agreement to pay enhanced rate of interest on default, enforceable.

An agreement to pay the principal of a debt by instalments with interest, and on default of payment of each instalment to pay an enhanced rate of interest thereon from the date of default of payment, is not an agreement which should be relieved against.

Dictum of Wilson, J., in *Mackintosh* v. *Crow* (I.L.R., 9 Cal. 689) approved.

[F., 12 M. 161 (164); R., 26 C. 300 (308); 11 M. 294 (295).]

APPEAL from the decree of E.C. Johnson, Acting District Judge of Vizagapatam, in Suit No. 18 of 1884.

The plaintiff, Thakum Jaganadham, sued the defendants (1) Ragunadha Panda and (2) Balamukunda Panda to recover Rs. 3,798-15-6, principal and interest on a registered bond, dated 30th April 1878, executed by defendant No. 1.

Defendant No. 2 was sued as the undivided brother of defendant No. 1.

The District Judge held that the debt was binding on defendant No. 2 and decreed payment of the principal sum and interest at 9 per cent. to date of decree, and at 6 per cent. from date of decree to date of payment.

Against this decree plaintiff appealed on the ground that he was entitled by the terms of the bond to interest at 9 per cent. to the date when the first instalment of the bond became due (11th October 1878), and to interest at 24 per cent. from date of default till date of decree.

The bond, after reciting a promise to pay Rs. 1,500, proceeded as follows :—

" I will pay interest for this at the rate of Rs. $\frac{3}{4}$ per 100 per month; the fixed instalments are as follow:—the whole of interest [277] accruing and Rs. 500 for the principal on the 15th Asvayuja Suddha of this year; the whole of interest accruing and Rs. 500 for the principal on the 15th Asvayuja Suddha of the year Pramadi; and the interest accruing and Rs. 500 for the principal on the 15th Asvayuja Suddha of the year Vikrama; I will pay the said three instalments in that manner, and get the payments entered on the back of this. In case of the amount of any one of the said instalments not being paid on the day of the instalment, the whole amount that may be due up to that time will be paid by me immediately in a lump with interest at the rate of Rs. 2 per cent. per month, without having any thing to do with the subsequent instalments."

Mr. *Branson*, for appellant.

Mr. *Michell*, for respondents.

The Court (COLLINS, C.J., and BRANDT, J.) delivered the following

* Appeal 96 of 1885.

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9 M. 276 =
10 Ind. Jur.
217.

JUDGMENT.

Bonds providing for repayment of loans by instalments with condition that on failure to pay any one instalment the principal sum due on date of default so made shall be forthwith exigible, with interest at a rate or rates specified, are so common that at first we were inclined to think that the District Judge had hardly sufficient grounds for saying that the terms of the bond in this case are unintelligible. Our first impression was that not only was it here intended that the principal sum with interest thereon at an enhanced rate should be payable on default of payment of the first or any subsequent instalment, but that the language of the bond would fairly and naturally bear that construction. But it does not necessarily do so, and though we are still inclined to think that the intention may have been, as above indicated, the constructions which it is possible to put on the words are so various, the language so ambiguous that we cannot say the District Judge was wrong in refusing to hold that under the bond the principal sum, Rs. 1,500, was payable, with interest thereon at 24 per cent. per annum, on and from the 11th October 1878, and this is all that we are directly called upon to decide in this appeal.

Whatever other construction may be placed on the disputed passage in the bond, there is nothing in our opinion which can be held as indicating that the increased rate of interest is payable from the date of the contract, and we concur in the view taken by **[278]** Wilson, J., in *Mackintosh* v. *Crow* (1) in respect of contracts of loan where the condition is that "if the money be not paid at due date it shall *thenceforth* carry interest at an enhanced rate," that it is open to a debtor "to contract to pay no interest at present, but interest hereafter; or to pay one rate of interest now and a higher or lower rate hereafter."

But in the present case it cannot, in our opinion, be held with sufficient certainty that the agreement in this case was that the principal sum with interest at the higher rate became forthwith payable on the 11th October 1878; and in the circumstances we are not prepared to say that the Judge was not justified in giving decree for the principal sum with interest thereon at 9 per cent from the date of the loan.

The terms of the bond might perhaps be most properly taken to be that on and after default in payment of the sum of Rs. 500 on the 11th October 1878, together with interest on that sum at 9 per cent. from the date of the bond, *viz.*, the 30th April 1878, that sum, principal and interest, was payable with interest thereon at 2 per cent. per mensem until date of payment; that on like default in October 1879 the second instalment of Rs. 500 with interest thereon at 9 per cent. was payable with interest thereon at the enhanced rate from that date, and so in respect of the third and last instalment: and we are of opinion that an agreement to this effect should not be relieved against.

But we do not consider that we are called upon to give effect to a construction of the terms of the bond which is at best doubtful and which was not put forward on behalf of the appellant, when the appeal cannot be allowed on the ground on which it was preferred and argued.

We shall then dismiss this appeal with costs.

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(1) 9 C. 689.

9 M. 279=10 Ind. Jur. 219.

1886
MARCH 8.

APPELLATE CIVIL.

9 M. 279=10 Ind. Jur. 219.

[279] APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

APPASAMI (*Defendant No.* 1), *Appellant v.* RAMASAMI (*Plaintiff*), *Respondent.** [8th March, 1886.]

Civil Procedure Code, Section 43.

Upon a settlement of accounts between plaintiff and defendants, Rs. 3,985-6-9 was found due by the defendants, who agreed to pay the same. They gave to plaintiff an order on their agents to pay Rs. 2,500 from the profits of certain land, and promised to pay the balance within a month. Plaintiff filed two suits, one for Rs. 2,500 and the other for the balance of the debt.

Defendants pleaded that both suits should be dismissed, as brought in contravention of the requirements of Section 43 of the Code of Civil Procedure.

The Lower Courts held that there were two distinct causes of action, and decreed both claims.

Held, on second appeal, that plaintiff had only one cause of action, and that the decree in one of the suits must be reversed.

[**N.F.**, 76 P.R. 1890; **R.**, 16 A. 165 (173) (**F.B.**); **D**, 36 M. 151 (157)=13 Ind. Cas. 458=22 M.L.J. 231=11 M.L.T. 63=(1912) M.W.N. 59.]

APPEALS against the decrees of T. Weir, Acting District Judge of Madura, confirming the decrees of S. Krishnasami Ayyar, District Munsif of Dindigul, in Suits Nos. 640 and 642 of 1883.

The facts necessary for the purpose of this report are set out in the judgment of the Court (BRANDT and PARKER, JJ.)

Bhashyam Ayyangar and *Kalianaramayyar*, for appellant.

Hon. *Subramanya Ayyar*, for respondent.

JUDGMENT.

The only ground on which exception is taken in second appeal to the decrees of the Lower Appellate Court is the technical ground that the claims in these two suits represent in fact only one claim which the plaintiff is entitled to make in respect of one and the same cause of action, and that both cases ought to have been, and ought now to be, dismissed as brought in contravention of the requirements of Section 43 of the Civil Procedure Code, in which case the plaintiff can, if so advised, and must, in order to obtain decree for the whole amount sued for, bring a fresh suit in a Court having pecuniary jurisdiction.

The facts are that on a settlement of accounts between plaintiff and defendants a sum of Rs. 3,985-6-9 was found due by the latter to the former, and the debtors on the 16th August 1883 **[280]** agreed to pay the amount found due, giving on that day an order on their officers or servants to pay the sum of Rs. 2,500 from the income received from two villages named for faslis 1291-92, and promising to pay the balance, Rs. 1,485-6-9, in a month.

The respondent (plaintiff) filed one of the two suits now before us for recovery of the sum of Rs. 2,500, and the other for the remainder, claiming also interest.

The appellant took in both of the Courts below the objection which we have now to consider.

The District Munsif held that there are two distinct and separate causes of action by reason of the promise to pay at once part of the sum

* Second Appeals 755 and 756 of 1885.

1886 MARCH 8. — APPELLATE CIVIL. — 9 M. 279 = 10 Ind. Jur. 219.

admitted to be due and the balance in a month; and that even if the two claims do arise out of one and the same cause of action, Section 43 is no bar, provided the suits be brought simultaneously, in support of which proposition he refers to *Kaleshar Prasad* v. *Jagan Nath* (1).

The District Judge in confirming the decrees also expresses an opinion that the causes of action in the two suits are entirely distinct by reason of there being two distinct and separate contracts to pay.

We are compelled to differ from the Courts below and to allow the objection taken by the appellant; but it is evident that in no cases need both suits be dismissed: the decree in either may stand, provided the decree in the other be reversed, in which case it will not be open to the plaintiff to sue in respect of the sum claimed in such suit.

Two weeks' time was allowed to the plaintiff to decide what course he would adopt.

We proceeded to give our reasons for holding that it was not open to plaintiff, having regard to the provisions of Section 43 of the Code, to bring these two separate suits.

The two claims, or rather the claim in respect of which two separate suits have been brought, in our opinion arise out of one and the same cause of action, namely, an obligation on the part of the debtors to pay and a right in favour of the creditor to sue for payment of the sum which the debtors admitted as due on settlement of accounts and which they thereon promised to pay; and the fact that the debtors undertook to pay part of such sum at [281] once and part after expiry of a fixed time which had elapsed when these suits were brought cannot enable the creditor to split an entire demand in a manner which Section 43 was intended to prohibit.

One of the reasons for such prohibition is "that the defendant be not put to unnecessary vexation," and one test is whether the same evidence and the same arguments apply in the two cases: that this is so here appears from the fact that the evidence was by consent taken in one case only and held applicable for decision in the two.

The District Munsif is not correct in saying that a different cause of action arises on each occasion when, in respect of a debt secured by an instrument providing for payment by instalments, there is failure to pay an instalment; under the terms of the agreement there accrues due to the creditor a part of his debt in respect of which he can sue, but the cause of action out of which the claim arises is the same, and the creditor is bound to include in his suit all that is then due in respect of his claim.

The case referred to by the District Munsif was decided with reference to the provisions of Section 7 of Act VIII of 1859, and, moreover, one of the grounds on which the Appellate Court based its decision was that it was not clear that the same cause of action was disclosed in both cases. In the cases before us we have no doubt that the cause of action is the same. Nor is the present case the same as *Umed Dholchand* v. *Pir Saheb Jiva Miya* (2), in which two separate bonds were given. It was contended that the giving of the order on the officers in charge of their treasury by the defendants, and its acceptance by the creditor, alters the case in respect of the claim for the Rs. 2,500, but the persons to whom the order was given were merely the servants of the debtors, and the payment not having been made, it is the debtors who have made

(1) 1 A. 650. (2) 7 Bom. 134.

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default, and the creditor is in our opinion at liberty to sue for the whole amount agreed to be paid, and must sue in one and the same suit for the whole claim arising out of the cause of action which, as we hold, is one and indivisible.

At the request of the learned vakil for the appellant the appeal is now allowed with costs in second appeal 756 and the original suit dismissed; and second appeal 755 is dismissed with costs.

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9 M. 282 = 2 Weir 245.

[282] APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

SADAGOPACHARYAR *v.* RAGAVACHARYAR AND OTHERS.*
[27th January, 1886.]

Criminal Procedure Code, Sections 4, 202, 350.

A magistrate upon complaint made having issued process and examined witnesses in support of the complaint ceased to exercise jurisdiction. His successor on taking up the case referred the complaint to the police for inquiry and report, and upon receipt of the report discharged the accused:

Held, that this procedure was illegal.

A reference under Section 202 of the Code of Criminal Procedure cannot be made after evidence has been taken for the complaint and process issued.

[R., 14 P.R. Cr. 1903 = 175 P.L.R. 1903.]

THIS was a petition under Sections 435 and 439 of the Code of Criminal Procedure to revise the proceedings of Mr. Mullaly, Joint Magistrate of Chingleput, in case No. 62 of 1884.

The facts necessary for the purpose of this report appear from the judgment of the Court (KERNAN and MUTTUSAMI AYYAR, JJ.).

Mr. *Subramanyam* and *Srirangacharyar*, for complainant.

Mr. *Wedderburn* and *Rangacharyar*, for accused.

JUDGMENT.

The procedure followed by the Joint Magistrate in this case is contrary to the provisions of Section 350 of the Code of Criminal Procedure. His predecessor accepted the petitioner's complaint, issued process upon it, and examined more than ten witnesses for the prosecution.

At this stage of the case, the present Joint Magistrate who succeeded the former was not entitled to ignore what the former Joint Magistrate had done and to refer the case to the police for inquiry and report, apparently under Section 202. He might under Section 350 have recommenced the inquiry, but the inquiry referred to by that section is defined by Section 4 and does not include a reference to the police, such as the original Magistrate might direct. That reference under Section 202 is made before inquiry begins [283] and cannot be made after evidence has been taken for the complainant and process issued. In order to make such reference, Section 202 provides that process may be postponed. We set aside the order of the Joint Magistrate and direct him to proceed according to law.

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* Criminal Revision Case 378 of 1885.

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MARCH 4.

APPELLATE CIVIL.

9 M. 283.

9 M. 283.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

VENKAYYA (*Defendant No.* 2), *Appellant v.* SUBBARAYUDU (*Plaintiff*), *Respondent.** [4th March, 1886.]

Regulation XXIX of 1802, *Section* 7.

The office of karnam in a zamindari village having been held by three brothers jointly in hereditary right, the zamindar on the death of one brother did not fill up the vacancy considering that the work could be well conducted by the two survivors.

On the death of the survivors their sons succeeded to the office. The zamindar subsequently desiring to reappoint a third karnam nominated an outsider to the joint tenancy of the office:

Held, that as there were heirs of the last holders in existence, the appointment was invalid.

[R., 10 M. 226 (288); D., 12 M. 188 (191).]

APPEAL from the decree of T. Ramaswami Ayyangar, Subordinate Judge at Cocanada, confirming the decree of Y. Janakiramayyar, District Munsif of Amalapur, in suit 1074 of 1882.

The plaintiff, Nedunnuri Subbarayudu, sued (1) the Raja of Pittapur and (2) Nedunnuri Venkayya to have the appointment made by defendant No. 1 of defendant No. 2 to the office of karnam in the village of Nedunnur in the zamindari of Pittapur cancelled, and to establish plaintiff's right to the said office.

The lower Courts decreed the claim.

Defendant No. 2 appealed.

The facts necessary for the purpose of this report appear from the judgment of the Court (COLLINS, C.J., and PARKER, J.).

Subba Rau and *Appadorai Ayyar*, for appellant.

Kristna Rau, for respondent.

JUDGMENT.

[284] The office of karnam in this zamindari village was hereditary in the plaintiff's family. It was originally held by three brothers, but on the death of one of them without issue, the raja considered that the work could be well conducted by the remaining two, and that it was not necessary to appoint a third. These two were succeeded in due course by their sons, of whom one—the plaintiff's father, Buchanna—has now resigned in consequence of old age.

The plaintiff's elder brother was appointed to succeed his father.

The raja now wishes to re-appoint a third karnam and has nominated an outsider to the joint tenancy of this hereditary office.

Such a course is opposed to Section 7, Regulation XXIX of 1802, which provides that the heirs shall be chosen except in the case of incapacity. It has been held by this Court in *N. Krishnamma* v. *N. Papa* (1) that the word "heir" means "next of kin," and judged by this ruling plaintiff is the proper person to be nominated, since his brother and cousin are already karnams and his father has declared himself incapable from old age—*vide* also *Arumugam Pillai* v. *Vijayammal* (2).

The appellant has no preferential claim as an heir, and the appeal must be dismissed with costs.

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* Second Appeal 757 of 1885.

(1) 4 M.H.C.R. 234. (2) 4 M. 338.

9 M. 284=2 Weir 266.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

1886 APRIL 2. APPELLATE CRIMINAL. 9 M. 284= 2 Weir 266.

QUEEN-EMPRESS *v.* DORASAMI.* [2nd April, 1886.]

Penal Code, Section 75—Trial of prisoner of offence under Chapter XII or XVII after previous conviction.

If a prisoner is to be tried for an offence punishable under Section 75 of the Indian Penal Code, a separate charge under that section must be framed and recorded.

APPEAL from the sentence of the Presidency Magistrate's Court, Black Town, in calendar case No. 20239 of 1885.

[285] The facts necessary for the purpose of this report appear from the judgment of the Court (KERNAN and MUTTUSAMI AYYAR, JJ.).

Counsel were not instructed.

JUDGMENT.

KERNAN, J.—We think that the practice of the Presidency Magistrates' Court is not consistent with the provisions of the Criminal Procedure Code.

The practice appears to be to charge the prisoner, say, of theft. No charge under Section 75 of the Indian Penal Code is placed on the record, but if the prisoner is convicted the Magistrate questions the prisoner whether he was convicted of the prior offence whatever it is. To this inquiry the prisoner replies either admitting or denying the fact; and, if he denies, the Magistrate without framing a charge tries him. If convicted, then the Magistrate in his judgment, as in this case, refers to the prior conviction as a ground for increasing the punishment beyond what should be given for a first offence.

No doubt the sentence pronounced may be, and in this case was, within the competence of the Magistrate to inflict for the first offence.

But the object and direction of the Code are that for each offence there must in warrant cases be a separate charge. We will not interfere with the sentence, and we dismiss the appeal; and no doubt the Magistrate will, in future cases, follow the views of this Court and in such cases frame a charge under Section 75 and try on that charge.

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9 M. 285.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

SIVASUBRAMANYA (*Plaintiff*), *Appellant v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*), *Respondent.*† [21st July, 1884, and 30th April, 1885.]

Forest land—Enjoyment—Adverse possession—Quasi possession—Prescription.

In a suit by a Zamindar to recover certain forest tracts from Government, the plaintiff relied on certain accounts called ayakut accounts as furnishing proof of the inclusion of the said tracts within the limits of his zamindari.

* Criminal Appeal 71 of 1886.

† Appeal 1882 of 1883.

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[286] The District Judge refused to accept these accounts as evidence of reputation, because no evidence was produced to show for what purpose, by whom and in what circumstances these accounts were prepared, and what guarantee existed to ensure their accuracy:

Held, that inasmuch as they were from time to time prepared for administrative purposes by village officers and were produced from proper custody and otherwise sufficiently proved to be genuine, they were admissible as evidence of reputation.

No distinction can be drawn between evidence of reputation to establish and to disparage a public right.

The plaintiff having proved that he and his ancestors had cut wood, pastured cattle, and gathered forest produce in certain forests for fifty years, the lower Court held that such acts of enjoyment were only evidence of an easement and not of adverse possession:

Held, that these acts, as they had been done under the belief and assertion that the said tracts formed portion of the zamindari and that the plaintiff and his ancestors were owners of the said tracts, were evidence of adverse possession.

In principle, an act done is one of ownership or evidence of an easement according as the person doing it asserts general ownership or a particular right in another's property.

The enjoyment of any right of ownership over the soil is, *prima facie*, proof of ownership of the soil.

Where, therefore, the lower Court found such an enjoyment of a forest as proved title to the profits thereof and such enjoyment was accompanied with an assertion of ownership of the soil:

Held, that the Court was bound to find a title to the soil established.

Where a tract of land with a defined boundary has been throughout claimed by a person as owner and acts of ownership have been done on various portions of it, such acts may be accepted as evidence of the possession of the whole tract. *Bhaskarappa* v. *Collector of North Canara* (I.L.R , 3 Bom. 452) distinguished.

[**Affir.**, 15 M. 101 (P.C.) = 18 I.A. 149 = 6 Sar. P.C.J. 74; **Rel.**, 16 Ind. Cas. 39 (40); **R.**, 15 M. 315 (321); 20 M. 299 (302); 34 M. 58 (59) = 5 Ind. Cas. 853 = 20 M.L.J. 362 = 7 M.L.T. 380 = (1910) M.W.N. 75; 34 M. 353 = 9 Ind. Cas. 9 = 21 M.L.J. 132 = 9 M.L T. 181 = (1911) 1 M.W.N. 55; 2 Ind. Cas. 63 (64) = 12 O.C. 58; **D.**, 21 M. 169 (171) = 8 M.L.J. 117.]

APPEAL from the decree of J. C. Hughesdon, District Judge of Tinnevelly, in suit 2 of 1882.

The facts necessary for the purpose of this report appear from the judgment of the Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.).

Bhaysham Ayyangar, for appellant.

The Government Pleader (Mr. *Shephard*), for respondent.

JUDGMENT.

THIS is an appeal from the decree of the District Court of Tinnevelly in so far as it dismisses the appellant's claim. The respondent has also objected to so much of the decree, as set aside the decision of the Assistant Suprientendent, the Revenue Survey, dated the 6th April 1880. The property in litigation consists of three hill tracts of forest land adjoining the zamindari of Singampatti and about 40 or 50 square miles in extent. The appellant's claim to the second tract as described in the schedule attached to the plaint was disallowed by the Judge. Of the other [287] two tracts, the first or eastern tract is said to be 12 square miles in extent, and it is bounded on the east by Karungaluttu, Vandal Odei, Kannimar Amman Kovil, and Panjantangi Mottai, on the west by Mulaikasam and Shenkatti Parambu, on the south by the Varattar, and on the north by arable lands which appertain to the appellant's zamindari. The third or western tract is, as described in the schedule, 35 square miles in extent, bounded on the east by the Manimuttar and Sellambu

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Odei, on the west by the territory of the Travancore Government and the Tambrapurni river, on the south by the Terkukakachi Malai and the Travancore territory, and on the north by the Tambrapurni and the Mylar. The second or middle tract lies to the north of the Terkukakachi Malai, to the south of the Vadakakachi Malai, to the east of the Manimuttar, and to the west of the Kossavenkuliyar, and it is about 1 square mile in extent. According to Mr. Baber, the Assistant Superintendent of the Revenue survey, who personally visited the hills in dispute, they are 103 square miles in extent by map measurement, and consist of hill ranges rising over 6,000 feet above the level of the sea, and of which the upper hills are clothed with valuable virgin forest and the lower slopes with valuable jungle. The fact that the head waters of the Tambrapurni river, a river on which considerable revenue derived by Government depends, lie in these tracts, lends a special importance to the appellant's claim. The appellant is the zamindar of Singampatti, which is one of the Tinnevelly palayams that were brought under Permanent Settlement in 1803. Before entering on the case, it is perhaps desirable to give a summary of the political history of Tinnevelly so far as it throws light on the origin and nature of these palayams, and on those events which may possibly have a bearing on the question of private property which is discussed by the Judge at some length. The history of Tinnevelly had no separate existence, but was bound up with that of Madura down to the time of the Muhammadan Government in the middle of the last century. Originally, it had formed part of the Pandiyan kingdom that extended from Cape Comorin on the south to the river Vellar on the north, which, rising in the district of Trichinopoly, takes a south-easterly course through the Pudukotta territory, and falls into the sea south of Point Calimere. The Pandiyan kings ruled over this part of the country until 1063 A. D., about which time the king-[288]dom passed into the possession of a Chola King called Rajendra. The last king of this dynasty was Sundara Chola Pandiya Deva, a prince whose succession was disputed by his illegitimate brother Vira Pandiya and who fled to Delhi where he obtained the support of the Muhammadan Emperor Alla Uddin. Sundara Pandiya regained his territory with the aid of a Muhammadan force and was consequently obliged to yield the chief share of Government to Muhammadan ministers. After his death, and in 1311, one of Alla Uddin's Generals seized the country and held it for some time for the Emperor of Delhi. This Muhammadan interregnum is said in Taylor's Historical Manuscripts to have lasted for forty seven years from 1323 to 1370. A new line of Pandiyan kings commencing with Parabramha Pandiya Deva recovered the kingdom from the Muhammadans with the assistance which they received from the Canarese kings of Dwara Samudram, who preceded the Vijayanagaram dynasty of Telugu kings. Throughout the reigns of this new series of Pandiyan kings, the rulers of the Canarese and the Vijayanagaram kingdoms appear to have exercised supreme authority over Madura and Tinnevelly, though without much ostensible interference. About the year 1520, however, the Pandiyan dynasty was ultimately deprived of all real power by the Nayaks, the Vijayanagarm Telugus, although some of the Pandiyan line retained nominal sovereignty for some time longer. Nagama Nayak and his son Visvanadha Nayak were the actual conquerors, and they and their descendants held the kingdom for the Vijayanagaram princes for fifteen generations. The creation of the palayam tenure now represented by the present zamindaries of Tinnevelly and Madura is assigned by tradition to Visvanada Nayak, and it was the most important political event of his rule. It

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is, however, more likely that all the palayams were not erected at one time, but by the successive princes of the Nayak dynasty.

Speaking of these institutions, Bishop Caldwell observes that it can hardly be said that the idea of governing the country by order of rude, rapacious feudal nobles such as the palayagars generally were, was a happy one, for, down to the period of their final subjection to British authority, in 1801, whenever they were not at war with the central authority, they were at war with one another, and it was rarely possible to collect from them the tribute due to the paramount power without a display of military [289] force. The last of the Nayaks, Vijaya Runganadha Chola, died in 1731, and in consequence of a disputed succession, the Nawab of Arcot sent an army under the command of his son, Safdar Ali, and Dewan Chanda Saheb. Chanda Saheb made himself master of Madura and of the countries under the rule of the Nayaks. In 1739 Reghuji Bhonslai, the great Mahratta General to whom one of the Nayak princes applied for assistance, defeated the Nawab of Arcot, and regained possession of Trichinopoly and Madura. But in 1743, the Nizam expelled the Mahrattas, and from that time the country formerly under the Nayaks was held by officers commissioned by Anwar Uddin, who was appointed Nawab of Arcot by the Nizam in 1744, and by his son and successor Muhammad Ali in 1749. In 1748 an expedition was sent by Muhammad Ali with a detachment of ninety Europeans under Lieutenant Innes, to establish firmly the Nawab's Government in the country to the south of the Coleroon, including Tinnevelly. In 1755 another expedition was sent to Madura and Tinnevelly by Muhammad Ali under Colonel Heron, in order to reduce those countries to obedience. At this time the palayagars of Tinnevelly evaded payment of the tribute on various pretences. From 1756 to 1763, the palayagars were in constant state of rebellion against the authority of the Nawab which was supported by the East India Company, who kept a small force of sepoys and cavalry under the authority of Muhammad Usuf. In 1761 the fall of Pondicherry awed the palayagars into submission and Muhammad Usuf made himself master of Madura and Tinnevelly. Until 1781 the country enjoyed tranquillity being administered on behalf of the Nawab by a succession of officers nominated by him from time to time. In 1791 the management of the country was made over under treaty by the Nawab of Arcot to the English. About 1793, all the palayagars of Tinnevelly, being assisted by the Dutch, were again in rebellion and an expedition was sent under Colonel Fullarton; but when the palayagars were on the point of submission, the war with Tippu distracted his attention and the country was not tranquilized until the fall of Seringapatam in 1799. As treasonable correspondence was found between Muhammad Ali and his son and Tippu Sultan, the Government of the Carnatic was assumed by the British under the treaty of 1801. Previous to the fall of Seringapatam, the palayagars of Tinnevelly were growing more and more rebellious. In 1799 [290] there was the first palayagar war, and the palayagars were reduced to subjection by Major Bannerman. Again in 1801, the second and the last palayagar war broke out and the rebels were overthrown by the army under the command of Colonel Agnew, and the country was finally reduced to subjection. In 1802, the palayagars were brought under the Permanent Settlement in the belief that it would operate to change these turbulant tributary chiefs into peaceful and contented landholders. Thus it will be seen that the district was under the Pandiyan kings, with a short Muhammadan interregnum of between forty and fifty years, till it passed

under the rule of Nayaks who created the palayagars as local chiefs subject to the payment of a tribute to the paramount power, that from 1731 to 1791 it was subject to the Nawab of Arcot, whose authority was often weak and resisted by the palayagars, and that it was not until 1801, when it passed under the British rule, that the country was fully tranquilized.

The zamindari of Singampatti belongs to an old palayagar Maravar family. It was permanently settled in 1803 at a peshkash of Rs. 8,006-2-11. The sanad was issued in the name of Nallakutti Tevar. In 1830, when Peria Sami Tevar held the zamindari the peshkash fell into arrears and the Collector of the district attached and held the zamindari, until 1832. Periya Sami died in 1834, and a dispute arising as to the right of succession, the estate came again under the management of the Collector, who transferred it in 1836 to Palanai Achi Ammal. Under her management the peshkash again fell into arrears, and in 1842 the Collector attached the zamindari and kept it under attachment until 1844. In 1845 Sankara Vadivammal succeeded to the estate, but she died shortly after, and there was again a dispute as to succession. On this occasion, the Collector had the management of the estate for five years from 1846 to 1851. From 1852 to 1856 Sodala Muttu Ammal remained in possession, and in 1856, it passed into the possession of Siva Subramanya Tevar, the appellant's father, who died in 1860. In his time, the Collector was in possession in 1857 and 1858 on account of arrears of peshkash. In 1860, the Collector assumed the management owing to the appellant's minority for six months, on the expiration of which time Isvaravadivu Ammal, the appellant's mother, was appointed to manage the zamindari under the Collector's general supervision and control. She died in 1867, when the estate came under the [291] Court of Wards, and the Collector, as the agent of that Court, remained in possession until 1881, when the appellant attained his majority. From 1830 the zamindari has thus been under the management of officers of Government at different intervals of time for a period of about 25 years.

In 1864, the Government desired to bring all forests in the district of Tinnevelly, in view to their better protection, under the management and control of the Forest Conservancy Department. In 1865, they questioned for the first time since the Permanent Settlement the proprietary right claimed for the appellant with respect to the hill forests in suit. But nothing appears to have been done until 1870, when an enquiry was made as to the appellant's title in an informal manner, and a report was submitted by Major Campbell Walker. This report and the report on the titles of other zamindars of Tinnevelly, who claimed the hill forests which adjoin their estates on the plains, were referred to the Government Pleader for opinion. It was considered on this occasion that before any action could be taken further information was necessary on several points, and this the Collector was called upon to furnish. On the 31st October 1879 Government directed a Survey Officer, appointed to determine disputes under the Boundary Act, to ascertain whether the forests in suit were within the Boundaries of the appellant's zamindari. The appellant being then a minor, the Collector, as the Agent of the Court of Wards, defended his title before the Survey officer who decreed in April 1880 that the appellant was entitled by a decision of the Collector in 1857, to which we shall hereafter refer more particularly to one-half of that part of the hills which lie between the Tekkukachi Malai on the south and the Elgai Vengai on the north, and the Manimuttar on the west and Karampandi Amman Kovil on the east. He declared further that the boundary line fixed by

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him would, as shown in the map L, run from the Mulaikasam of the Pachiyar to Mothalati junction, and thence along the Kossavenkuliyar and across the ridge of Kakkachi Malai to the Manimuttar. He decided also that all the lower hill tracts to the north of the Mylar and Sellambu Odei and to the west of the Manimuttar and those to the east of the latter river and west of Kattadi ridge should be included within the limits of the zamindari. Seeing that the appellant was a minor at the date of this decision, Government extended the time allowed by Act XXVIII of 1860 **[292]** for appealing from it to six months from the day on which he should attain his majority. This he did on the 31st January 1881 and he instituted this suit on the 30th July 1881. He alleged that the hill tracts were his ancestral property, that they formed part of his zamindari, that they were known by the name Singampatti hills, and that they had remained in his possession and that of his ancestors from time immemorial. He stated further that after the Survey Officer decided against him, the respondent entered on the hills and excluded him from possession. The respondent resisted the claim, contending that the suit was not properly valued, that the appellant was not entitled to the hills, that only some parts of those hills were called Singampatti hills, and that the appellant could acquire no legal title because people called them Singampatti hills. It was further asserted that the hills in dispute belonged to the Crown, and that the zamindari of Singampatti itself was bestowed upon the appellant's ancestor by the Crown. The title and immemorial enjoyment set up by the appellant were denied. Two issues were framed: (1) is the suit properly valued? (2) whether the right to, and possession of, the property in dispute is with plaintiff (appellant) or the Government? At the trial, however, the first issue was abandoned, and although the Judge considered that the second issue was not sufficiently specific, Counsel on both sides submitted that it was sufficient for their purpose.

The District Judge, Mr. Hughesdon, came to the conclusion that the appellant failed to prove his title and disallowed his claim to possession and other relief as proprietor, but he found that the appellant had certain exclusive rights in the nature of easements in the western tract and that he had similar rights in the eastern tracts though not exclusive, and he consequently set aside the decision of the Assistant Superintendent of Revenue Survey. He observed that it was clearly shown that the zamindar had the exclusive right of pasture, wood-cutting and gathering of wild products in the western tract, and that he had perhaps a right of the same kind but of limited extent in the eastern tracts, but he added that in his opinion these rights did not render the zamindar unqualified proprietor or owner of the land in fee simple, for such rights were in the nature of an easement and the officers of Government were shown to have interfered on frequent occasions with the zamindar's full enjoyment of his rights and the zamindar **[293]** was admittedly without title-deeds. In support of his conclusion he referred to *Clark* v. *Elphinstone* (1), *Wilson* v. *Mackreth* (2), *Bhashkarappa* v. *The Collector of North Kanara* (3) and Sir Henry Maines's Village Communities, 4th edition, page 160, and finally formulated the grounds of his decision in these terms:—"The result of the various authorities I take to be, first, that the enjoyment of easements, even though such enjoyment is exclusive, is to be distinguished from possession and will not create

(1) L.R. 6 App. Cas. 164. (2) 3 Burr. 1824. (3) 3 B. 452.

a title by prescription or support an action of ejectment; secondly, that private property in forest land does not exist in India except by express grant from the State; and thirdly, that even if such proprietorship does exist, it has not the same incidents as private ownership in England." Before proceeding to consider how far these several propositions can be supported, it is desirable to see what is the evidence as to the appellant's enjoyment and as to interference with it by officers of Government. We may here observe that the sanad or deed of permanent settlement, which the zamindar produces in appeal, contains no statement of boundaries. It does not, therefore, enable us to say whether or not the hill-tracts in question are included in the grant. It appears from the report of the Select Committee, Vol. II, p. 553, that certain accounts were submitted by the Collecter, Mr. Lushington, in the year 1800 and that the Permanent Settlement of the palayagar revenue in Tinnevelly was founded upon them. These accounts are not produced in evidence on either side, and it is not possible for us to say whether any such account is still in existence in regard to the Singampatti palayam, and if so, whether any revenue derived by the zamindar from the hills in dispute was part of the assets on which the permanent assessment was fixed in 1803. Such being the case, both the appellant and the respondent relied on what are called ayakut accounts as containing statements of boundaries and furnishing proof of the inclusion of the disputed tracts in the zamindari limits, or in the limits of Government villages. But because they produced no evidence to show for what purpose, by whom, and in what circumstances those accounts were prepared, and what guarantees existed to ensure their accuracy, the Judge refused to accept them as evidence of reputation. It appears to **[294]** us that, inasmuch as these accounts were from time to time prepared for administrative purposes by village officers, they are admissible as evidence of reputation provided they are produced from proper custody and otherwise sufficiently proved to be genuine. They are to some extent public documents, and, although it would be unsafe to attach much weight to them except in relation to the purpose for which they were specially prepared, they are not to be altogether disregarded. Exhibits D, NN and PP, produced by the appellant and exhibits V, VI, VII and XXI which were relied upon for the respondent, purport to be ayakut accounts. These accounts are accounts made for revenue purposes to show the sources of revenue in each village, and they give the limits of the villages to which they refer. It is not material that the zamindar claims the hills as his private property, for the real issue is whether they are State or private property, and no distinction could be drawn between the evidence of reputation to establish, and that to disparage, a public right, *Drinkwater* v. *Porter* (1). On this point the Indian Evidence Act is, we apprehend, in accordance with the rules accepted by the English Courts, Section 32, Clause 4. As for the ayakut accounts produced by the appellant, they are produced from the respondent's custody and they are more than fifty years old, and this special circumstance also renders them admissible as evidence of reputation unless they are shown to be tainted with suspicion. Exhibit NN is the nanja ayakut account of the Government village of Vikrama Singapuram, dated 1803, and the southern boundary of that village is described to be the Tambrapurni river. A reference to the map will show that that river lies between the hills in dispute and the Government village, and the account is therefore evidence that the hills were not reputed in 1803 to be within the limits of Vikrama Singapuram.

(1) 7 C. & P. 181.

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Exhibit PP purports to be the ayakut account prepared in 1825 according to that of 1818 for the village of Malayankulam.

Singampatti hills and the river Vandal Odei running from north to south are described to be the western boundary. This shows that the hill tracts in suit were not included in the limits of the Government village of Malayankulam which lies to the east.

[295] Exhibit D, which is mainly relied on by the appellant as supporting his case, purports to be the nanja ayakut of Singampatti for 1777 and to give its eight boundaries which are said to include the hills in dispute. For several reasons we regard this document with suspicion and deem it unsafe to act upon it. In 1856 the then zamindar applied to the Collector for a copy of the ayakut and olugu accounts of 1211 for his zamindari and the Collector then informed him that no ayakut and olugu account existed for the zamindari (exhibit II). Again, there was an inquiry in 1868 whether any olugu account existed showing in what villages the hills in question were included and the result was a statement made by the zamindari karnam Narayana Pillai that there were no ayakut or olugu accounts for the zamindari of Singampatti or for the hills in dispute either with him or in the zamin records (exhibit III). In 1859 or 1860 a list of the *congo* or old Mahratta records in the Collector's custody was prepared by a Revenue Officer named Koneri Rau, but exhibit D does not bear his initials. The 14th witness for the appellant, who is the Collector's vernacular Head Clerk, deposed that exhibit D was entered in a list of records prepared in 1878 under his directions and those of the Assistant Record-keeper Varada Rau; that after Mr. Baber commenced his inquiry, the witness was asked for the ayakut accounts, that when he made a report to the Collector on the 18th February 1880, he had not found D, that he and the Assistant Record-keeper then went through the Mahratta and Tamil records, that the Assistant Record-keeper discovered D, and that the witness then sent it to Mr. Baber, and that there are no similar ayakut accounts of so early a date. His evidence as to the circumstances in which D was found and the mode in which it is entered in list IV are by no means satisfactory, and there are grounds for the suspicion that exhibit D was surreptiously introduced into the Collector's records after Government questioned the zamindar's title.

Exhibits V, VI and VII purport to be the ayakut accounts of 1777, 1799 and 1803 for Urkad, Tinnevelly and Kalladikuruchi, respectively, and though produced by the respondent do not greatly support his case. The conclusion we come to as to this part of the case is that while there is no proof of an express grant in regard to these hills, the ayakut accounts of the Government villages of Vikrama Singapuram and Malayankulam in the res-[296]pondent's possession show that the hills were not reputed to be within the limits of those villages in 1803 and 1825. The next document in date on which the appellant relies is exhibit AA, which shows that in 1818 he obtained from the Collector an order addressed to the tahsildar or Brahmadesam, in which sub-division the hills in suit are situated, directing him to inquire whether, as alleged by the zamindar, the hill people residing in Ambasamudram had obtained pattas from the zamindar for hill produce and had made default in the payment of tirva and committed mischief by cutting large trees, and if found to have done so, to enforce payment of the tirva. Ambasamudram lies on the north-east confines of the hills, and although the hills are only described as the hills attached to the zamindari, the evidence does not show, nor was it

suggested at the hearing, that there were any other hills in that part of the district to which the order might have applied.

We may next refer to documentary evidence which shows that these hills were claimed by the zamindar as part of his estate in 1840 and 1852, and that the Sub-Collector then acted in the belief that the claim was true. In 1840 a dispute arose between the managers of the temple at Paupavinassam and the zamindar as to whether a portion of the forest in the western tract called Puttankadu formed part of the zamindari. Each party asserted an exclusive right to take the hill produce, and it was kept in deposit for some time, and in 1842, the Sub-Collector directed the tahsildar to hand over the value of the produce in deposit to the zamindar. On this occasion the Sub-Collector remarked that he should not interfere with the hills attached to the zamindari, and that as the Puttankadu hill was not in the Sirkar (Government) ayakut, Government officers should not interfere with its produce (exhibits O to S).

Again, in 1852 there was a dispute between the zamindar and the raiyats of the Government village of Kalakad. Exhibit IX, which is a copy of the Collector's order on the subject, dated February 1857, shows that it was a boundary dispute between Kalakattu hill and Singampatti zamin hill, that two tahsildars were deputed to inquire into the matter, that after inquiry and local inspection, they suggested that the disputed locality should be divided equally between the two hills. The order directed that the spot in question should be divided equally, as suggested, between the said zamin and Kalakattu hills, that a permanent [297] boundary line should be set out, and that the contending parties should be informed that they should enjoy their respective portions as allotted at the division. Not satisfied with this order, the then zamindar, Siva Subramanya Tevar, instituted Original Suit 747 of 1858 on the file of the District Munsif of Brahmasamudram, alleging that the moiety awarded to the Kalakad raiyats formed part of the hills attached to his zamindari and praying for the cancellation of the Collector's order (exhibit XI*a*). Although he was not successful in this litigation, yet it is clear from what took place on this occasion that both the Collector, the zamindar and Kalakattu raiyats believed that the eastern tract to which the moiety of the disputed locality was attached formed part of the Singampatti zamindari. Again in July 1854 the tahsildar of Ambasamudram, a Government taluk, called the attention of the then zamindar of Singampatti to the fact that people used to assemble in Seri Muthaiyan Kovil and Vanatirtam during the new moon festival of the Adi month, and intimated to him that the duty of making arrangements for preserving the peace and preventing crime devolved on the zamindar because those places (which are in the western part of the lower hills awarded by Mr. Baber to the appellant) were attached to the zamindari (exhibit GG.)

Again in May 1864 the statement V was prepared by the Forest Conservator of Government and zamin forests, and the Singampatti hills now in dispute were described in it as zamindari. We find further that in October 1864, the Collector addressed the letter U to the appellant's mother acknowledging her to be the owner of the Singampatti hills, and inquiring, with reference to the Proceedings of Government, dated the 30th July 1864, whether she was willing to lease out the Singampatti hills *attached to her zamin* to Government for a long period at a reasonable sum. There can therefore be no doubt that between 1840 and 1865 the zamindars for the time believed and often openly asserted as against others who

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sought to interfere with the hills in dispute, that they formed part of their zamindari and that the district officers were not only cognizant of the claim but invariably acquiesced in it, and at times even expressly acknowledged it.

Moreover, there is considerable oral and documentary evidence to show that the appellant and his ancestors enjoyed these hills for more than fifty years asserting that they were included in their [298] zamindari. The Judge finds that it has been clearly shown that the zamindar has the right of pasture, wood-cutting and gathering of wild products. Whilst we adopt his finding, we would also draw attention to exhibits V and QQ1, of which V shows that the annual revenue derived by the zamindar from the hill tracts was estimated in 1864 at Rs. 3,550, while QQ1 which was prepared in 1868. indicates that the articles which were produced on the hills were about forty-three in number, that their average annual income was Rs. 6,209-5-2, that eleven cereals were grown and assessed at 10 annas per kotta, that seventy-one descriptions of small trees and thirteen sorts of big trees used to be cut and utilized. There is also evidence that fees were levied by the zamindar or his lessees for cutting wood, that a hedge was put up near Vandal Olei to prevent cattle from trespassing, and that there were zamin thanas at which strangers got permission to enter, and that timber depots were maintained at Timilasapuram and Erasapuram. It appears further that a series of leases issued from 1831 show that the hill produce and the right of cutting small trees were let by the zamindars or by Government officers on their behalf from time to time. Exhibit BB proves further that timber used to be felled in 1842. There is also evidence that the timber which passed through the zamin depots bore at times the zamindar's stamp, and that cultivation was carried on on the hills though it was to a small extent and in its nature *kumari* as observed by the Judge. It appears further that the hills have been enjoyed as indicated above from before 1818. In connection with the question of possession, the Judge has apparently omitted to notice the intention or belief with which the acts of enjoyment mentioned above were done from time to time, but it is one of the matters which ought to be considered in coming to a finding as to the nature of the appellant's possession. The effect of the evidence on this point is that the appellant's ancestors and Government officers when they managed the zamindari exercised these acts of enjoyment, alleging that the hill-tracts formed part of the Singampatti zamindari. We may refer here to a few documents, which, in addition to the other evidence already discussed, tend to show that the acts we have referred to were done in the belief, whether it was well or ill-founded, that the zamindar for the time being owned the hill-tracts as part of his zamindari.

Exhibit M, which is dated the 2nd August 1831, together with [299] exhibit N, show that the zamindar leased out the hill for three years (from Fasli 1240 to 1243), that was designated Singampatti hill, and that the Collector, as manager for the time being, for arrears of peshkash called up the lessees of the hill and of a tope and confirmed the pattayams granted by the zamindar. In document M, the hill is referred to as the Singampatti hill, and in document N, the lessees are described as being the lessees of *the hill and the tope of the zamindari*. This document shows that the hills had so long been enjoyed by the zamindar that they had acquired a designation connecting them with the zamindari.

Exhibit T refers to similar leases granted in 1842 and 1843. Exhibit T1, which purports to be the patta granted on the 2nd September 1843, not only designates the hill which was the subject of the lease as included

in the Malaipattam of the Singampatti, but also proceeds to set out its boundaries which include the tracts now in dispute.

Exhibits BB and CC form part of the correspondence that took place between the Sub-Collector and his subordinates in regard to certain timber cut down by the lessee in contravention of the terms of his lease, and in CC, dated the 4th November 1842, the Sub-Collector refers to the timber as timber cut on the "Singampatti zamin hill."

Exhibit FF proves that in 1861 the Deputy Collector brought to the notice of the Collector that 'kulla marams' (small trees) were largely cut and carried from the "Singampatti zamin hill," and suggested that the timber cut from the Singampatti hill be sealed in order that there might be no ground for doubting whether such timber was of ayan (Government) hill. It will be seen from Exhibit XVI that the Collector writing on the same subject in February 1862 referred to the hills as the hills of "the Singampatti zamin." As the Government questioned the zamindar's title in 1865, we do not refer to acts done upon the hills and leases granted subsequently on behalf of the zamindar. It may be that the local officers of Government who were also agents of the Court of Wards, considered themselves bound to act in regard to these hills on behalf of the appellant in the same manner in which his predecessors acted. However this may be, the acts done on either side subsequently to 1865 are not *ante litem motam*. Upon the whole evidence we see no reason to doubt that whilst on the one hand the hill-tracts in dispute were enjoyed by the appellant and **[300]** his ancestors for upwards of sixty years, and there is no evidence to show at what earlier period their enjoyment first commenced, successive zamindars, on the other hand, who held the zamindari and Government officers who managed it for them, believed and openly and frequently asserted that the hills were part of the zamindari which is the zamindar's private property. We shall next consider to what extent and on what ground and with what effect Government is shown to have interfered with the zamindar's enjoyment of his rights as owner. The Judge refers in para. 42 of his judgment to documents XII to XV and to the evidence of the appellant's 15th witness and to Exhibit A, and remarks that not only were the appellant's rights in these hill-tracts limited in extent, but even within the sphere of their operation were exercised under the supervision and control maintained by officers of Government as paramount lord of the soil.

In 1837, the Collector issued an order (Exhibit XII) to the Tenkasi tahsildar in connection with the Courtallom forests. He observed that the forests were destroyed by raiyats on the pretence of raising punja crops on the slopes, and that such destruction affected the sarl (drizzle) and the rainfall, and then went on to direct that the people of two villages near Courtallom should be informed that no one should fell more forests and raise more punja crops than what had already been done, either on the Courtallom hill or on the Vadakarai and other mountains which are adapted for producing sarl, and that if any raiyat disobeyed the order, four times the actual assessment should be collected from him. It refers also to similar objectionable practice among the owners of some nutmeg gardens in Melagaram and other places. But it has no reference to the hill tracts now in dispute or to the Singampatti zamindar. Nor is there any allusion to the position of Government as lord paramount of the soil. Exhibit XIII is another order issued by the Collector in 1839 with reference to an application made by Tenkasi Sundram Ayyar for the grant of some waste land on kaul in Kasimapuram. By this document the Collector

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declined to grant the application until he had some further information, and observed that, on pretence of cultivating punja crops, hill forests were destroyed and clouds were not attracted so as to moisten the soil. In this also there is no allusion to the hill-tracts now in dispute, and it only shows that the Collector refused to grant some waste land on a Government hill [301] for cultivation lest the applicant might destroy the hill forest and injure the annual rainfall. Exhibit XIV is another order, dated the 14th March 1842. It also purports to refuse an application for grant of waste land on a Government hill in Illuvakudi Irupu for reasons already stated. Exhibit XIX, dated 1844, refers to the orders passed on the subject of the destruction of hill forests, reiterates the effect of such destruction upon the collection of clouds on the hills, and directs the tahsildar to see that the hills in the taluk are never cleared of their trees. It has no special reference to the Singampatti zamindari hills. Exhibits XV and XVI, which are not mentioned by the Judge, purport to be orders issued by the Sub-Collector in 1862 in regard to the Singampatti hill. It was observed that the timber cut on the hills attached to the Singampatti zamindari might be sealed by the zamindar instead of being taken to Ambasamudram, and it was added that not more than 20 cubic yards of timber should be cut down every month lest too large a quantity should be felled from the hills of Singampatti. It was pointed out that these hills depended for their water-supply on the rainfall and that interference with that source of supply would impair the forest growth.

It must be remembered that about this time the zemindari was under the management of the appellant's mother under the Collector's superintendence. There is nothing in these documents to show that the Collector issued this order in the exercise of the right of the Crown as lord paramount of the soil. They, on the contrary, recognize the right of the zamindar to the forests as fully as does the enquiry made by the Collector in 1864, whether the appellant's mother was prepared to grant the hills attached to her zamin to Government on a long lease in order that they might bring them under conservancy of the Forest Department. Exhibit XVII, dated the 16th August 1866, shows that the restriction that the zamindar should not cut down more than 20 cubic yards of reserved wood in any month was then also in force. Exhibit XX shows that in 1868 the Collector set apart portions of the lower tracts of these hills for the use of certain Government villages accustomed to graze their cattle in these hills. It must be observed that this order was passed when the appellant was a minor under the Court of Wards and subsequently to 1865 when the Government questioned the zamindar's title.

Again Exhibit A is an engagement or a muchalka executed [302] in 1866 by a lessee in favour of the appellant's mother. It contains a clause to the effect that the lessee shall act up properly to the rules contained in the Regulations, Acts and Gazettes for the conservancy of the hills aforesaid. This shows no more than that the appellant's mother was willing to conform to the conservancy rules, but not that she recognized the Crown as entitled to interfere with the proprietary right. The 15th witness for the appellant to whom the Judge refers deposed that he was a lessee in 1868, that formerly any quantity of timber might be felled, and that during his lease the Collector would only allow twenty-five bandy-loads a month.

The foregoing evidence shows that the destruction of hill-forests was considered to affect the rainfall, that efforts were made to prevent such

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destruction on hills in Government villages in 1837, 1839, 1842 and 1844, that whilst the zamindari was under the Collector's superintendence during the appellant's minority, restrictions were placed by treating certain trees as reserved wood and fixing the maximum quantity of such wood as might be cut down within one month without injury to the hill-forests, and that the appellant's mother conformed to the wishes of the Collector in a matter in which the zamindar as well as the public were interested. While we can discover no foundation for the suggestion made by the Judge that Government officers imposed these restrictions on the ground that the hills belonged to the Crown, on the other hand there is clear and strong evidence that they believed, rightly or wrongly, that the hills in question formed part of the zamindari.

Another question raised by the Judge is whether the acts of enjoyment which have been proved in this case are acts of ownership, and he comes to the conclusion that they are only evidence of an easement, and that such enjoyment is *not* real possession. By juridical possession we understand that a person stands in such relation to a particular thing that he has in fact dominion over it, and when he and those under whom he claims have in fact exercised this dominion from time immemorial or for the period fixed by the law of prescription, he becomes the legal owner of the thing, unless private ownership in it is forbidden by law and on that account is rendered legally impossible.

Physical possession is a pure matter of fact, and there is nothing peculiar about it, but in order that it may generate owner-[303]ship, it is necessary that the possessor should hold the thing exclusively, and *for himself as owner*.

The exclusive holding is a physical fact, and when it is united with the intention to hold for himself as owner, it becomes such as will generate a title by prescription. When we speak of actual possession, we refer to the physical fact, and when we speak of adverse possession we refer to the fact as in union with the intention to hold as owner. On the other hand, when a particular act is done upon a thing with the belief that another is its owner and not with the intention to hold as owner, and when the particular act has been continuously done for the period fixed by the law of prescription, the person doing the act acquires a legal right to do that act though the thing upon which it is done is in other respects under another's dominion. It should also be observed that, when there is an intention to hold a thing as owner, it is not necessary that it should be enjoyed in any particular way, but it is sufficient that some overt act is done upon the thing in the execution of such intention. In *Clark* v. *Elphinstone* (1) it was observed by the Privy Council that it was not necessary that some act should always be done upon the spot in dispute itself, but that it was enough if some overt acts of ownership were done in relation to that spot, as, for instance, enclosing it. In principle the act done is one of ownership or evidence of easement according as the person doing it asserts general ownership or a particular right in another's property, and in the first case the act of enjoyment is designated possession and in the latter case *quasi* possession. Such being the distinction in principle between acts of ownership and acts which are done in the exercise of easements, we are unable to support the conclusion at which the Judge has arrived, *viz.*, that the appellant's rights are mere easements. It may be that specific portions of the hills were not regularly culti-

(1) L.R. 6 App. Cas. 164.

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vated but such cultivation is not necessary when other acts of ownership are done upon them. As already observed, there is evidence of acts of enjoyment done in the open assertion of title as owner, and the ayakut accounts and the special circumstances of the case warrant the presumption that such acts were done for more than sixty years, if not from time immemorial. As to the interference by officers of Government with the enjoyment by the zamindar of his rights [304] in full, there is no evidence to show that such interference was accompanied with a denial of the zamindar's right as owner. The enjoyment of any right of ownership over the soil, whether it be the cutting of timber or of turf or the gathering of produce, is *prima facie* proof of ownership of the soil, and when the District Judge found that there had been such an enjoyment of the forest as proved a title to the profits, he was logically bound to find a title established to the soil, seeing that the enjoyment had been throughout accompanied with an assertion of such ownership. We see no reason to doubt that all the hills to which the suit refers were included in, and formed part of, the zamindari as it existed in 1803 and as it had been enjoyed by the appellant's family prior to the Permanent Settlement.

Again, according to Baber, the enjoyment in this case is evidence of ownership in regard to the lower hills which he recognized as part of the zamindari, and the respondent has not appealed from this part of the decision, but the same enjoyment is shown of the whole area. Further, it is not denied by the Judge that the zamindars had the right not only to collect dues but to fell timber, and if in the exercise of this right they could destroy the hill forest, we do not see why the act of cultivating the hills with wet crops or laying out the hill regions into specific groups of fields permanently under cultivation should alone be accepted as proof of ownership. It may be that the parties in possession thought that such cultivation was unprofitable or impracticable. A defined boundary is no doubt an incident of private occupation, but the hills in dispute have defined boundaries and they have been enjoyed and at times expressly let with reference to those boundaries.

As for the cases cited by the Judge, they either do not support his view or are not on all fours with the suit before us. The contest in *Clark* v. *Elphinstone* had reference to a plot of forest-land between the conterminous private estates of which one was obtained by grant from the Crown by Wilson and Ritchie and the other by Mackenzie. There was no evidence adduced to prove that *any* overt or physical act of ownership was done upon the specific plot. It was found as a fact that no defined boundary was established by agreement subsequently to the grant. The Judicial Committee observed that there was no doubt that in many cases acts done upon parts of a tract of land may be evidence of the possession of the whole, that if a large field were surrounded by [305] hedges, acts done in one part of it would be evidence of the possession of the whole; but that that case was not upon the facts one of that class. So far it is an authority in support of the view that when a tract of land with a defined boundary has been throughout claimed as owner and acts of ownership have been done upon various portions of it, such acts of enjoyment may be accepted as evidence of the possession of the whole. It is also an authority for the opinion that there may be private ownership in forest-land and that it may be lost by virtue of adverse possession for the period fixed by the law of prescription. The Lords of the Privy Council remarked further in their judgment that in the case before them

there was no evidence of actual possession of the land then in question, nor of any overt or physical acts of ownership done upon it, and that it remained as it ever was in its forest and jungly state. The Judge seems to lay stress on this passage, but in the connection in which it occurs it imports not that any special form of cultivation is necessary but that some overt act evidencing an unequivocal intention to appropriate the land as owner is indispensable.

Another case relied upon is *Wilson* v. *Mackreth* (1) which was an action of trespass for entering on the plaintiff's land and digging and carrying away his turf and peat. The plaintiff was shown in that case to have an exclusive right to take the profit of the turf and to dig for that purpose. The question raised for decision was whether the plaintiff, who was not the owner of the soil, could maintain trespass *quare clausum fregit*. The Court of King's Bench held that he could, and observed that it was an exclusive right and not a mere right of common, that it must be taken to be a grant from the lord of the Manor who was the lord of the soil. This case certainly supports the view that the right to cut turf and the ownership of the soil may vest at one and the same time in different persons but it does not warrant any *a priori* assumption that ownership in the soil may not be acquired by prescription. *Burt* v. *Moore* (2) likewise shows only that a right to separate herbage may vest in one who is not the owner of the soil. *Ex hypothesi* these cases related to particular exclusive rights in *alieno solo* or property of which the general ownership was admittedly in another, and they do not show that ownership in the soil may not be **[306]** acquired by prescription. *Bhaskarappa* v. *The Collector of North Canara* (3) decided in substance that there could be no grant, no acquiescence in a possession unless the essential elements of possession, a fixed, a definable boundary and an exclusive possession, exist and are present to the perception of the parties, and that the *kumari* cultivation proved in that case was so precarious and unequivocal that no grant could be presumed. In this and the other Bombay cases, there are general observations as to the control which the State exercised in regard to waste land in mirasi districts prior to the British rule, and which it is still entitled to exercise in protection of its right to the revenue from land. There are also observations as to the theory of State property under Hindu and Muhammadan rule. To these we shall presently refer, but they do not show that no grant ought to be presumed when adverse possession has been proved for sixty years, and when it has been during that period repeatedly and openly alleged and even at times acknowledged to have been exercised as owner. Under the Muhammadan rule it was no doubt asserted (and it was part of the Muhammadan law as applied to infidels) that the property in the soil was in the State, but the influence of this rule was not felt practically in Tinnevelly as is shown by the fact that Tinnevelly is one of the mirasi districts in this Presidency. It is further shewn that owing probably to the distance from the capital of the Nawab of the Carnatic his authority was often ignored and even set at defiance, as will appear from the political history of the district, and detachments of troops had frequently to be sent under British officers to enforce the payment of tribute due by the turbulent Tinnevelly palayagars of that time. The probability is that the Muhammadan rule never materially influenced the notion of property which prevailed in this district during the

(1) 3 Burr. 1824. (2) 5 T.R. 333. (3) 3 B. 452.

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rule of the Pandiyan Kings and of the Nayaks. At their inception these palayagars were feudatory chieftains, but practically they were petty chiefs who paid a tribute to the central power at Madura. The Hindu traditions as shown by the immemorial existence of mirasi rights in the district have been in favour of the proposition that property is acquired by occupation as owner. Manu and other Hindu writers have rested private property on such occupation. We desire not to be understood as denying the right of the Crown to exercise a [307] control over the mirasidar's claim to waste land in order to protect its claim to the revenue which it may derive from it, and we do not think that the Crown was entitled to eject persons who had acquired a right by occupation.

The conclusion we come to is that the propositions formulated by the Judge are not warranted by the circumstances of this case.

We are of opinion that the acts of enjoyment proved in this case are acts of ownership done adversely to the respondent, and that as the adverse possession has extended to more than sixty years, the appellant has acquired a title by prescription. The appeal is allowed and the objections overruled and so much of the decree of the Judge as dismissed the claim is reversed and the claim decreed with costs in all Courts. Mesne profits will be ascertained in execution and it is to be understood that the rights of vicinage enjoyed by any raiyats are unaffected by this decree.

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PRIVY COUNCIL.

PRESENT:

Lord Monkswell, Lord Hobhouse, Sir Barnes Peacock, and Sir Richard Couch.

[*On appeal from the High Court at Madras.*]

VIZIANAGARAM MAHARAJA (*Plaintiff*) v. SURYANARAYANA AND OTHERS (*Defendants*). [10th December, 1885, and 6th February, 1886.]

Regulation XXV of 1802, Section 3—Inam—Grant by zamindar—Tenancy, not determinable at will of grantor's successor—Admission.

Regulation XXV of 1802, Section 3, imposes restrictions on alienations only to secure the interests of the public revenue, and under it the zamindar has no power to disturb grants otherwise valid made by his predecessor, or titles to inams acquired by prescription (1).

An inam, existing under grant made in 1811, became in 1863 the subject of arrangement between the zamindar, who had succeeded the grantor in the zamin-[308]dari, and the inamdars. This resulted in what was either a confirmation of the original grant on terms more favourable to the zamindar, or a new grant of an estate in all respects, save as to the rent, similar to the previously existing estate, which was a tenancy in perpetuity.

To a suit brought by certain mortgagees against the inamdars, to enforce mortgage rights existing since 1842, the defence was made that possession taken of the

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(1) See the judgment in *Muttu Vaduganadha Tevar* v. *Dora Singha Tevar*, I.L.R., 3 Mad. 290, at p. 307; L.R., 8 I.A. 99. It is there stated that this Regulation was framed with a view to the land revenue, and not otherwise to infringe on, or limit, the rights of anybody; and that in Regulation IV of 1822, there is a declaration to this effect. See also *Collector of Trichinopoly* v. *Lekkamani and others*, L.R. 1 I.A. 283. As to Section 8, that it applies only to questions between the zamindar and the Government, see *Venkataswara Yettiappah Naicker* v. *Alagoo Mootoo Servagaren*, 8 M.I.A. 327.

inam lands by the Collector in 1845 had determined the original inam rights therein, as well as the lien of the mortgagees.

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The present zamindar, son and successor of the grantor of 1863, now claiming that he had determined the tenancy by a notice to quit:

Held that the above did not operate as any estoppel as between the plaintiff and the inamdars, the zamindar not having been a party to the suit, but was only an admission, and not conclusive:

Held, also, that the tenancy was not determinable by such notice.

[R., 19 M. 100 (103); 26 M. 589 (591) (F.B.); 19 Ind.Cas. 68 (70); 19 Ind. Cas. 721 (725) = 24 M.L.J. 642 (650) = 13 M.L.T. 506; D., 12 Ind. Cas. 487 (490) = 10 M.L.T. 391 = (1911) 2 M.W.N. 406; 24 M.L.J. 405 (407) = 13 M.L.T. 293 = (1913) M.W.N. 307.]

APPEAL from a decree (1st May 1883) of the High Court (Turner, C.J., and Muttusami Ayyar, J.) reversing a decree (12th May 1882) of A. L. V. Ramanna, Subordinate Judge of Vizagapatam.

The question raised on this appeal was whether a zamindar had power to determine the tenancy, as held at his will, of a village granted as an inam by one of his predecessors to a tenant, through whom the present tenants claimed.

The suit was brought by the appellant against thirty defendants, of whom the respondents were the first eight (the others being interested as mortgagees and sub-tenants under the respondents) to recover the village of Buradapeta as part of the jiraiti lands of his zamindari, Vizianagaram. He also claimed balance of katubadi for the fasli years 1289 and 1290, the entire of that for fasli 1291, costs and interest.

It was alleged, among other defences, that the village had been granted to the defendant's ancestor as a permanent inam by the Maharaja's predecessor in the zamindari, and was so held by the present tenants.

Buradapeta was granted in 1811, by the Maharaja of the day, in lieu of another village Malliada, which had been granted in 1802 in lieu of village Chetanapalli, granted as an inam by the Raja Narayana Gajapathi Raz, 1797, to Pidaparti Sitarama Sastri. whose descendants were now shareholders in the tenancy of the village Buradapeta, principal defendants in this suit, and now respondents.

On Sitarama's death in 1842 his sons effected a partition, and mortgaged parts of the village to persons styled Durivar on the record, who held the mortgaged lands in usufruct till the death in **[309]** 1845 of the Maharaja above-named. He was the present appellant's grandfather. On his death the Collector took possession of the zamindari, including the lands subject to the inam in question, the succeeding zamindar, appellant's father, being absent at Benares. The village remained zuft, or attached. In 1850 Appayya Dikshatar, the second son of Pidaparti Sitarama, took a lease of it for three years at a rent, executing a kadapa to the Collector, who executed to him a kaul. Afterwards, in 1863, the petitions were presented and the documents executed, as set forth in their Lordships' judgment. The appellant succeeding to the zamindari, on the death of his father in 1879, called on the respondents to execute fresh engagements, which they refused to do, with the result that notice to quit was given, and the present suit was brought. The Subordinate Judge found that, at the permanent settlement, the village, Buradapeta, was included in the assets of the Vizianagaram zamindari, the ancestral estate of the plaintiff. He was of opinion that the grant of 1811 had come to an end in 1845, when the Collector took

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possession. The grant of 1863 was, according to his judgment, a new grant resumable at will; and at all events not binding on the plaintiff, whose rights were distinct from those of his father, at whose death in 1879 the cause of action accrued. A decree was accordingly made in favour of the plaintiff, with costs. This judgment was reversed, on appeal to the High Court, by a Divisional Bench. After stating the facts, which are repeated in their Lordships' judgment precisely as stated in that of the High Court, the judgment continued thus:—"The Subordinate Judge holds that the inamdars were not in possession in virtue of their inam right from 1853—1863, that in 1863 a new grant was made to them and that, in view of their pleadings in the mortgage suit, they are not entitled to deny that it was a new grant. He also holds that the new grant was resumable at pleasure, that, if it was not so resumable, it was not made for any of the purposes recognized by Hindu law and the zamindari regulations as rendering it binding on the zamindar's successors; and that, if the original grant subsisted after 1863, the position of the respondent, similarly to that of the Zamorin, entitled him to repudiate grants made by his predecessor, unless it was shown that such grants were made for the benefit and improvement of the estate.

"We may deal first with the last reason assigned by the **[310]** Subordinate Judge in support of his decision. The Maharaja is a nobleman whose family, prior to the introduction of British rule, no doubt exercised, from time to time, certain rights of sovereignty over more or less extensive territories. On the introduction of British rule the sovereignty over the territory, in which the estate of the Maharaja's ancestors were situated, passed to the Crown. The difference between the respondent and the Zamorin is that the personal law of the former is Hindu and the latter Malayalam, and even under the Malayalam law the Zamorin would not be entitled to dispute grants made by his predecessors to which, if originally invalid, the holders had acquired a prescriptive title. This case falls to be decided in reference to the personal law of the parties—that is, the Hindu law and the Common and Statute Law of British India.

"We may next dispose of the contention that the appellants, in view of their pleadings in 1866, have no right to assert that the arrangement in 1863 was other than they then alleged it to have been. The Subordinate Judge appears to have considered, though he does not say it distinctly, that the appellants are estopped from so doing. The allegations made by the appellants in 1866 in a suit to which the respondent was not a party, may, no doubt, be used as evidence of admissions made by the appellants, but they do not estop them from asserting as against the respondent that these admissions were inaccurate. We are then at liberty to consider what was the real nature of the arrangement in 1863. On this point, with all respect for the opinion of the learned Judges who decided the Appeal R. A., 22 of 1869, we find ourselves unable to agree with the view they expressed. The inams had been arbitrarily attached as resumable in 1845 under a misapprehension of the law. The right of resumption was questioned; the revenues of the inams had been applied to satisfy the arrears of revenue due on the zamindari, on the understanding that the amount appropriated would be repaid if the attachment was released. In 1853, a temporary concession was made to the inamdars with which they were not satisfied: the village was still held zuft or attached, pending the settlement of the dispute, until in 1863 the Maharaja finally came to an arrangement with the inamdars. Reading the petitions and orders together,

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it appears that the inamdars on their part offered not indeed to forego their claim on the misappropriated income, but to consent that it should [311] be set off against such gifts as were ordinarily made to noblemen in India by their tenants and dependents and to pay an increased quit-rent, and this surrender of rights asserted by them they offered on condition that the grant should be reinstated.

"They subsequently offered to pay quit-rent at the rate at which it had been paid from 1853 to 1863, and there can be little doubt this was the result of a negotiation. Possibly, the inamdars were influenced to offer these terms by reason that a decision, unfavourable to certain grantees in the same zamindari, had been then recently pronounced on an erroneous view of Regulation XXV of 1802.

"On the other hand, the late Maharaja, reciting the grant by his father and the attachment of the village and the terms of the adjustment at which the parties had arrived, accepted the terms offered and directed his officer to put the zuft lands in possession of the inamdars—in other words, to take off the attachment which had so long subsisted, for the lands were at the time in the possession of the inamdars or of their tenants. It is true that in accordance with a common practice in this country, the applications were made by the leading members only of the two branches of the family of the original inamdar; but it would be unsafe to infer from this circumstance that the right was recognised as abiding only in the petitioners, or that it was intended that they, and not the other members of their respective families, should be benefited. The terms 'be bound to obey the orders of the circar,' from which the Subordinate Judge infers a tenancy at will, are no more than the common words in which a tenant professes his respect for his superior lord.

"It is noticeable as suggesting that the zamindar's agents may have had some part in negotiations before the presentation of the first petitions in 1863 that both in those petitions and in the Maharaja's orders the grant of Buradapeta is expressly declared to have been made after the permanent settlement. It has now been shown that the grant in 1811 was but an exchange of lands for lands granted in February 1802, and the grant of 1802 an exchange for lands granted in 1797 and 1800, so that the right to resume might fairly have been questioned even on the view then taken of the Regulation. However this may be, it cannot be denied that the parties to the documents of 1863 intended thereby to effect a settlement of the then long-pending dispute, and we [312] feel constrained to hold, on the construction of those documents, that the arrangement resulted in a confirmation of the original grant, on terms more favourable to the zamindar. If, however, the arrangement is to be regarded as a new grant, construing the documents in the light of surrounding circumstances, we hold that it was intended to be the grant of an estate in all respects, save the amount of quit-rent, similar in tenure to that which had been created by the grant of 1811, namely, a tenure in perpetuity. Such an arrangement, made by a Hindu father to put an end to a *bona fide* dispute, would be equally binding on a Hindu son, whether the estate of which the land granted formed part was of the tenure known as Raj or an ordinary tenure. The appeal must be decreed, the decree of the Court of First Instance reversed, and suit dismissed with costs."

On this appeal, Mr. *J. D. Mayne* and Mr. *G. P. Johnstone*, for the appellant. The questions are whether (1) the High Court has taken a correct view

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of the state of things subsisting between the zamindar and the lessee in 1863; and whether (2) assuming that view to be correct, and the lease given in 1863 to have been a new transaction, it is binding on the present Maharaja, who was then alive, and whose interest, as a son, could not be alienated by his father. The grants of 1792, of 1802, and of 1811 were not pious grants; and, as to the first question, the effect both of the acts of the parties, and of the proceedings of the revenue officers, before 1863, was that the estate granted in 1811 had, in 1863, been brought to an end. In 1845 the Collector had taken possession of the inam lands and the lease made in 1863 was neither by way of compromise, nor made in terms of the prior grant. It is not to be construed as continuing the former grant, and what its words do not involve cannot be understood from the circumstances.

It was made and accepted as a new grant, of a purely voluntary kind, for purposes which did not give rise to any obligation on the succeeding Maharaja to abide by it. So that considering that those who had originally been inamdars were out of possession between 1845 and 1863, coming in at the end of that time after the direct management of the Collector, they must have come in under a title different from their old one. And on the part of the case, the point of limitation, or the accrual of a title in the zamindar by non-claim in the part of the inamdars, might have **[313]** been taken for the plaintiff. [Their Lordships intimated that this latter contention was not now open to the appellant.] Still it may be contended that acceptance of the lease, which might have been refused in 1863, altered the tenure, the other circumstances also showing that the parties had got rid of the grant of 1811, which they treated as non-existent. Besides other acts which should estop them from setting up the original inam, the tenants came in under a right which absolutely contravened their old title. They are not now in a possession to set it up.

As regards the second point, all that the grantor in 1863 was capable of transferring could not carry with it the alienation of the interest already, under the Mitakshara law, vested in his son. The arrangement of 1863 is, therefore, not binding on the appellant, besides, on its true construction, creating no more than a tenancy at will. Reference was made to Madras Regulation XXV of 1802, Section 3—*Bilasmoni Dasi* v. *Raja Sheopersad Singh* (1).

The respondents did not appear.

On a subsequent day (6th February 1886), their Lordships' judgment was delivered by

SIR RICHARD COUCH.—The question in this case is whether the respondents are entitled to hold the village of Buradapeta, in the principality of the appellant, as tenants in perpetuity at a rent of Rs. 253-6-7, under a grant made by the appellant's father in 1863, a suit to recover the village having been brought by the appellant on the ground that he had, after his father's death, determined the tenancy by a notice to quit. The facts of the case, as proved by the evidence in the suit, are stated in the judgment of the High Court.

In 1794, Viziaram Raz, zamindar of Vizianagaram, the ancestor of the appellant, took up arms against the Government, and was defeated and slain at Padmanabham. His son, Narayana Gajapathi, then a youth of sixteen years of age, fled to the hills; but in 1797 came in and surrendered himself, and, on payment of a heavy fine, was allowed to resume possession

(1) 9 I.A. 33=8 C. 664.

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of his raj. Probably, out of his gratitude for his good fortune, Narayana Gajapathi at once created several inams in favour of Brahmans and his dependents. Among others, one Pidaparti Sitarama Sastri, the ancestor of the respondents, received in 1797 a lease, expressed in the terms of a [314] pious gift, of certain lands at Chetanapalli to be held by him and his heirs from generation to generation, subject to an annual quit rent of Rs. 50, and in 1800 the same grantee also received other lands in the same village to be held with the lands formerly granted on payment of a quit-rent increased by Rs. 100, which was reduced shortly afterwards to the extent of Rs. 50.

In 1802 the Permanent Settlement was introduced, and the villages of Chetanapalli, Malliada, and Buradapeta, were included in the assets of the zamindari.

Early in 1802 Narayana Gajapathi Raz conferred on Sitarama lands in Malliada in lieu of those held by him in Chetanapalli, and in 1811 he conferred on him the village of Buradapeta, to be held in lieu of the lands in Malliada at a quit-rent of Rs. 45 by the grantee and his heirs from generation to generation "for the satisfaction of Sri," the expression usual in cases of pious gift.

On Sitarama's death, his sons Seshadri and Appayya made a partition of the village in March 1842, and, to discharge outstanding debts due by the family, each of the brothers made a usufructuary mortgage of his share for Rs. 4,000 to the Durivar family. Narayana Gajapathi Raz was unable to live within his means, and, on more than one occasion, it was necessary for the Government to take charge of his revenues. Eventually he died at Benares, leaving large debts.

At that time, owing to a misconception of a provision in the Regulations, which was intended for the security of the land revenue, it was believed by some officers that grants made by a zemindar were generally resumable by his successor.

It appears from Proceedings of the Government, dated 30th January 1853, that on receipt of the news of Narayana Gajapathi Raz's death, "the Board of Revenue directed the Governor's Agent, who was in charge of the zamindari, to adopt all measures in regard to resumptions of inams and shrotriems to which it would be legal and proper for the late Raja's successor to have recourse," and that the Agent, in anticipation of such instructions, had already issued orders for the attachment of all lands conferred by the late Raja, subsequently to the Permanent Settlement, whether agraharams (grants made to Brahmans), mokhasas, or other inams. It also appears that in 1848 the Agent "requested permission to employ the collections derived from the attached lands for the liquidation of the public debt of the [315] zamindari, and offered suggestions for the settlement of the claims of the ousted inamdars," and "that the Government while considering this money available for the purpose agreed with the Board of Revenue that the claims of the parties who had been dispossessed called for further inquiry, and only permitted the Agent to employ the collections as a present recourse on the distinct understanding that the sums appertaining to such of the inams as might be eventually restored should be repaid from the zamindar's treasury." It further appears that it was reported to the Government in 1852 that the lands attached in 1845 consisted of 87 villages and 184 detached plots bearing a gross assessment of Rs. 83,312, from which sum quit-rents of Rs. 6,839 being deducted, a sum of Rs. 76,473 represented the net income of which the grantees were deprived. It was also reported that the

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zamindar wished to resume the whole of the lands attached indiscriminately, and to grant compensation in certain cases by money allowances, and that the collections derived from the attached lands up to the end of fasli 1261 (1851-52) amounted to 3 lakhs, of which Rs. 2,40,000 had been devoted to the liquidation of the public debt.

The condition of the dispossessed mokhasadars and inamdars, in the opinion of the Commissioner for the Northern Circars, Mr. Walter Elliot, demanded great consideration, and, while he believed the zamindar was empowered, under Regulation XXV of 1802, Section 3, to resume lands alienated by his father, he urged him to deal liberally with the inamdars. The Governor in Council, in Minutes of Consultation recorded on Mr. Elliot's report, said the Government felt "themselves bound to express their disapproval of resumptions and the substitutions of money allowances (except with the full consent of parties interested) when there has been long possession such as gives all persons a legal title by prescription. It would be an injustice such as they could not sanction where such prescriptive right as is recognized by Hindu law may have been in existence by an unquestioned and undisturbed enjoyment for many generations. The Governor in Council could not view such resumptions as other than a spoliation, which should not be carried out, as interfering with the peace of the country for which the Government are responsible." The Governor in Council also expressed doubts as to the soundness of Mr. Elliot's opinion as to the effect of Regulation XXV of 1802, Section 3, **[316]** and intimated that the true construction of the Rugulation was probably that which has been since adopted by this Committee, namely, that it imposed restrictions on alienations only to secure the interests of the public revenue, and that the zamindar would have no power to disturb grants otherwise valid, made by his predecessor, or titles to inams acquired by prescription. Considering the prompt and liberal settlement of the claims of the dispossessed grantees essential to the tranquillity of the country, and having been informed that the zamindar was willing to abide by the opinion of the Government, the Governor in Council desired the Commissioner and Special Agent at Vizagapatam to consider themselves empowered to use the name and authority of the Government in impressing upon him the absolute necessity of at once entering into a liberal and just settlement of all the claims. It was ordered that the views entertained by the Government should be communicated to the zamindar.

It appears that in 1850, during the dispossession, Appayya, one of the sons of Sitarama, took a lease of Buradapeta for three years at an annual rent of Rs. 650. On the termination of this lease, the late Maharaja directed his agent to collect from the Buradapeta raiyats the quit-rents then existing, and a quarter of the gudikattu daul (the entire assessment), and payments were made on that footing up to 1863, the village still being regarded as attached. The dispute relating to the propriety of the resumption was still subsisting, and it seems probable that a settlement was delayed by the provision which, in 1847, the Government had made for the protection of the inamdars, that the income of any inam appropriated for the liquidation of arrears of revenue in the zamindari should be repaid from the treasury of the zamindar on the restoration of the inam.

However this may be, in 1863, the eldest sons of Seshadri and Appayya each presented to the late Maharaja a petition respecting the moiety of

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the village which had fallen to his branch of the family in the following terms :—

"Darkhast (application) presented by Pidaparti Suryanarayana, agraharamdar of Buradapeta, *alias* Lakshminarayanapuram agraharam attached to Vizianagaram thana.

"The said village which was granted to my paternal grandfather, Pidaparti Sitarama Sastrulu, by Sri Narayana Gajapathi Razu Maharazulungaru subsequent to the settlement, having been **[317]** after (the time of) the donor attached by the then Collector, still continues under attachment. The same not having been as yet released from attachment, I have been suffering much.

"I therefore humbly submit as follows :—

"In the event of Your Highness being graciously pleased to take all the money collected from the said agraharam during its attachment up to the end of fasli 1272 on account of your installation and other nazars (presents), and to grant me my share of lands in that agraharam from fasli 1273, I shall pay the katubadi fixed by Your Highness and enjoy the remaining income, and be bound by the Circar orders.

"I, therefore, pray that Your Highness will be graciously pleased to restore the said agraharam and protect (me).

"18th July 1863."

Upon these petitions, the Maharaja issued an order to each of the petitioners which differed only in the amount of the rent. In one, it was Rs. 115-3-0 and in the other Rs. 138-3-7, the total rent of the village being Rs. 253-6-7 instead of Rs. 45 under the grant made in 1811. The order is as follows :—

"Buradapeta, *alias* Lakshminarayanapuram agraharam, attached to Vizianagaram thana, which was favoured by our father subsequent to the settlement, being under attachment, it was settled that you should for the 4½ vruttis of land in your holding in that village pay, out of Rs. 691-3-0, being the gudikattu daul (the entire revenue) thereof, Rs. 115-3-0 inclusive of Rs. 22½ katubadi in existence prior to the attachment, and enjoy the remaining income, and that the said village should be placed under the head of zuft villages. While such state of things continued, you submitted to our huzur on the 18th instant, a sanad (petition) requesting, among other matters, that the land might be restored to you, the said amount itself being fixed as katubadi, and that you will continue to enjoy the said 4½ vruttis of land, paying every year the said katubadi, and be bound by the Circar orders. Being moved to show you favour, we have issued orders this day to the thana Amin to put the attached lands in your possession from the current fasli 1273, subject to the katubadi of Rs. 115-3-0 (Rupees one hundred and fifteen and annas three). You shall accordingly take possession, pay the said katubadi of Rs. 115-3-0 duly every year, and be bound by the Circar orders."

Thereupon each of the petitioners executed sanads engaging **[318]** to pay the rent and "act up to the orders of the Circar," and they were put in possession of the village.

The Maharaja died in 1879, and was succeeded by the appellant. In 1881 the appellant called on the respondents to execute fresh engagements, undertaking to pay such rent as he might fix, and on their refusal notice was given them to quit the village on the 1st July 1881, which they refused to do.

Before stating their opinion on the main question, their Lordships will dispose of another question which was raised. In 1866 the

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Durivar mortgagees sued the inamdars to enforce the mortgages executed in 1842. The inamdars pleaded that the mortgaged lands having been resumed in 1845 by the Collector, the original right possessed by them therein and the mortgage lien of the plaintiffs thereon had ceased to exist. The suit was dismissed by the First Court, and their decree was affirmed on appeal. As the Maharaja was not a party to the suit, this plea does not operate as an estoppel, but is only an admission and not conclusive. This was so held in the present suit by the High Court, which then proceeded to consider the real nature of the arrangement in 1863, and held that it resulted in a confirmation of the original grant on terms more-favourable to the zamindar, that if the arrangement was to be regarded as a new grant, it was intended to be the grant of an estate in all respects, save the amount of quit-rent similar in tenure to that which had been created by the grant of 1811, namely, a tenure in perpetuity.

Their Lordships think the latter is the correct view, but the difference is not material in this suit, where the question is whether the tenancy could be determined by the notice to quit. The circumstances under which the applications to the Maharaja and his reply were made are to be considered. He was, doubtless, aware of opinion of the Government. The inamdars had not relinquished their rights under the grant of 1811. The effect of the attachment in 1845, and the subsequent transactions was at least doubtful, and the inamdars had a claim to have the collections repaid to them from the zamindar's treasury. In the application to the Maharaja, the applicant is described as agraharamdar of Buradapeta, and it is proposed that the Maharaja shall take all the money collected during the attachment on account of his installation and other presents. It is prayed that he will be pleased to restore the said agraharam. This meant more than becoming [319] yearly tenants, and when the Maharaja replied that they were to take possession, and ordered it to be given to them, he, in their Lordships' opinion, intended that they should hold the agraharam at the increased rent, in the same manner as they had done before the attachment. And it was admitted by the appellant's counsel that the Maharaja had power to do this. Their Lordships will, therefore, humbly advise Her Majesty to dismiss the appeal, and to affirm the decree of the High Court dismissing the suit.

Solicitor for the appellant: *R. T. Tasker.*

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9 M. 319.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

GOMPERTZ (*Plaintiff*), *Appellant v.* GOLDINGHAM AND OTHERS (*Defendants Nos.* 1, 2, 4, 7 *and* 8), *Respondents.**
[14th and 26th January, 1886.]

Club—Expulsion of member by committee—Audi alteram partem.

G, having been expelled from a club by the committee on the ground that he had published a certain pamphlet which was considered to be a libel by the committee, sued the members of the committee for damages and to have his name replaced on the list of members. It was proved that, in considering G's conduct

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* Appeal No. 82 of 1885.

with reference to the publication of the pamphlet, the committee took into consideration certain letters which G had written to certain members of the committee and that his expulsion was partly for printing the pamphlet and partly for writing the letters: 1886 JAN. 26.

Held, that as the decision of the committee was arrived at *bona fide*, the Court had no right to decide whether the pamphlet was or was not a libel. APPELLATE

Held, further, that as G had no opportunity for defending himself on the charge of writing the letters, his expulsion was illegal. CIVIL.

[Appr., 23 B. 122 (129); R., 11 B. 534 (536); 24 B. 13 (22); 10 M. 133 (144).] 9 M. 319.

APPEAL from the decree of W. F. Grahame, Acting District Judge of Cuddapah, in Suit No. 12 of 1884.

The plaintiff sued the defendants for Rs. 500 damages for removing his name from the list of members of the Bellary Club, and to obtain an order that his name should be restored to the said list.

The defendants were the committee of management of the club.

[320] Defendants 2—7 pleaded, *inter alia*, that the plaintiff was expelled from the club for publishing and circulating, in the form of a printed pamphlet, correspondence between himself and the committee, prefaced by remarks of a very objectionable character, such conduct being, in the opinion of the committee, calculated to disturb the order and harmony of the club and injurious to its interests and character.

The suit was dismissed with costs.

Plaintiff appealed.

The facts necessary for the purpose of this report appear from the judgment of the Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.)

Mr. *Norton*, for appellant.

Mr. *Branson*, for respondents.

JUDGMENT.

Judgment was delivered by

COLLINS, C. J.—After setting out the evidence in detail, the judgment proceeded as follows:—

At the hearing of this appeal, the counsel for the appellant abandoned the appellant's claim for damages and abandoned also the third, fourth and sixth grounds of appeal, and he rested his contention that this appeal ought to be allowed on four grounds—

(1) That the committee which expelled him from the club was not duly constituted as directed by Rule V.

(2) That the action of the committee was illegal and without reasonable and probable cause and otherwise than *bona fide*.

(3) That the appellant had no opportunity of explaining his conduct.

(4) That the committee expelled him, not for printing and publishing the pamphlet only, but for printing and publishing the pamphlet and for writing the letters of the 13th February to Major Chard and Colonel Smith.

Rule 5, Section 1, provided that the affairs of the club shall be managed by a committee of seven members, to be elected as vacancies occur, or annually at a general meeting held on the third Friday in February. Section 4 provides that immediately on a vacancy occurring in the committee, a general meeting shall be called by the Secretary to elect a fresh member. Reading the two sections together, we cannot say that the words in Section 1 may not bear the construction suggested for the respondents that the words "or annually at a general meeting held on the third Friday **[321]** in February" suggest only an alternative. It must also be noted

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that there is no provision made for the re-election of out-going members as is usually the case when an annual election is made compulsory. Furthermore, the practice of the club has been in accordance with that construction, and, as the words are capable of bearing it, it must be accepted as the true construction. The first contention therefore cannot be supported. We have now to consider the other objections taken by the appellant, and it must be borne in mind that we have no right to sit as a Court of Appeal upon the decision of the members of a club duly assembled. We refrain from passing any opinion whether or not the preface of the pamphlet contained a libel. If two-thirds of the committee came honestly to the conclusion that the publication and circulation of that pamphlet was injurious to the character of the club or likely to disturb the harmony of the club, they had the power to decide whether the offender, *i.e.*, the publisher and circulator of that pamphlet, merited expulsion, and we are far from saying that it is impossible that reasonable men could not come to the conclusion at which the committee arrived in this case, and we have no doubt that they acted as they believed in the interest of the club and in perfect good faith. But before they could expel they must hear the accused. "No proceeding," says Lord Denman in the case of *Innes* v. *Wylie* (1), "in the nature of a judicial proceeding can be valid unless the party charged is told he is so charged, is called on to answer the charge, and is warned of the consequences of refusing to do so."

The late Chief Baron Kelly, in *Wood* v. *Wood* (2), lays down this rule of law thus: "The committee are bound in the exercise of their functions by the rule expressed in the maxim *audi alteram partem* that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence." This rule is not confined to strictly legal tribunals but is applicable to every tribunal or body of persons invested with authority to adjudicate "upon matters involving civil consequences to individuals." And, again, in *Dawkins* v. *Antrobus* (3), Brett. L.J., says: "If a decision is come to depriving a gentleman of his position on such a charge **[322]** as must be made out here, *viz.*, that he has been guilty of conduct injurious to the character and interests of the club, in my opinion there would be a denial of natural justice if a decision was come to without his having an opportunity of being heard." We are of opinion that Mr. Gompertz had ample notice of the charge made against him with regard to publishing and circulating the pamphlet. The proceedings at the meeting of the 23rd February 1884 made it clear to him that if he did not retract the statements contained in the pamphlet and apologise for the circulation of the same, the committee of the club would take action under Rule 6. There is also his statement to the Honorary Secretary that if he felt an apology was necessary, he would submit it to the Committee the following day. He did write a letter, dated 24th February 1884, which the committee decided to be insufficient. He had also the letter of the 25th February 1884 from the committee, which tells him in express terms that unless he retracts the libellous insinuations contained in the printed pamphlet, and apologises for having made and circulated the same, his name will be removed from the club. He takes no notice of this communication and his name is accordingly removed. We are therefore of opinion that he had ample notice that the committee of the club objected to the

(1) 1 C. & K. 263. (2) L.R. 9 Ex. 196. (3) 17 Ch. D. 615.

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publication of the pamphlet in question, and that if he did not withdraw the statement and apologise, they would exercise the powers conferred on them by the club under Rule 6. Mr. Gompertz says that he sent no answer to the letter from the committee, of the 25th February, because he thought that letter was extremely insolent and that silent contempt was the only possible reply. But it is urged that the appellant was not expelled for publishing and circulating the pamphlet only. It is said that the letter to Major Chard from the appellant, dated 15th February 1884, and also the letter to Colonel Smith, of the same date, had a great effect on the minds of the Committee and contributed materially to plaintiff's expulsion, and that appellant had no notice of that fact and was never called upon to explain or to withdraw those letters. We find that on the 18th February 1884 the committee were considering two grounds of complaint against appellant—his conduct in relation to the letter put in by Major Chard complaining of the "gross rudeness" on the part of the Honorary Secretary, and also Mr. Gompertz's libel contained in the printed pamphlet.

[323] Mr. Goodrich, a member of the committee, says in his evidence that the letter written by plaintiff to Major Chard (Exhibit I) was a part of the whole case and was taken into consideration in dealing with appellant's conduct all through; "we considered on the 25th February that it any single member of the club persisted in any line of conduct when called upon to abandon that line of conduct by almost every other member present at the General Meeting of the club, his membership cannot conduce to the harmony of the institution." The effect of the appellant's letter to Colonel Smith was apparently very unfavourable to the appellant, for Colonel Smith says: "I see the paper shown me (the pamphlet). I received a similar one on my returnfrom the camp of exercise on the 19th February this year, I received a letter from plaintiff along with this paper. I tore up the letter and the paper, as I thought it was such a damned piece of impertinence in the gentleman who sent it to me. I recollect I was addressed as then being a member of the committee. I do not recollect the contents of the letter. I thought it to be a piece of impertinence. The letter was impertinent in addressing me in that manner in connection with the pamphlet as regards the affairs of the club. The impression that the letter and pamphlet were calculated to produce on me was most unfavourable as regards the plaintiff's conduct in the first instance. I see Exhibit I. This is the letter to Major Chard. The committee took the letter into consideration before the General Meeting." And Major Chard says, in his evidence, "we took into consideration the libellous language especially in the preamble of this the appellant's pamphlet *and in the letter addressed to me*, and the two opportunities we had given him to retract and apologise." Major Chard was then asked what was the purpose of the letter, and the answer was to influence him as a member of the committee. "I consider (he says) the whole of plaintiff's conduct as against preserving the harmony of the club. The committee expelled the plaintiff after due consideration of the plaintiff's conduct." Surely the appellant ought to have been told the effect these letters were having upon the mind of some at least of the members of the committee. The evidence of these three gentlemen makes it clear to us that the appellant was expelled partly for printing and circulating the pamphlet and partly for writing these letters to Major Chard and Colonel Smith, and there is no evidence to show that his attention was directed to **[324]** anything but the pamphlet. The learned counsel for the respondents drew our attention to the fact that the appellant knew that his letter

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to Major Chard was laid before the committee, but that is not enough. Now, bearing in mind the rule of law so clearly laid down in *Innes* v. *Wylie* (1) by Lord Denman, C. J., and in *Wood* v. *Wood* (2) by Kelly, C. B., we have come to the conclusion that the appellant had no opportunity of defending himself against this particular charge. Indeed, as far as we can judge, he did not know that the writing of these letters was a part of the charge against him. We believe that the committee were acting according to the best of their judgment, but they have made a mistake, and they have expelled the appellant from the Bellary Club partly on a charge which, if they had considered the matter, they would have found had never been brought to the appellant's notice. Upon this ground and this ground alone, we are of opinion that the appellant is entitled to succeed in his appeal. We therefore reverse the decision of the Lower Court and declare that the appellant was wrongfully expelled by the defendants, and we order the defendants to restore his name to the list of members of the Bellary Club.

We have now to consider the question of costs, and we bear in mind that the third point taken by the counsel for the appellant and the only point on which he succeeds was taken for the first time at the hearing of this appeal. It does not seem to have been brought to the notice of the Officiating District Judge. We think it right under all the circumstances of the case to order that each party pay their own costs in the District Court, but, as the appellant has succeeded in the appeal, we give him the costs of the appeal.

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9 M. 325.

[325] APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

KUMARASAMI (*Plaintiff*), *Appellant v.* SUBBARAYA AND OTHERS (*Defendants*), *Respondents*.* [22nd and 30th March, 1886.]

Will—Construction—Trust—Uncertainty.

A Hindu by his will, after appointing certain persons executors for the purpose of managing his estate after his death, gave them the following directions :—

"You should give my brothers, their wives and children, according to your wishes" :

Held, that no trust was created by these words.

APPEAL from the decree of Kernan, J., in civil suit No. 70 of 1884.

The facts are fully set out in the judgments of the Court (BRANDT and PARKER, JJ.).

Mr. *Grant*, for appellant.

The Acting Advocate-General (Hon. Mr. *Shephard*), for respondents Nos. 3 and 4.

Mr. *Branson*, for respondent No. 6.

Mr. *Shaw*, for respondent No. 7.

JUDGMENT.

PARKER, J.—The plaintiffs are two of the brothers of the late Krishnasami Mudali, who died on 21st September 1882. His executors

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* Appeal No. 25 of 1885.

(1) 1 C. & K. 263.

(2) L.R. 9 Ex. 196.

having renounced their office by a deed, dated 24th March 1883, administration with the will annexed was, with the plaintiff's consent, granted to the defendant No. 1 in British Burmah. The will bears date 11th September 1882, and the present suit is brought by the plaintiffs to have the trusts of the will carried out under the direction of the Court.

The testator made several bequests by his will and gave several directions as to his property, but there was no bequest to the executors, nor did they take any benefit under the will. The clause in the will which has led to the present litigation runs as follows:—"You should "give my brothers Kumarasami Mudaliar, Subbaraya Mudaliar, and "Vyapuri Mudaliar, their wives and [326] (sons) children according to "your wishes. You should defray the expenses of the marriages of "Ramasami Mudaliar's four daughters. You should pay for the education, "&c., of the aforesaid person's two sons what may be required."

The learned Judge (Kernan, J.) held that as regards the residue of the estate after provision made for the marriage of Ramasami's four daughters and the education of his two sons, a trust was created by the will for the three brothers of the deceased (plaintiffs Nos. 1 and 2 and defendant No. 1) and their wives and sons, and therefore declared them entitled to one-third each, but subject nevertheless as to plaintiff No. 1, to pay one-third of his share to his son and one-sixth to his wife; and subject as to defendant No. 1, to pay one-third of his share to his son. Plaintiff No. 2 being unmarried, was declared entitled to one-third absolutely.

The appeal against this decree is preferred by the plaintiff No. 1. It is contended for him by Mr. Grant that no precatory trust was created by the will; that the clause as to the gift to the three brothers, their wives and sons was void for uncertainty, and that the Court should have held there was an intestacy as regards the residue of the estate; and that even if there were a trust, the Court should have followed, in making the distribution, the principles of Hindu and not of English law, and divided the property equally among the three brothers for the benefit of whom and of their Hindu families the bequest was intended.

The Advocate-General for the wife and son of plaintiff No. 1 contended that the words were sufficiently definite to create a trust, and that English principles of distribution would apply even though Section 179 of the Indian Succession Act was not applicable. Though his clients did not appeal, they might, he urged, have been entitled to share equally all round, although the learned Judge had ordered distribution *per stirpes*.

Mr. Branson and Mr. Shaw for the two minor sons of the late Ramasami supported the contention of plaintiff No. 1 that there was an intestacy as to the residue of the estate, but urged that in that case they were entitled to share as the representatives of a deceased brother as well as the three surviving brothers of Krishnasami.

It appears to me that the words "You should give . . . . according to your wishes" are not sufficiently imperative and too [327] uncertain and general to create an implied trust. The words express a wish only and not a command, and though they indicate the objects intended for the testator's benevolence, they are uncertain both as to the property and the way in which it shall go. (*Vide* Lewin on Trusts, 7th Ed., Chapter VIII, Section 2, and notes.)

As the words stand, the only persons who could exercise the power given by this general direction are the executors named by the will; but they have not exercised it, and they have renounced the only character in which it was competent for them to exercise it. (*Vide* Williams on

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Executors and Administrators, Vol. I, page 290.) In such a case the Court will not take upon itself to execute the power (*Keates* v. *Burton*) (1). I would not attach importance to the omission of the will to bequeath the residue of the estate to the executors, for the same formalities cannot be looked for in a Hindu as in an English will. Had the executors proved, the estate would have vested in them, and they could have exercised the power. But they have not chosen to act, and the Court cannot act unless the power is coupled with a trust (*Brown* v. *Higgs*) (2), and a trust is not created unless the words are imperative and the subject and objects are certain (*Knight* v. *Knight*) (3). Even had the estate been bequeathed to the executors and vested in them on probate, it seems very doubtful whether these words could have been construed as creating a trust for the benefit of the three brothers of the testator and their families over the whole of the residue of the estate (*Mussoorie Bank* v. *Raynor*) (4). If the words communicate a mere discretion no trust will arise (Lewin, 7th Ed., Chapter VIII, Section 2 (7) and notes), and in this case there is nothing whatever to show what would have been a sufficient compliance with the direction.

With all deference therefore to the learned Judge, I am of opinion that no trust is created by the words "You should give my brothers . . . . their wives and sons according to your wishes;" and that there is consequently an intestacy as regards the residue of Krishnasami's estate after the other directions of the will have been complied with.

The other directions of the decree, save as to costs, should be **[328]** confirmed and the costs of this appeal and of the suit should, I think, be paid out of the estate.

BRANDT, J.—The material portions of the will made by M. I. Krishnasami Mudali on the 12th April 1879 are as follows: "I have appointed," three persons named, "executors for the purpose of conducting matters after my death according to what is mentioned hereunder in regard to all my self-acquired moveable and immoveable property."

"With the income from my landed property, food (boiled rice) should be given to ten persons daily in Kodumbaukum garden. I should be buried in the said garden."

"One day's Oobhayam or service in the year shall be performed during the Arunachala Eswarar's Covil Vasantha Ootchavam in the place adjoining Chengah Bazaar within one hundred rupees."

"You should give my brothers Kumarasami Mudaliar, Subbaraya Mudaliar, and Vyapuri Mudaliar, their wives and (sons) children according to your wishes. You should defray the expenses of the marriages of Ramasami Mudaliar's four daughters. You should pay for the education, &c., of the aforesaid person's two sons what may be required."

"Rewards shall be given to servants, &c., according to what is mentioned in the list annexed hereto. The debts due to me shall be collected and recovered, and the debts due by me shall be paid off."

"In this manner do I write and leave the will, while in the enjoyment of good memory and in the presence of witnesses mentioned herein."

The executors having disclaimed probate of the will, did not exercise the powers given under the will, and letters of administration with copy of the will annexed were granted by this Court to the two plaintiffs and defendant No. 1 on the 7th January 1884; and the present suit was

(1) 14 Ves. 434. (2) 8 Ves. 561 (569). (3) 3 Beav. 148. (4) 4 A. 500.

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brought by the plaintiffs, who prayed that the estate of the testator and the trusts of the will be administered by this Court, and the rights of the plaintiffs and defendants be ascertained and declared, and for the taking of accounts, appointment of a receiver, &c.

The learned Judge (Kernan, J.) before whom the question which we are now called to consider, came for disposal, held that [329] the executors having renounced and not exercised the powers given to them by the will, could not exercise the power given to them only as executors, though specially named as executors,—the power, that is to say, appearing to be expressed in the clause of the will "you should give my brothers . . . . . their wives and children according to your wishes;" but that a trust must be held to have been created by this clause in the will for the three brothers of the deceased and their wives and sons, and that the Court should carry out that trust.

The learned Judge then declared that the said three brothers, their wives and sons are entitled to the residue of the estate (after providing for the legacies, charities, debts, &c.); and ordered that the said residue be divided into three shares, one of which plaintiff No. 1, Kumarasami, was to take subject to his giving or paying to his son, defendant No. 3, one-third of such one-third share, and to his wife, defendant No. 2, one-sixth of such third share; Vyapuri, defendant No. 1, to take one-third subject to his giving or paying to his son Krishnasami, defendant No. 4, one-third of such one-third share; and plaintiff No. 2, Subbaraya, a one-third share.

Appeal is preferred on the grounds that it should have been held that the clause in the will in respect of which the said order was made should have been held void for uncertainty, and that no trust was created thereby; that there was a mere direction to executors to act according as they pleased; and that the persons named as executors having failed to act, effect cannot be given to the direction, and that the Court should have held that the testator died intestate as to the residue of his estate, and that the residue devolved on his heirs: that even if it be held that a trust was created to which the Court should give effect, regard should have been had, not to the manner in which according to English law or rules of equity distribution might have been made, but to the probable wishes and intentions of the testator and with reference to the Hindu law by which the latter was governed.

We have had the advantage of hearing the case ably argued by Mr. Grant for the appellant, by the Acting Advocate-General for the defendants Nos. 2 and 3 (third and fourth respondents), by Mr. Branson for defendant No. 5 (sixth respondent), and by Mr. Shaw for defendant No. 6 (seventh respondent.)

I am of opinion that the terms of the disputed clause in the will are as regards the words of recommendation used not such as [330] can be held to be imperative, and that they are too uncertain both as regards the subject and the objects of the recommendation or wish to be construed as a trust.

It cannot be said that there is certainty even as regards the objects of the recommendation, for it might or might not have been a sufficient compliance with the intention of the testator if some provision had been made for the testator's brothers, or for one or more of them, or for the wives only, or one or more of them, or for the children only, or for one or more of them; the words of recommendation are of the loosest description.

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But there is still greater uncertainty as to the subject. The disputed clause occurs at the commencement of the will; there is no direction first to provide for specified charges and to pay specified legacies and to dispose of the residue according to discretion, among a class of persons or persons sufficiently indicated; and it appears to me to be a case in which a mere discretionary power was given, which in the absence of *mala fides* on the part of the executors, a Court would not have compelled the executors to exercise (*Brown* v. *Higgs*) (1), and that the words in dispute did not create a power in the nature of a trust.

The executors "did not exercise the power, but renounced the only character in which it was competent to exercise it," (*Keates* v. *Burton*) (2), and even if it were open to the Court to give effect to the clause in dispute, the Court would, in my opinion, do well not to attempt to execute a power or a trust of such a character as this.

I think further that if the Court had to execute such a trust, it should have regard rather to what may have been the presumed wishes and intention of the testator than to apply principles which would be adopted if the rule to be followed were the rule of English law or equity; and if the English law were applicable all the class would take equally, which rule has not been here followed in its integrity. And I am of opinion that there was in fact an intestacy, and that in any case we could not better follow what may be taken to have been the intention and wishes of the testator than by treating this as a case of intestacy, in respect of the residue of the estate.

It has been well put by the learned counsel for the appellant **[331]** that the testator could hardly have contemplated a distribution, which it may be assumed was intended in the first place for the benefit of his brothers, the result of which is to give an absolute estate in respect of a very considerable portion thereof to the widows of two of those brothers. A distribution under which the brothers would have taken equal shares would have been to that extent provision for the widows and children. There is moreover very considerable force in the argument that the Legislature expressly refrained from making applicable to Hindus the provisions of Section 77 of the Succession Act, and the following sections. The Privy Council case (3) is authority for the proposition "that the words of gift used by the testator must be such that the Court finds them to be imperative on the first taker of the property, and that the subject of the gift over must be certain and well defined." In my opinion neither of these conditions exist in the present case. Their Lordships further expressed an opinion that "the current of decisions now prevalent for many years in the Court of Chancery shows that the doctrine of precatory trusts is not to be extended."

On the whole, and with all deference to the learned Judge from whose decision this appeal lies, I am of opinion that the testator must be held to have died intestate in respect of the residue of his estate now in dispute; and that the decree should be amended accordingly; and that in other respects, and as to reference to take an account except in respect of costs in the original suit from decree in which this appeal is preferred, it should be confirmed, and that the costs in the original suit and in this appeal also be paid out of the estate.

(1) 8 Ves. 569. (2) 14 Ves. 437. (3) 4 A. 500.

Solicitors for appellant: *Grant & Laing.*
Solicitors for respondents Nos. 3 and 4: *Branson & Branson.*
Solicitors for respondent No. 6: *Grant & Laing.*
Solicitors for respondent No. 7: *Grant & Short.*

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9 M. 332.

[332] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

VELLI PERIYA MIRA RAVUTHAN (*Petitioner*) *v.* MOIDIN PADSHA RAVUTHAN AND ANOTHER (*Respondents*).*
[19th and 27th February, 1886.]

Rent Recovery Act, Sections 35, 76—*Civil Procedure Code, Sections* 4, 622.

A sale of the tenants' interest in certain land having taken place under Sections 39 and 40 of the Rent Recovery Act, the Deputy Collector refused to issue a sale certificate to the purchaser on the ground that the sale had been irregularly conducted:

Held, that under Section 35 of the Rent Recovery Act the purchaser was entitled to a sale certificate.

Held, further, that the High Court had no power to revise the proceedings of the Deputy Collector under Section 622 of the Code of Civil Procedure.

[F., 16 M. 451 (452); 17 M. 298 (299).]

THIS was an application to the High Court under Section 622 of the Code of Civil Procedure.

The facts necessary for the purpose of this report appear from the judgment of the Court (COLLINS, C.J., and PARKER, J.).

Krishna Rau and *Appadorai Ayyar*, for petitioner.

Hon. *Subramanya Ayyar* and *Ramachandra Rau Saheb*, for respondents.

JUDGMENT.

In this case the tenants' interest in certain lands was brought to sale under Sections 39 and 40 of the Rent Recovery Act. The petitioner became the auction-purchaser and paid up the purchase-money, but the Deputy Collector afterwards refused to allow the usual sale-certificate under Section 35 to be issued to him, on the ground that certain irregularities in the procedure had been brought to light. The Deputy Collector thereupon on May 20th 1884, passed an order by which he purported to set aside the sale and "decreed" that it was invalid.

The petitioner presented appeals both to the District Court and afterwards to the Collector, but both appeals were rejected for want of jurisdiction. It is not now contended that these orders [333] were not right, but the petitioner prays that the High Court will exercise its powers of revision under Section 622 of the Code of Civil Procedure, and set aside the Deputy Collector's order of May 20th, 1884, as made without jurisdiction.

There is no provision in the Rent Recovery Act which enables a Collector to set aside a sale once completed, and Section 35 is imperative that a sale-certificate shall be given to the purchaser.

The tenants' remedy, if any, under the Rent Recovery Act was restricted to a suit for damages under Section 49, and the Deputy Collector

* Civil Revision Petition 275 of 1885.

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clearly assumed a jurisdiction not vested in him by law when he decreed the cancelment of the sale.

The question remains whether the order of May 20th, 1884, is amenable to revision by the High Court under Section 622 of the Code of Civil Procedure. It may be conceded that the Deputy Collector purported to act "as a Revenue Court," and in so acting, assumed a jurisdiction not vested in him by law. But Section 4 of the Code of Civil Procedure enacts that, save as provided in the second paragraph of Section 3, nothing in the Code shall affect any law passed by a local Government prescribing a special procedure for suits between landholders and their tenants. The Rent Recovery Act (Madras Act VIII of 1865) is such a law, and it follows that the special revisional powers given to the High Court in Section 622 will not affect the provisions of Madras Act VIII of 1865. Section 76 of the latter Act enacts that "in proceedings under that Act" no judgment of a Collector or order in execution shall be liable to revision otherwise than by appeal to the Zila Court; and although the Deputy Collector's proceedings were not strictly speaking "proceedings under the Act," but rather "proceedings taken under colour of the Act" (for which a suit for damages might be brought under Section 49), that circumstance alone will not give a jurisdiction which Section 4 of the Code of Civil Procedure was designed to exclude.

The remedy is by suit in the ordinary Courts and we must dismiss this petition with costs.

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9 M. 334.

[334] APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

SUNDARAM AND ANOTHER (*Representatives of Defendants Nos.* 45 *and* 46), *Appellants v.* SANKARA (*Plaintiff*), *Respondent.** [22nd March and 5th April, 1886.]

Civil Procedure Code, Section 503—*Receiver—Powers—Limitation—Cause of action.*

A zamindari was attached in execution of certain decrees against the zamindar, and the plaintiff was appointed receiver with full powers, under Section 503 of the Code of Civil Procedure, to manage the zamindari. Before the appointment of the receiver, the zamindar had expended certain sums at the defendants' request to repair a tank for the irrigation of lands held by them in common with him. This suit was brought to recover the sums so expended.

It was objected that the receiver could not maintain the suit on the ground that the sum sued for was neither the subject of a suit against the zamindar nor property attached in execution of a decree against him;

Held, that the receiver could maintain the suit.

It was also contended that the suit, whether viewed as one for contribution or upon a contract, was barred by limitation in respect of all payments made by the zamindar more than three years before the suit; and further that the receiver could only sue the defendants severally for their proportionate shares of the sum claimed.

Held, that the suit being for work and labour done at their request was not barred by limitation, and that the defendants were jointly and severally liable for the sum sued for.

[Appr., 34 C. 1305 = 5 C.L.J. 270 (281).]

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* Appeal 33 of 1885.

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APPEAL from the decree of C. Ramachandra Ayyar, Subordinate Judge of Madura (East), in suit No. 5 of 1884

The facts of the case are set out in the judgments of the Court (BRANDT and PARKER, JJ.).

Bhashyam Ayyangar, for appellants.

Hon. *Subramanya Ayyar*, for respondent.

JUDGMENTS.

BRANDT, J.—This suit was instituted by the receiver of the Sivaganga zamindari. The receiver was appointed on the 9th March 1882; the zamindari was attached in January 1881 in execution of original suit 35 of 1879, and the plaintiff was [335] appointed receiver of the property under attachment, with full powers under Section 503, Civil Procedure Code.

The suit was instituted on the 25th January 1884.

The defendants are the proprietors of, or sharers in, a dharmasanam (inam) village, Vembathur, in the zamindari; the inam is held in 128 shares, of which 109 and a fraction belong to the defendants, and the remaining 18 and a fraction belong to the zamindar, by purchase. The village of Vembathur is irrigated from a kanmoi or tank in the zamindari ayyan village, Kall-urani; this tank receives its supply from the Vaigai river by means of a channel; and from the tank an ayyan zamindari village, as well as the defendants' dharmasanam village, receives its supply, the water passing to the former through five sluices, and to the latter through two sluices. The zamindar, as such, is entitled only to collect poruppu (a light assessment) on the inam lands.

There appears to be no question that the inamdars are entitled to the water flowing through the two sluices, which irrigate about the same quantity of lands as the other five sluices.

The plaintiff's case is that, owing to heavy floods in 1877, the plaint kanmoi or tank and the channel that supplies it were so much damaged as to make cultivation impossible; that "the cost of repairing the said common kanmoi and its channel was usually paid by the zamindar and the said dharmasanam villagers;" that the zamindar obtained a loan from Government of Rs. 1,50,000, and which part of this repaired the plaint tank; that in September 1878 an estimate for Rupees 13,990 for this purpose was prepared and sanctioned, and the work finally completed at a cost of Rs. 13,934-14-0, completion certificates having been given by the Special Supervisor on the 9th June and 1st September 1881: that the defendants "consented to pay their shares as usual in the amount which might be spent for the repairs of the said kanmoi and channel," and that, at the request of Muttayyar, the father of defendant No. 1, and of Krishanayyar, defendant No. 4, "who were the chief among them" (the dharmasanamdars), the contract for the work was given to those two persons jointly with two contractors, Mahadevayyar and Palaniyandia Pillai, and that the money paid as aforesaid was paid to the said four persons. That the sum of Rs. 5,972-5-7, that is, one-half of the whole less the proportionate share payable by the zamindar as one of the dharmasanam co-sharers, is due from the defendants; that though [336] pressed for payment they have not paid; that interest at 12 per cent. per mensem on the sum claimed should be allowed from the completion of the work; that "the cause of action is the non-payment of money by the defendants;" and that it arose on the 1st March 1881, the

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date of the completion of the tank work; and on the 1st September 1881, the date of the completion of the channel work.

Twenty-five out of the 55 defendants contested the claim; of these the appellants, defendants Nos. 45 and 46, whose defence was adopted by the other contending defendants, pleaded that the plaintiff, as receiver, could not maintain the suit;

That the claim is barred by limitation in respect of any moneys paid by the zamindar more than three years prior to suit, *i.e.*, prior to 25th January 1884; that a decree cannot be given for the whole sum claimed, or against the defendants jointly and severally; that, as the zamindar is a co-sharer with the defendants in the dharmasanam village, he cannot sue for contribution in respect of the money said to have been expended without stating the specific liability of each co-sharer.

The custom alleged by the plaintiff was denied; and the allegations as to the loan of money from Government and the expenditure of part of it on the repair of the plaint channel and tank were denied; and it was denied that the contesting defendants consented or agreed to pay their proportionate share of the cost, prior to execution of the work; they further said that they are not bound by the agreements, if any, which any other co-sharers may have entered into in the matter; that the tank and channel in question had always been treated by the zamindars as their exclusive property, and the maintenance and repairs thereof have been at the exclusive cost of the zamindars, who have an exclusive right of fishery in and over the tank when full, and of cultivating the bed of the tank when dry; and that the repairs set out in the plaint were not urgent nor necessary.

Among the other issues framed by the Subordinate Judge was this, the 3rd, "whether the suit is maintainable?" but in disposing of this, the lower Court appears to have had regard only to the objections that the zamindar, being a co-sharer, could not sue the other co-sharers for contribution jointly, and that the defendants cannot be held jointly and severally liable for the whole amount. The 2nd issue is framed specially with reference to this latter [337] contention, and the 2nd and 3rd issues were disposed of together. The Subordinate Judge does not appear to have considered or disposed of the objection that the receiver is not capable of maintaining the suit.

The Subordinate Judge held that the objections raised and considered in reference to the 2nd and 3rd issues were not maintainable.

As to whether the defendants agreed to contribute their share towards the costs of the repairs in this case (5th issue), it was held that though there was no proof that all the co-sharers agreed, it was proved that the father of defendant No. 1 and defendants Nos. 4 and 8 as leading men among them, and representing the shareholders, several of whom also were then present, requested that the tank and channel might be repaired, and they must be taken to have duly represented the whole body of shareholders, and that they agreed to pay a moiety of the cost. As to whether the custom set up on the zamindar's behalf was proved (6th issue), the evidence, oral and documentary, was held to establish that the defendants on all occasions of repairs being made contributed a moiety of the cost and that in some instances they paid their shares after the repairs were completed.

It was held that there was not misjoinder of parties nor of causes of action and a decree was given against "the defendants" for the principal

sum sued for, with interest at 6 per cent. per annum, from the 15th December 1883 and proportionate costs.

The appellants contest all the findings on the facts and again raise the points of law taken in their written statement and which they contend were wrongly decided or not decided in the lower Court.

The first question to be determined in appeal is whether the suit, brought by the receiver, is maintainable.

A receiver does not represent the estate for all purposes; he would have none of the powers which may be conferred under Section 503, of the Code of Civil Procedure, in respect of property belonging to the judgment-debtor not attached in the suit in which the order was made; but in the present case, the whole zamindari was attached, and in order to determine whether the receiver can sue, it is necessary to ascertain what the real cause of action is, and on what right or rights it is based. The cause of action is stated in the plaint to be "non-payment of the money by the defendants;" **[338]** but the customary repair of the dharmasanam tank at the joint cost of the zamindar and the defendants and the necessity for the repairs in the present instance were set out, as well as the alleged consent of the defendants to pay their share 'as usual.' And it is contended on behalf of the respondent, and must in my opinion be held proved, that the respondent is under an obligation, whether enforcible by common law, or created by the terms of the original grant of the inam, or by custom to make necessary repairs, and that the dharmasanamdars are bound to contribute towards such repairs: indeed, these facts were in the event hardly denied on behalf of the appellants. If the suit had been for recovery of the money on the alleged agreement to pay alone, the suit would not, in my opinion, have been maintainable by the receiver; but after considerable doubt, I agree with my learned colleague that the right of the zamindar to be recouped to the extent of one-half of the cost of the repairs, if otherwise established, is maintainable in a suit by the receiver. The obligation to repair is one which the defendants might no doubt sue to compel a receiver in charge of the estate to fulfil; and the money sued for, which I find was in the result paid by the zamindar only because it was not paid before or at the time of making the repairs, as it should have been, was money not belonging to the zamindar personally, but advanced, it may be assumed, on the security of his estate and certainly for the purpose, among others, of making necessary repairs to irrigation works in the estate; and if now recovered will be available not for the personal use of the zamindar, but of the creditors on whose behalf the estate has been attached.

The statement in the plaint that "the defendants consented to pay their shares as usual in the amount which may be spent for the repairs," coupled with Exhibit R in which the intended repairs and the amount of the sanctioned estimate are notified to the mahajanams, and the latter are "previously warned" that they should forthwith pay Rs. 7,362-8-0, the half share due by them; as well what appears in Exhibits K, M, N, and A, afford some grounds for the contention that the custom was for the dharmasanamdars' share to be paid, if at all, in advance; but the latter and other documents and the oral evidence in my opinion establish the fact that even if this was the proper course, when payment in advance could not be obtained, the repairs were done at the expense of the zamindar and the defendants' share recovered afterwards. **[339]** And in the instance now in dispute, I have no doubt, and I think it is established by the

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evidence, that the dharmasanamdars, as a body, represented by their headman, expressed a wish to have the repairs done, admitted the necessity, and agreed to pay their share. The contract was not signed till December 1878, and as no dates are given as to when the alleged consent was actually given, it is quite possible it was after the date of R, September 1878, that the defendants asked the zamindar to expend the money which they knew he had, and promised to recoup him afterwards. That this is so, is borne out to some extent by the fact that defendant No 45, one of the appellants here, appears from Exhibit V to have stated to the receiver that he was willing to pay his share if informed how much was due.

It is true that two months afterwards his son in Exhibit IV [2] objected to pay this share; but the objections are put on grounds which cannot be supported, as that the repairs were done without notice, that more was done than was necessary, and that the zamindar was bound to make the repairs in return for the exclusive rights of fishery enjoyed by him in the tank, and for the use of the bed of the tank when dry. This latter contention is supported by no evidence deserving of credit, and the liability to pay a share in the expenses of repair is not denied. And the findings as the obligation on the part of the zamindar and of the defendants and as to the promise on the part of the latter being what they are, I am of opinion that the finding of the lower Court, namely, that the obligation on the part of the defendants to make good their share did not arise until the work was completed, is correct, and that the claim therefore is not barred by time.

As to the objection that the suit is not maintainable by reason of the zamindar being by purchase a co-sharer with the defendants, I think this is clearly untenable; he sues for the balance due after deducting the amount due by him as such co-sharer, and the fact of his having such interest in the dharmasanam village can in no way affect his right to sue in the capacity of a landlord under an obligation to repair the tank.

As regards the joint and several liability of the defendants on the other hand, I have had no little doubt. The fact that each sharer is jointly and severally liable for the poruppu does not appear to me conclusive as to their joint and several liability for the half [340] of these repairs; while the fact that the patta for the whole village stands in the name of one person only appears to me to raise some doubt whether the suit should not have been brought either against that person alone, or against all the sharers for their respective shares severally: but, it is to be observed that in the notice R demand is made on the whole body of shareholders for the lump sum, and that not only is there no evidence that objection to this was taken by any of the shareholders, but that, as I find, the latter consented to and indeed urged, the carrying out of the repairs with moneys to be advanced by the zamindar and, it must be presumed, on the conditions therein specified, save that they were not to be called on to pay their share in advance.

It is true that Exhibits IV and V would seem to show that the receiver was prepared to accept the separate shares due from individual sharers; but this he might well do, suing only those who refused to pay for the balance due, without admitting that no joint and several liability existed; and the only conclusion to which I can come is that by custom or otherwise such joint and several liability attaches in this case to each sharer.

I agree then in the result that this appeal should be dismissed with costs.

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PARKER, J.—The first point is whether the plaintiff, as a receiver, appointed under Section 503 of the Code of Civil Procedure, is competent to maintain this suit. The whole zamindari is under attachment, and the receiver has, under Section 503, all such powers as to bringing suits. . . . and for the realization, management, protection, preservation and improvement of the property as the owner himself has.

Granted that there is upon the zamindar as the holder of the estate, a common law obligation to maintain the tank with the right to recover half of the expense thereof from the inamdars, I think there can be no doubt that in the event of necessity, the obligation would rest upon the receiver to spend such sum as might be requisite for the due maintenance of the tank, and that he would be at liberty to sue to recover from the inamdars the half of such sum as he might have paid out of the treasury of the estate. Why then should he not sue to recover for the estate monies so expended before the date of his appoinment as receiver?

If the estate be an impartible zamindari, it would descend at the death of the holder to his eldest son. Let us assume that the [341] zamindar left by will to his second son all his personal property and outstanding debts; upon which of the two would the right to collect these sums from the inamdars devolve? It appears to me that the right would devolve upon the eldest son as zamindar; and that the obligation and the right to be recouped cannot be dissevered. Inasmuch as the obligation passes with the estate, so also does the right to be recouped. I think therefore that the plaintiff, as receiver, can maintain this action.

The next point is whether the suit is based on an agreement, or upon custom. It is contended for the appellants that in the first case no binding agreement is proved, and in the second that the plaintiff cannot recover upon the suit as framed, and that no custom having the force of law is made out.

The custom that the mahajanams of Vembathur should contribute half the expenses of the repairs of this tank can be traced back to 1833 (exhibit K); to 1838 (exhibit M); to 1840 (exhibit L); to 1842 (exhibit N); to 1856 (exhibit VI); to 1862 (exhibit A); and to 1872 (exhibit D). There is abundant oral evidence to the same effect, including that of the karnam's gumasta (plaintiff's first witness) who speaks from an official experience of 33 years. I gather that the custom has been to collect the mahajanams' half share for the repairs beforehand, if possible, but that when this has not been found practicable it has been afterwards collected by more or less of compulsion. As the tank is not in a common village, but in one belonging to the zamindar only, it may well be that he has been under an obligation to keep it in repair and that the mahajanams could not actually interfere in its up-keep, though they were liable for half the expenses thereof, getting as they did half the supply. Upon the whole, therefore, I am of opinion that plaintiff has succeeded in showing the existence of a custom which is ancient, certain and reasonable, these being the necessary requisites of a valid custom.

The Subordinate Judge has found that the defendants agreed to pay their half share as usual, and exhibit R shows that the usual attempt was made to collect beforehand the half share due from the mahajanams. There is to my mind no objection which can be fairly taken to the form of the suit. The plaintiff does not base his claim upon agreement as distinguished from custom, but upon both combined—upon agreement made in accordance with custom. I agree with the Subordinate Judge that the agreement

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[342] was made by the leading men among the mahajanams as representing and binding the rest.

The question of limitation comes next. Being of opinion that the obligation rested upon the zamindar to do the work for the joint benefit of himself and the mahajanams, and that there was no time *absolutely* fixed for the re-payment to him of the sums so expended, the article of the Limitation Act which will govern the suit will be Article 56 of Schedule II, and the law will imply under the circumstances that the work was done at the defendant's request. The time will, therefore, run from the date when the work was done. The work was carried out under Government supervision, and the completion certificates are dated 1st March and 1st September 1881. The suit was brought on 25th January 1884 and is in time.

Lastly, it is contended that the defendants are not jointly liable to the plaintiff for this claim, but are only severally liable, each to the extent of his respective holding.

The plaintiff in this case holds a double character :—1st as zamindar, 2ndly as inamdar for 18·46 shares out of 128. He sues, however, as zamindar, to recover from all the sharers jointly, half the expenses incurred by him less the amount for which he himself is liable for his 18·46 shares.

Putting aside for the moment the fact that the zamindar is himself a part-sharer, the question is, are all the sharers jointly liable to him as zamindar for the monies spent on their joint behalf ? The patta stands in the name of one mahajanam only and all the sharers are jointly and severally liable for the poruppu. The fact that the lands are periodically distributed according to their proportionate shares, is a matter which affects them only *inter se*. Whatever piece of land each may be holding at any given time, and whatever be the number of shares into which the village is divided at any given time, all alike are liable to the zamindar for the poruppu due to him on the entire village. This of course does not detract from the right of any one sharer to contribution from the rest, should he be made to pay the whole poruppu. These repairs are made by the zamindar to the tank as landlord for the common good of the whole village held in the name of one mahajanam, and it seems to me therefore that all the sharers will be jointly and severally liable.

[343] Nor can it in my opinion make any difference that the zamindar is himself a sharer. As a sharer he would no doubt be liable in a suit for contribution, if he had not paid up the full amount due on his own shares. But he has done this, and the suit is only brought as zamindar for the balance jointly and severally due from those sharers who have not paid up. If he recovers from any one of them, that sharer will be able to claim contribution from any one of the rest who has not paid up the full amount due on his share.

Upon these grounds, I have come to the conclusion that the decree of the Lower Court was correct, and I can see no reason why interest should not be allowed. I would dismiss the appeal with costs.

9 M. 343 (F.B.).

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APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, and Mr. Justice Muttusami Ayyar.

PONNAPPA PILLAI (*Plaintiff*), *Appellant v.* PAPPUVA YYANGAR AND ANOTHER (*Defendants Nos. 2 and 3*), *Respondents.**
[24th April, 1885.]

Hindu Law—Liability of ancestral estate for father's debt—Effect of sale in executioof mortgage decree and of money decree against the father—Transfer of property Act, Section 85.

Where the property of an undivided Hindu family, consisting of father and sons, has been sold in execution of a decree obtained against the father only for a debt contracted by him for purposes neither immoral nor illegal, the sons cannot recover their shares from the purchaser, if the decree has been obtained upon a mortgage or hypothecation of the property directing such property to be sold to realize the debt. It is otherwise if the decree in execution of which the sale takes place is a mere money decree.

Per Kernan, J.—It will still be necessary in all cases where a creditor seeks in a suit to bind a son's estate in ancestral or other property for a debt incurred by his father and not by him, that the son should be made party to the suit.

Girdharee Lall v. *Kantoo Lall* (L.R., 1 I.A. 321.)

Muddun Thakoor v. *Kantoo Lall* (L.R., 1 I.A. 321).

[344] *Deendyal Lall* v. *Jugdeep Narain Singh* (L.R , 4 I.A., 247), discussed.

Hardi Narain Sahu v. *Ruder Perkash Misser* (I.L.R. 10 Cal., 626), followed.

Ponnappa Pillai v. *Pappuvayyangar* (I.L.R., 4 Mad., 1), modified.

[R., 9 M. 424 45) ; 3 Bom. L.R. 322 (341) ; 4 Bom. L.R. 587 (597) ; 18 Ind. Cas. 848 (850).]

THIS case came before a Full Bench on 1st April 1881.

The facts will be found reported at I.L.R., 4 Mad., 1.

In pursuance of the order made by the Full Bench (Turner C.J., Innes Kernan, Kindersley, and Muttusami Ayyar. JJ.), on the 1st April 1881, the Munsif reported that the sale of the ancestral estate of plaintiff and defendant No. 1 took place under a decree which directed that the land should be sold to realize the amount due on a mortgage.

Appellant did not appear.

Hon. *Rama Rau* and *Balaji Rau*, for respondents.

The Court (TURNER, C. J., KERNAN and MUTTUSAMI AYYAR, JJ.) delivered the following

JUDGMENTS.

TURNER C. J.—Since these cases were formerly before the Court two decisions have been passed by the Privy Council in reference to the questions which called for decision. In *Muttayan Chetti* v. *Sangili Vira Pandia Chinnatambiar* (1), our ruling that the principles laid down in *Girdharee Lall* v. *Kantoo Lall* (2) apply to cases in this presidency has been approved. On the other hand, in *Hardi Narain Sahu* v. *Ruder Perkash Misser*, (3) decided as recently as the 5th December 1883, it has been held affirming *Deendyal Lall* v. *Jugdeep Narain Singh* (4) that where the right, title and interest of the father has been held liable in execution of a mere money decree, the interests of the son will not pass to the

* Second Appeals 703, 704, and 705 of 1878.

(1) 6 M. 1. (2) 1 I.A. 321. (3) 10 C. 626. (4) 4 I A. 247.

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decree-holder, being the auction purchaser, although he may have also held a mortgage on the property. At the same time the case is distinguished from those in which the father, being a member of a joint family governed by the Mitakshara law, had mortgaged the family property to secure a debt and the decree had been obtained upon the mortgage and for the realization of the debt by means of a sale of the mortgaged property.

This decision, it must be admitted, corrects the view expressed by me as to the effect of the decision of the Privy Council in *Muddun Thakoor's case,* (1) and which had also been expressed by Sir Michael Westropp and Mr. Justice Melville in *Narayanacharya* [345] v. *Narso Krishna* (2) and by Mr. Justice Mitter and Mr. Justice Maclean in *Umbica Prasad Tewary* v. *Ram Sahay Lall,* (3) and again in *Sheo Proshad* v. *Jung Bahadoor* (4).

It is necessary, therefore, that I should again consider the rulings by which we are to be guided and give effect to what may be collected as the intention of the august forum to whose rulings our decision must conform.

In *Girdharee Lall* v. *Kantoo Lall* (1) their Lordships held that among Hindus governed by the Mitakshara, ancestral property in which the son, as the son of his father, acquires an interest by birth is liable to the father's debts, and that a son is not at liberty to contest a sale of ancestral estate made by a father to discharge a debt contracted for purposes which were not immoral. These rulings are unaffected so far as I know by any subsequent decision.

The report of the case of *Muddun Thakoor* v. *Kantoo Lall* (1) not being sufficiently full to enable me to ascertain under what circumstances the sale impugned was made and what was the interest which the Court executing the decree against the father professed to sell, I obtained through the courtesy of the Chief Justice of Bengal a copy of the transcript. It appears that on February 11th, 1855, the two sons of Kunhya Lall deceased, Bhikharee Lall, the father of Kantoo Lall and Bujrung Sahye, the father of Mahabir Pershad, in consideration of a loan of Rs. 3,540, executed in favour of Mussamat Bibi Asmatunisa and others a bond undertaking to pay the principal and interest at 12 per cent. per annum at a time named; and, as security, they thereby hypothecated Mouzah Rajpore Usli Alinugger, Mouzahs Khuma Munjulpore Subrampore, Chuck Durcon Dhoodula Dakhili Anundpore Usli Shapore Dakhili Balasandut and Mouzah Assamudpore (see pp. 131, 132).

On November 23rd, 1857, the bond-holders obtained judgment on the bond in the Court of the Principal Sadr Amin of Bhagulpore against Bhikharee Lall and Bujrung Sahye in the following terms:—

"Plaintiffs sue defendants for the recovery of Company's Rs. 3,540, principal under a bond duly registered, dated 11th [346] February 1855, and Company's Rs. 1,189-7-1, interest thereon from date of bond to date of present suit at one per cent. aggregating Company's Rs. 4,729 7-0.

Statement as to evidence.

Read the cause of action, dated the 11th February 1855 A.D., No. 2.

Whereas after the filing of pleadings and recordings of proceedings under Regulation XXVI of 1814 and adducing of witnesses on the part of plaintiffs in this suit, the defendants presented a petition to the presence on the 2nd June 1858, acknowledging the plaintiffs' claim, stating, *inter*

(1) 1 I.A. 321. (2) 1 B. 262. (3) 8 C. 898. (4) 9 C. 389.

alia, that the plaintiffs do not agree to being sworn in this suit; therefore, having presented this petition to the presence, they pray that, according to our answer acknowledging claim, the said suit be decreed to the plaintiffs, and as in this suit an answer acknowledging claim has been filed on the part of defendants consequently.

ORDERED.—That this suit be decreed to plaintiffs according to acknowledgment filed by defendants. The plaintiffs do recover from defendants the money claimed with costs and interests from the date of suit to that of realization.

DETAIL OF COSTS."

The plaint is not in the transcript, nor is there any other decree. I apprehend the order I have set out was regarded as the final proceeding. There is nothing in this proceeding to show that the plaintiffs sought to obtain the enforcement of the hypothecation.

All that appears is that the plaintiffs sued to recover the amount of the bond from the obligees, and that the defendants acknowledged the claim and prayed that a decree might be passed in favour of the plaintiffs, and that it was ordered that the suit should be decreed according to the acknowledgment filed by defendants, and that the plaintiffs should recover from defendants the money claimed with costs and interest from the date of suit to that of realization (pp. 133, 134). In terms this decree was what is termed a money decree. It appears from the proceeding of the Principal Sadr Amin, dated February 2nd, 1859, that "the right, title and interest" of the judgment-debtors in Mouzahs Rajpore Alinugger Usli and Dakhili and three Mouzahs included in **[347]** Mouzah Anundpore together with Buniyadpore *alias* Manikpore Usli and Dakhili was brought to sale in execution of the decree of Mussamat Asmatunisa on 6th September 1858 and that the mahayats were purchased by Mudlan Chand Doss. The Principal Sadr Amin overruling an objection taken by the judgment-debtors to the sale of Anundpore, ordered that the auction sale should be confirmed and that a bill of sale should be given to the auction purchaser (p. 38). The sale was held under the provisions of Act IV of 1846, Section 10, which declared that sales in execution of decrees should be of the nature of private transfers. The sale certificate is not in the transcript. Its purport may, however, be inferred from the proceedings of the Deputy Collector of Bhaugalpore, April 9th, 1860, on a petition addressed to him by the auction-purchaser which commences as follows:—

"The petitioner states that in execution of decree in the suit of Mussumat Asmatunisa on the 6th September 1858, I purchased the right, title and interest of Bhikharee Lall and Bujrung Sahye, proprietors in a share of Mouzah Rajpore Alinugger, including the Mouzahs appertaining thereto in Purgunnah Bhaugulpore, the whole of Mouzah Anundpore including Buniyadpore *alias* Manikpore together with the Mouzahs appertaining thereto in Purgunnah Bhaugulpore at the auction sale held in the Civil Court of the Principal Sadr Amin, etc."

The Deputy Collector ordered that the name of the auction-puchaser should be enrolled instead of Bhikharee Lall and Bujrung Sahye in respect of Mouzah Rajpore Alinugger; and by another proceeding also dated April 9th, 1860, in which the date of the auction sale is given accurately as 6th September 1858, he also ordered the substitution of the auction-purchaser's name for that of Bhikharee Lall, the then registered holder of Anundpore (pp. 104-106).

In order to confirm the title to the properties purchased, the auction-

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purchaser allowed the revenue to fall into arrear, and before the orders last mentioned were passed, the properties were brought to sale for arrears and purchased by Muddun Thakoor (pp 109, 110)

It was found by the High Court that Muddun Thakoor was in fact the auction-purchaser and that Muddun Chand Doss had only purchased as a benamidar, and it was held that the revenue sale [348] under the circumstances gave Muddun Thakoor no new title (p. 264).

On these facts the Principal Sadr Amin supported the title of the auction-purchaser. The High Court considered that the claim of Mahabir Pershad could not be sustained, as he had not been born till November 1858 and, therefore, subsequently to the sale in September 1858; but it reversed the decree of the Principal Sadr Amin in respect of the share of Kantoo Lall in Mouzahs Rajpore Alinugger and Anundpore.

This part of the decree of the High Court formed the subject of the appeal preferred to the Privy Council by Muddun Thakoor; and their Lordships, applying the rule they had declared in *Girdharee Lall's case* that the interests of sons as well as of their fathers in property although ancestral were liable for the payment of the fathers' debts. held that the sale conveyed the interests of Kantoo Lall to the purchaser and that the purchaser having found that there was a decree against the fathers, and that the property was liable to satisfy the decree if it had been properly given against them, and having inquired into that, and *bona fide* paid a valuable consideration for the property, was not bound to go further back. Their Lordships did not hold that the decree was a mortgage decree. The order for sale was a mortgage decree. The order for sale was not contained in the decree, but as is usual in execution of money decrees passed after decree.

It appeared to me then that the following points were established by this decision.

That fathers may for the satisfaction of those debts which it is the duty of their sons to discharge out of ancestral estate render available the interests of their sons as well as their own; that the Court has the same power when it is called upon to execute a decree for money obtained against the fathers; that though the property be described as the right, title and interest of the judgment-debtors, a sale in execution of a money decree would pass the interests of the sons as well as of the fathers; and that a bidder is not bound to inquire whether the debt was contracted for a proper purpose: that he has only to see that the decree has been properly passed, and if he purchases without notice that the debt has been contracted for purposes which do not bind the son, he will be protected.

[349] In *Deendyal Lall* v. *Jugdeep Narain Singh*, (1) Toofani Singh being indebted to a creditor executed in his favour a Bengali mortgage bond: on this the creditor sued and obtained a decree in the ordinary form of a decree for money. In September 1870 he caused to be brought to sale the rights and proprietary and mokurriri title and share of Toofani Singh, the judgment-debtor. Their Lordships held that there passed by the sale only such a share as would have fallen to the father on a partition, and that it was immaterial whether the debt on which the decree was obtained had been contracted for a purpose binding on the family. The sale was held under Act VIII of 1859, which did dot declare a sale in execution to have the effect of a private transfer, but declared that the purchaser should

(1) 4 I. A. 247.

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obtain a certificate that he had purchased the right, title and interest of the judgment-debtor. It does not appear whether it was then argued that the father had not only a right to secure to himself his own share on a partition, but also a right in certain circumstances *e.g.*, for the payment of his debts when not immoral, a right to sell the interest of his sons. This decision was in this country regarded as inconsistent with the decision in *Muddun Thakoor's case*(1) and various suggestions were made to reconcile them. Mr. Mayne seems to have been of the same opinion, for he suggested as a possible explanation that the execution creditor had expressly attached the *share* of the father Toofani Singh. In *Suraj Bunsi Koer* v. *Sheo Proshad Singh*, (2) their Lordships summarized their rulings in terms which have been frequently cited in this Court, and which are to the effect that the interests of the sons as well as of the father in joint ancestral estate pass under a conveyance executed by the father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, and that the sons cannot recover the property unless they show that the debts were contracted for immoral purposes; and, secondly, that the purchasers at an execution sale being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings. In that case the father, Adit Sahai, had inherited Mouzah Bissambhurpore and, after two sons had been born to him, mortgaged the estate. On this [350] mortgage the creditor sued and obtained a decree for the recovery of the amount from the judgment-debtor and for a sale of the estate in default. A sale was ordered in execution of this decree, when the widow of the judgment-debtor, who had died, filed a petition of objections on behalf of her minor sons setting forth their claims as co-parceners. She was referred to a regular suit, and the sale took place. A suit was then instituted by the minors through their mother as guardian, and it being proved that the debt had not been contracted under such circumstances that it would be binding on the minors, and that the purchaser had previously to the sale had notice of the minors' claim, it was held that interests of the minors did not pass by the sale. These are the grounds on which the case was distinguished by their Lordships from that of *Kantoo Lall*, the authority of which they expressly declared they desire to leave unimpaired :—

"The respondents must be taken to have had notice, actual or constructive, of the plaintiffs' objections and with the order made upon them, and therefore to have purchased with the knowledge of the plaintiffs' claim and subject to the result of this suit.

"It follows then that as against them as well as against Bolaki Choudri (the decree-holder) the plaintiffs have established that by reason of the nature of the debt neither they nor their interests in the joint ancestral estate are liable to satisfy their father's debt."

The following conclusions I drew from this judgment :—firstly, that unless the plaintiffs had proved that the debts were not of such a nature as would have justified an alienation of ancestral property by a father, the sale would have conveyed their interests to a purchaser ; that, if they had even established that point, they could not have recovered their interests from the purchaser unless they had proved he had had notice that the debt was not one in which the sons' interests would be bound; and that

(1) 1 I.A. 321. (2) 6 I. A. 88.

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if the points mentioned had not been proved, the sale, whether under the order in the decree or under an order in execution of the decree as a money-decree, would have passed the interests of the sons to the purchaser.

In re-affirming their ruling in *Kantoo Lall's case*, (1) their Lordships, I may observe, drew no distinction between a sale [351] in execution of a mortgage and a sale in execution of a money-decree.

Such were the decisions of the highest Court of Appeal when these cases formerly came before this Court. As I had understood them, I thought they warranted the opinion that inasmuch as a father has a right to sell ancestral estate including the interests of his sons in order to free himself from a debt, provided he had not contracted it for a purpose which relieved the sons of their obligation, the Court executing a decree could, by a sale, make the same disposition as the father, that the father having a disposing power to discharge proper debts, the Court would exercise that power in favor of a creditor; that the father had a right independently of his right to a share on a partition; and that a sale of his right, title and interest would. therefore, transfer the estate to a *bona fide* purchaser without notice as effectually as the father could have done. I also thought where a father had thought fit to deal with a limited interest in the estate by creating a mortgage, and the creditor desired to enforce the mortgage, it was the duty of the creditor to make all persons interested in the right to redeem parties to the suit according to the rule which is recognized in Section 85 of the Transfer of Property Act, and that, in consequence, if the sons were not parties to, nor represented in, the suit, they could not be foreclosed of their right to redeem. On both points my conclusions are overruled by the latest decisions of the Privy Council, and though I do not see that the arguments I have advanced were fully put to their Lordships, I daresay it was because they are open to objections which do not at present present themselves to my mind. However this may be, we have now only to follow the exposition of the law contained in *Hardi Narain Sahu* v. *Ruder Perkash Misser* (2), and to ascertain whether in the cases before the Court the sale was made in execution of mortgage or money-decrees.

The decree in second appeal 703 of 1878, ordered a sale of the hypothecated property, and the Judge has found that although the decree was both a money and a mortgage-decree, the property was sold in execution of the mortgage-decree.

The sale must be sustained. The appeal fails and is dismissed with costs.

[352] KERNAN J:—These cases having been referred to a Full Bench, the majority of the Court, on the 1st April, 1881, held that the principle established by the decision of the Privy Council in *Girdharee Lall* v. *Kantoo Lall* (1) as to the liability of a son's share of ancestral property to pay the debts of his father, not contracted for illegal or immoral purposes, applied to this Presidency. That decision has since been approved of by the Privy Council in *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (3.)

By order of the 1st April 1881, issues were directed to be tried whether the ancestral lands of the plaintiff and defendant No. 1 sold in the Suits Nos. 35 of 1876 and 193 of 1876 were sold under so much of the decree in these suits as was personal, or in execution of the decree for enforcement of the mortgage. The Munsif returned that the sales took

(1) 1 I.A. 321. (2) 10 C. 626. (3) 9 I. A. 128.

place under decrees, which were both personal and directed sale of the lands to realize the amounts due on the mortgages.

This was in effect a finding that the sales were made under the decrees directing sale of these identical ancestral lands for payment of the debts due by defendant No. 1, the plaintiff's father. It was found in the original suit that those debts were not incurred by defendant No. 1 for an illegal or immoral consideration.

The plaintiff no doubt was not party to the mortgages or to the suits in which the decrees for sale were made. But following the decision of *Muddun Thakoor* v. *Kantoo Lall* (1), and the several subsequent cases in the Privy Council to the same effect *Suraj, Bunsi Koer's case* (2), &c., we are bound to hold that, though the plaintiff was not a party to those suits yet, as they were suits in which the sale of the mortgaged ancestral lands was prayed for, and in which decrees for sale of the specified lands were made, the plaintiff is bound by such sales, as he has not shown that the mortgage debts of his father were contracted for illegal or immoral consideration. The principle decided by the Privy Council does not conflict with the general rule, *viz.*, that all persons whose interests are sought to be prejudicially affected by a suit should be made parties, unless their interests are sufficiently represented **[353]** and protected by other parties to the suit (*see* the rule—Mitford on Pleadings, pp. 163-4).

It was because the son was not a party to the suits against his father in each of the cases before the Privy Council and, therefore, not bound thereby as if he was a party, that an opportunity was given him by the Privy Council to show that the debt due by his father was not in its nature one which bound the son.

It will, therefore, be still necessary in all cases where a creditor seeks in suit to bind a son's estate in ancestral or other property, for a debt incurred by his father and not by him, that the son should be made party to the suit. The son can then raise all proper defences, and if a decree for sale shall be made, a purchaser will be protected without any prejudice being done to the son.

The decision in the present cases following *Muddun Thakoor's case* (1) and *Bunsi Koer's case* (2) and several other cases of sales under decrees made for sale of the property mortgaged is in no way inconsistent with the recent decision of the Privy Council in *Hardi Narain Sahu* v. *Ruder Perkash Misser* (3), in which it was held that a sale under a money decree against a father of his right, title and interest in ancestral property did not pass the interest of his son in the ancestral property sold. That case affirmed the decision in *Deendyal Lal* v. *Jugdeep Narain Singh* (4). The case of *Muddun Thakoor* was apparently believed by the Privy Council to be the case of a mortgage and a decree thereon directing sale of the lands mortgaged—see the judgment of the Court referring to the decree for sale. *Suraj Bunsi Koer's case* was certainly one of mortgage, and in it *Deendyal's case* was referred to. *Hardi Narain Sahu's case* (3) explains the distinction between sales under the two classes of cases, and the different result of the sales under the different decrees.

MUTTUSAMI AYYAR, J :—I assent to the order, as it is in accordance with the recent ruling of the Privy Council.

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(1) 1 I.A. 321. (2) 6 I.A. 88. (3) 10 C. 626. (4) 4 I.A. 247.

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[354] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

SUNDARA (*Defendant No. 1*), *Petitioner v.* SUBBANNA (*Plaintiff*), *Respondent.** [12th March, 1886.]

Civil Procedure Code, Section 206—Jurisdiction of Court to amend its decree after appeal.

Under Section 206 of the Code of Civil Procedure a Court has power to amend its decree by bringing it into conformity with the judgment, after the said decree has been confirmed on appeal.

[**Overruled**, 18 M. 214 (215) (**F.B.**); **N. F.**, 11 A. 267 (278); 18 B. 542 (545); 6 C. P.L.R. 143; **Appr.**, 10 A. 51 (55); **R.**, 15 M. 403 (404).]

THIS was a petition under Section 622 of the Code of Civil Procedure against an order of T. Rangacharyar, District Munsif of Tiruvarur in the Tanjore district.

The petitioner, Sundara Ayyan, defendant No. 1 in suit No. 39 of 1883, sought to have the decree in the suit amended under Section 206 of the Code of Civil Procedure. The decree declared that the person of defendant No. 1 and his property generally should be liable for the sum decreed; whereas the prayer in the plaint was that certain property hypothecated by him to secure payment of the sum claimed should be held liable; and in the judgment it was decided that the property hypothecated should be sold for the amount of the decree. Upon this petition the Munsif delivered the following judgment:—

"The decree in question was appealed against and reversed by the District Court of North Tanjore. The matter was taken up before the High Court in second appeal. The High Court reversing the decree of the Lower Appellate Court, confirmed the decree of this Court. The ground stated in the petition for correcting the decree was a ground of appeal from the decree of this Court. The matter has gone up for consideration before the higher Courts, and for some reason or other the relief expressly prayed for by the petitioner was *not* granted. I consider that Section 206 applies only to final decrees and such decrees as have not ceased to be final by an appeal having been preferred against them. The decree between the parties as it now exists is not a mere **[355]** decree of this Court, but one approved by the High Court on second appeal; and this Court has no power, in my opinion, to alter such decree; and more so, as the petitioner failed to have it set right, though one of his appeal grounds expressly referred to this relief. Petition is dismissed."

The ground upon which this petition was based was that the Munsif had failed to exercise jurisdiction in refusing to amend his decree by bringing it into conformity with the judgment.

Parthasaradi Ayyangar, for petitioner.

Respondent did not appear.

JUDGMENT.

We do not agree with the District Munsif that his jurisdiction to amend the decree under Section 206 is affected by that decree being

* Civil Revision Petition 318 of 1885.

approved on second appeal by the High Court. Section 206, Civil Procedure Code, enacts that the decree must agree with the judgment, and, if there is an error, the Court shall amend the decree so as to bring it into conformity with the judgment. We set aside with the order of the District Munsif and direct him to pass fresh orders.

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APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

AMMA (*Defendant No.* 1), *Appellant v.* KUNHUNNI (*Plaintiff*), *Respondent.** [17th March, 1886.]

Civil Procedure Code, Sections 562, 565, 566—*Illegal order of remand.*

A District Munsif having taken all the evidence offered on the issues in a suit, disposed of the suit upon his finding on one of the issues without deciding the rest.

On appeal the District Judge reversed the decree and remanded the suit for the trial of the issues left untried:

Held, that under Section 562 of the Code of Civil Procedure, the order of remand was illegal.

APPEAL against an order of H. J. Stokes, Acting District Judge of South Malabar, in appeal No. 1 of 1885, remanding suit No. 63 of 1884 on the file of the District Munsif of Calicut for trial of certain issues left untried by the said Court.

[356] The facts appear from the judgment of the Court (KERNAN and MUTTUSAMI AYYAR, JJ.).

Sankara Menon, for appellant.

Sankara Nayar, for, respondent.

JUDGMENT.

The Court of first instance tried all the issues, that is, the Munsif took evidence on them all. But the Munsif thought that his finding on the third issue would render unnecessary any finding on the other issues.

On appeal the District Judge reversed the finding on the third issue and ordered the case to be remanded for trial by the Court of first instance of the issues untried.

This order was supposed to be justified by Section 562 of the Code of Civil Procedure, but it was not legally justifiable under that Section. That Section provides that if a Lower Court has disposed of the suit on a preliminary point so as to exclude evidence of fact which appears to the Appellate Court essential to the determination of the case, and if the decision on that preliminary point is reversed on appeal, then the Appellate Court may *remand.* But in this case no evidence appears to have been excluded, as evidence was given on the issue which the Judge has directed to be tried. The Judge should have acted either on Section 565 or 566.

We set aside the order of the District Judge and direct him to restore the case to his file and proceed according to law.

Costs of this appeal to be provided for in the decree.

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* Appeal against Order 116 of 1885.

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APRIL 9.

APPELLATE CRIMINAL.

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9 M. 356 = 2 Weir 677.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Parker.

SCOTT *v.* RICKETTS.* [9th April, 1886.]

Criminal Procedure Code, Section 526—District Magistrate and Civil and Sessions Judge (qua Magistrate) of Bangalore subordinate to High Court.

The District Magistrate and the Civil and Sessions Judge of the Civil and Military Station at Bangalore are Magistrates subordinate to the High Court at Madras within the meaning of Section 526 of the Code of Criminal Procedure.

IN petition No. 19 of 1886, James Scott prayed that the High Court would withdraw case No. 97 of 1886 on the file of the District [357] Magistrate of Bangalore, as well as case No. 1 of 1886 on the file of the Civil and Sessions Judge of Bangalore, and try them, or transfer them for trial to a Presidency Magistrate of Madras, or transfer the former case to the file of the Civil and Sessions Judge of Bangalore.

In petition No. 23 of 1886, Lancelot Ricketts prayed that case No. 1 of 1886 on the file of the Civil and Sessions Judge of Bangalore might be transferred to the file of the District Magistrate of the said station to be tried with case No. 97 of 1886 on the file of that Magistrate.

Mr. *Branson* and Mr. *Grant*, for Scott.

Mr. *Shaw*, for Ricketts.

JUDGMENT.

We think we have jurisdiction to transfer these cases, as the Courts of both Magistrates are as Courts of Magistrates of the First Class subordinate to this Court within the meaning of Section 526 of the Code of Criminal Procedure.

We think that, under the circumstances stated in the affidavits on both sides, it is necessary for the ends of justice to transfer these two cases from the Courts of Colonel Hill and Major Maltby, respectively, to be heard and inquired into by another competent Magistrate. The cases are case and cross-case, and it will conduce to convenience that they should be heard by the same Magistrate. There is no other Magistrate at Bangalore to whom the cases can be transferred. Mr. Scott states he intends to summon Major Maltby as a witness, and that he and Mr. Ricketts are very intimate friends. We do not say that Major Maltby would be influenced in his decision by that fact, but we think we are justified in removing the case under the circumstances from his Court.

As to Colonel Hill's jurisdiction, counsel for Mr. Ricketts contends that no offence was committed outside the Civil and Military station, and that Colonel Hill has no jurisdiction to try either case. We should then either allow the two cases to proceed in separate Courts, or remove the cases to be inquired into by a Magistrate in Madras.

We think the latter is the course we ought to pursue, although some inconvenience may follow.

We order accordingly both cases be transferred to the file of Colonel Smith, the Chief Presidency Magistrate of Madras.

Solicitors for Ricketts : *Barclay & Morgan.*

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* Criminal Miscellaneous Petitions 19 and 23 of 1886.

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FULL
BENCH.

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(F.B.).

[358] APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Brandt, and Mr. Justice Parker.

REFERENCE UNDER SECTION 46 OF THE INDIAN STAMP ACT, 1879.*
[9th March, 1886.]

Stamp Act, Schedule I, Article 50, *Clause*(*b*)—*Court Fees Act, Schedule II, Article* 10 (*a*) – *Vakalatnama*—*Power-of-attorney.*

A document was given to P by thirty-six persons jointly interested in a certain sum of money authorizing him to appear before a certain officer and receive payment thereof:

Held, that the document was a power-of-attorney, and that consequently the proper stamp duty was one rupee, leviable under the Indian Stamp Act, 1879, Schedule I, Article 50 (*b*).

THIS was a reference by the Board of Revenue under Section 46 of the Indian Stamp Act, 1879.

The case was stated as follows:—

"Certain sums of money had been ordered to be refunded to thirty-six raiyats in respect of thirty-seven pattas, thirty-six being sole pattas and the thirty-seven a joint patta, in the names of all the raiyats. On the 31st August 1885, these raiyats executed a joint document bearing a Court Fee adhesive stamp of the value of 8 annas, authorizing one Pitchu Ayyan to receive the money on their behalf and sign the refund bill. The question then for consideration is, whether the document is properly stamped as a vakalatnama with a Court Fee stamp of the value of 8 annas under Article 10 (*a*), Schedule II of Act VII of 1870, or whether it should be stamped with a stamp of the value of one rupee as a power-of-attorney under Article 50, clause (*b*) of the schedule to the General Stamp Act, I of 1879."

The Acting Government Pleader (Mr. *Powell*) for the Board of Revenue.

The Full Bench (COLLINS, C.J., KERNAN, MUTTUSAMI AYYAR, BRANDT, and PARKER, JJ.) delivered the following

JUDGMENT.

We are of opinion that the instrument should bear a stamp of the value of one rupee under Article 50, Clause (*b*), Schedule I of the Stamp Act.

[359] This instrument under which Pitchu Ayyan is authorized to receive payment of the money to which the raiyats are entitled is a power on behalf of thirty-six persons jointly interested in a particular fund authorizing him to do a single act, and there is nothing before us to show that the persons entitled to the refund would be required to do more than appear in person or by a person duly authorized by them before the officers directed to refund the money and to receive it.

This decision in no way conflicts the decision of this Court in referred case No. 4 of 1885. *Reference under Stamp Act, Section* 46 (1).

* Referred case 1 of 1886.

(1) 9 M. 146.

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Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Muttusami Ayyar.

SIMSON AND OTHERS *(Plaintiffs), Appellants v.* VIRAYYA *(Defendant), Respondent.** [26th February, and 19th March, 1886.]

Contract—Breach—Rescision—Reciprocal promises - Condition precedent—Damages—Measure of.

On 6th March, 1883, V promised to sell 5,000 bags of gingelly seed at Rs. 7 As. 11 a bag to S. Two-thirds of the price was paid in advance. V agreed to deliver the 5,000 bags at the end of April, and to give S notice as instalments of 1,000 bags were ready for delivery within the stipulated time, and S promised to pay V the balance of the contract price on each instalment when ready for delivery. There was neither delivery nor payment in terms of the contract.

3,000 bags were delivered by V, but S did not pay the balance of the price due, and 2,000 bags were never delivered. On 7th May, V declined to deliver these bags, on the ground that S had not paid the balance of the contract price for the 3,000 bags delivered when ready for delivery, and, subsequently, repaid to S the balance due to him of the money advanced.

In a suit by S against V for damages for non-delivery of 2,000 bags:

Held, that V was not excused from performance of his promise by the failure of S to pay the balance due for the bags delivered, and that S was entitled to recover the difference between the market and the contract price on the day the contract was broken by V.

[R., 10 Ind. Cas. 18 (19).]

APPEAL from the decree of K. Krishnasami Rau, Subordinate Judge at Cocanada, in suit 17 of 1883.

[360] The plaintiffs, Messrs. Simson Brothers, sued the defendant, Golla Virayya, for Rs. 6,821-13-0, damages for breach of a contract to supply 5,000 bags of gingelly seed.

The Subordinate Judge gave plaintiffs a decree for Rs. 500. Plaintiffs appealed against this decree so far as it dismissed their claim for Rs. 6,321-13-0, and the defendant objected to the decree for Rs. 500.

The facts and arguments appear from the judgment of the Court, (COLLINS, C.J., MUTTUSAMI AYYAR, J.).

The *Acting Advocate-General* (Mr. *Shephard*), for appellants.

Mr. *Shaw*, for the respondent.

JUDGMENT.

The appellants and the respondent are merchants residing in Cocanada, and on the 6th March, 1883, the latter contracted to sell to the former 5,000 bags of white gingelly seed at Rs. 7, As. 11, per bag. The contract price amounted to Rs. 38,457-8-0, of which two-thirds, the sum of Rs. 25,625, were paid in advance. The respondent agreed to deliver the 5,000 bags on board the appellants' ship at the end of April, 1883, and to give them notice as instalments of 1,000 bags each were made ready for delivery within the stipulated time; and the appellants engaged to pay him one-third of the contract price on each instalment when it was ready for delivery. There was neither delivery nor payment in the terms of the contract. But it is admitted that 2,995 bags were delivered at Masulipatam on board the *Macedonia* on the 15th May, 1883, and that Rs. 125 were paid on account of the balance of price.

* Appeal 12 of 1885.

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No claim is, however, now made, either by the appellants in respect of the bags so delivered with reference to the delay in their delivery, or by the respondent on account of the appellants' failure to pay the remainder of the proportionate price; and the present litigation is confined to the bags of gingelly seed, which the appellants asserted were short delivered. Their case was, that 2,995 bags were alone delivered on the 15th May; that the remainder was never delivered at all, though the time for delivery was extended to the 20th June in regard to 2,000 bags; that Rs. 11 a bag was the market price on that date, and that the respondent was further liable to pay a sum of Rs. 68-2-0, which represented the charges incurred on re-shipment of 342 bags. The respondent's contention was that 3,000 bags were delivered on the 15th May; that on the appellants' refusal to pay the balance of the [361] proportionate price on 2,000 bags, which were reported to be ready for delivery, he rescinded the rest of the contract, and that he was not responsible for the cost of re-shipment.

As to the five bags, this appeal is not pressed at the hearing, and as to Rs. 68-2-0, we consider that the decision of the Subordinate Judge is right. The learned Advocate-General drew our attention to the evidence of the respondent's witness Ramamurti, who deposed that some of the bags got wet when they were taken to the steamer and were consequently returned by the captain of the vessel. We cannot accept this evidence without more as sufficient to show that the seeds were materially damaged, or that there was any negligence on the part of the respondent in respect of those bags. The substantial claim we have to consider is that which relates to 2,000 bags, and the questions raised for our decision in connection with it are :—(1) whether the time for their delivery was extended to the 20th June, and, if so, whether the market price on that day was Rs. 11 a bag; (2) whether the appellants broke their part of the contract by refusing payment of the balance of price due on 2,000 bags; (3) whether the respondent became entitled by such breach to rescind the rest of the contract; and (4) whether any, and what, compensation was due to the appellants, if not the amount claimed by them. The correspondence which took place between the parties clears the way to a correct decision to a considerable extent, and we shall proceed to refer to such portions of it as are material. On the 25th March the respondent's brother sent him a telegram to the effect that gingelly seeds were not procurable at Jaggaiyapet, and it was desirable to settle, though at some loss (Exhibit A). This shows that so early as in March the respondent experienced difficulty in procuring the seeds, and that they were scarce in the market. On the 18th April, however, the respondent wrote to the appellants the letter marked D, stating that 2,000 bags were ready for delivery and that the rest were expected from Jaggaiyapet, and requesting that Rs. 125, the balance of price due for 2,000 bags, might be remitted to him. We may observe here that the balance really due was Rs. 5,125, and that Rs. 125 was mentioned instead by mistake. On the 20th April, the appellants inquired by telegram whether the respondent was sure that 5,000 bags could be delivered on the 20th May, and he replied on the same day by his letter F, that he was waiting for information from Jaggaiyapet. He also [362] sent the telegram G that he would reply as soon as he got the information. On the 21st April, the appellants acknowledged the receipt of letter D, and forwarded a cheque for Rs.125, which they also described as the balance due on 2,000 bags. They further inquired whether the remaining 3,000 bags would be delivered or not, as they desired to buy them elsewhere

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if the respondent could not deliver them, and added that, of course, 3,000 bags at least would be ready, as he had bought that quantity (Exhibit IV). Thus, it appears that on the 21st April, 2,000 bags were ready for delivery, that 1,000 bags more were expected to be ready soon, and that the parties were in doubt whether the remaining 2,000 bags could be procured. On the 24th April, 1883, the respondent pointed out that Rs. 125 were inserted in his letter D, by mistake for Rs. 5,125, and that the appellants should remit the balance of Rs. 5,000 (Exhibit H). To this, however, the appellants did not send a reply, but Mr. Simson admitted in his evidence that he declined to pay. The reason which he gave for this refusal was by no means satisfactory. He said he did not know that a clause was inserted in the contract in regard to the payment of proportionate price as instalments of 1,000 bags were made ready for delivery, and that the respondent never told him of it; but that when he discovered that it was part of the contract, he made no objection to it. He added that he told the respondent that he had no right to put in such a clause.

On the 26th April, the respondent sent to the appalants letter E, in which he explained that 3.000 bags could be delivered on the 20th May, and that the remaining 2,000 bags might be delivered on the 20th June, and he earnestly requested that the time fixed for their delivery might be extended to the 20th June. The appellants' contention as to this part of the case was that they extended the time accordingly and sent a verbal message to that effect by one Venkata Reddi. It is strange that they did not call Venkata Reddi as a witness; though assuming that the message was sent, it may well be that it was never delivered to the respondent.

It is not denied for the appellants that, as observed by the Subordinate Judge, Exhibit E contains an endorsement that they received the letter on the 28th April, and sent a reply to it on the 1st May. Exhibit I, is a letter from the appellants to the respondent of 1st May, and after acknowledging two letters from [363] the respondent, dated the 24th and 25th April, and referring to the telegram already sent that the steamer would arrive at Masulipatam on the 15th May, it proceeded to state as follows:—"You must borrow "gingelly for the steamer, as we cannot fill her without your seed, and "the claim for dead freight, which we shall have to pay if we leave space "in her for 2,000 bags, will amount to RS. 6,000. Please, therefore, do "your utmost to get the seed somehow or other and avoid such disastrous "loss. We note you have already purchased 3,000 bags, but for the balance "2,000 bags you must also arrange and ship them by the said stea- "mer in time, either by borrowing or by purchasing from other "people." It is not possible to reconcile this letter with the appellants' contention that they extended the time for delivery to the 20th June; but it shows on the contrary that they were most anxious that the 2,000 bags should be delivered on the 15th May, and that they insisted on the respondent borrowing or purchasing them in time for shipping them on that date if he desired to avoid the penalty of paying Rs. 6,000 as dead freight. The letter of the 25th April, which is acknowledged in Exhibit I, was not produced by the appellants. They stated that that letter was mislaid, but beyond their statement, there was no other evidence. Seeing how inconsistent their account of the extension of time by a verbal message is with their own letter, we are not prepared to hold that the Subordinate Judge was in error in finding that, instead of extending the time, they refused all extension beyond the 15th May. In May the price began to rise, and one Mahomed Kasim wrote to the respondent on the 3rd idem that gingelly

seed sold at Jaggaiyapet on 1st May at Rs. 803 per putti (Exhibit III). On the 1st May the appellants sent to the respondent a telegram requiring him to borrow 2,000 bags and to ship all the 5,000 bags on the 15th idem. The respondent stated in reply on the 3rd May, that the appellants did not fulfil their part of the contract in regard to payment of proportionate price on the bags which were ready for delivery; that he incurred a great loss in purchasing 3,000 bags; that in consequence of the breach of contract on their part to pay the balance of proportionate price he lost many opportunities of purchasing gingelly seed at once, and that therefore he was not to blame for it. On the 5th May he sent a reply (Exhibit VIII) to the appellants' letter I. In this he noted the contents of that letter and remarked, "Had you sent [364] the balance as soon "as I informed you that gingelly seed had been made ready in obe"dience to the terms of the contract, I would have completely "fulfilled my contract in due time, as I did for the money you had "given me in advance. But you did not act up to the terms of the "contract. So it is evident that it is not at all a fault of mine, and so I "am not responsible to make arrangements for the delivery of the remain"ing bags." On the 7th May the appellants wrote to the respondent to the effect that, though they were most anxious to help the respondent, they could not do more than what they had already done. They then proceeded to state, in justification of non-payment of proportionate price, that the amount already advanced was Rs. 10,375 in excess of the full value of 2,000 bags, and that the dead freight and the penalty they might have to pay for short shipment was Rs. 10,000. In this letter only 2,000 bags are spoken of as ready for delivery, though it had previously been intimated to them that 3,000 bags were ready; but it must be borne in mind that this letter was written in answer to the respondent's complaint that the balance of proportionate price on 2,000 bags was not paid as required by him. In their letter the appellants further said, "You say you will deliver the remaining 2,000 bags by the "20th June. Is this quite certain, and can we rely on your doing so "without doubt? It is most important to know this positively, so that "we may arrange matters for the best" (Exhibit V). Mr. Simson states in his evidence that the respondent declined on the 7th May, to undertake to deliver 2,000 bags on the 20th June. Again, the appellants addressed to the respondent letter II on the 12th May and inquired, after stating that he had no cause for complaint in regard to payment of balances, whether he would ship 2,000 bags of castor seed instead of gingelly seed to save dead freight, and whether he would make ready for shipment the remaining 2,000 bags of gingelly seed by the 20th June if the balance of price were paid. The respondent did not accede to the appellants' suggestion, and intimated to them, on the 19th May, that he would neither lend them 2,000 castor bags nor supply the remaining 2,000 gingelly bags by the 20th June (Exhibit IX). In advertence to this letter, the appellants sent letter VI on the 24th May, stating that the respondent had got into the hands of some unscrupulous person who was trying to stir up a difference of opinion between them, and that if he saw their agent, Mr. Hay, [365] the latter would point out that he took an erroneous view of his liability as a contractor. Though a hope was expressed that the difference might thus be settled, no further correspondence took place until the 25th June. When the respondent made up an account of what was due to him in respect of 3,000 bags delivered out of 5,000 bags, and remitted to the appellants the balance due to them out of the money advanced and

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of the subsequent payment of Rs. 125 (Exhibit K) on the 27th June, the appellants wrote to the respondent letter VII in which they acknowledged receipt of letter K and said "we are sending a steamer to Masulipatam, "due there about the 15th July next, for the balance of 5,000 bags gin-"gelly seed you sold us. We trust, having given you so long a time to "deliver and assist you in completing your contract, that you will have "no difficulty in effecting a shipment under Mr. Hay's instructions. Please "telegraph us as soon as you receive the present, whether you will be "ready to ship by that time."

As already observed, the appellants' contention, that they extended the time for delivery from 30th April to 20th June in regard to 2,000 bags, cannot be supported. The oral evidence is not only incomplete, but it is also inconsistent with their letters of the 1st, the 7th, and the 12th May, and with Simson's evidence as to what the respondent said on the 7th May. In the first they told the respondent that he must deliver all the 5,000 bags on the 15th May, and in the other two they inquired whether he would be able to deliver the 2,000 bags by the 20th June.

The respondent repudiated his liability to deliver them at all on the 3rd, the 7th, and the 19th May; we must accept the Subordinate Judge's finding on this point. It is argued for the appellants that the time for delivery must then be taken to have been extended at least to the 15th May. The appellants were no doubt inclined to extend the time until the day on which the steamer chartered by them was expected to arrive at Masulipatam. It was probably for that purpose they inquired on the 20th April whether 5,000 bags could be delivered on the 20th May, and the respondent's reply, dated the 26th April, was that he could get them ready if they extended the time to the 20th June. On the 1st May they refused such extension, and told him to get the 2,000 bags ready by the 15th May, on which day they had information that the steamer would touch at Masulipatam. On the 3rd May the respondent [366] charged them with breach of contract in regard to the payment of balances, and on the 5th May he distinctly repudiated his liability for future performance, and he since continued to do so whenever he was asked to deliver the 2,000 bags. The evidence discloses no trace of mutual undertaking that 2,000 bags were to have been delivered on the 15th May, and on this ground we are unable to hold that there was an extension of time, as a matter of mutual agreement, up to 15th May either.

Though the time fixed by the contract was the 30th April, it was considered by neither party as of its essence; and when the contract time expired, the respondent's application for an extension was pending. Though the extension which the respondent sought was refused on the 1st May, a fresh extension was offered instead, till the 15th May. The appellants demurred to it on the 3rd and 5th May, and it was finally known on the 7th May that it was the respondent's fixed resolution to stand upon the right asserted by him to rescind the contract. It would therefore be fair to assess the damages, if any, with reference to the market price on that day, for the appellants could not reasonably be expected to go into the market to buy the bags of gingelly seed, which the respondent refused to deliver, until the negotiations for an extension were finally at an end. As to the market price, the Subordinate Judge takes it to have been Rs. 7-15-0 on the day of the breach. The evidence is conflicting and vague as to the quality of the gingelly seed to which the witnesses referred. We should ordinarily hesitate to come to a different finding, but in the present case the Subordinate Judge has overlooked the respondent's admission contained in his

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written statement, *viz.*, that the market price was Rs. 8-2-0 a bag on 3rd May. It is also in evidence that the price was steadily rising in the month of May, and we must therefore find that the difference between the contract and the market price on the day the contract was broken was 7 instead of 4 annas per bag. It remains for us to decide the question whether the respondent was entitled to rescind the contract on the ground that the appellants failed to pay the proportionate price on the 3,000 bags which were ready for delivery. There is no doubt that the proportionate price was not paid, and that such non-payment was in contravention of the terms of the contract. It is argued by the learned counsel for the respondent that the promise to prepare for delivery instalments of 1,000 bags [367] and the promise to pay the balance of price due for each of those instalments, are reciprocal promises, and that the refusal by one party to perform his promise gives a right to the other to put an end to the rest of the contract. In dealing with cases like the present, it is necessary to keep in view the rule stated by Coleridge, C.J., in *Freeth* v. *Burr* (1), and the rules of law applicable to conditions precedent. We cannot adopt the argument for the respondent that the payment for each instalment of bags which were made ready for delivery, was a condition precedent to the preparation of the remainder for delivery. If it were so, there would be an end of the case. The contract was for the purchase of 5,000 bags of gingelly seed, and upon its true construction there was but one contract for that quantity. It was in this view that two-thirds of the price fixed for 5,000 bags was paid in advance, and the receipt E contains a distinct recital that the advance was on the entire contract. The words in this document are "Rs. 25,625, being the "advance due for the 5,000 bags of white gingelly which was contracted "with you this day to be delivered on board the ship at Masulipatam at "the rate of Rs. 7-11-0 per bag, was paid by you and received by me." They contemplate one entire contract and one delivery, and a part-payment in advance in respect of the whole. It appears to us to be plain that the primary or general intention was that the contract should be single and indivisible. A default in payment of the balance of proportionate price in respect of one or more instalments cannot, and does not, go to the whole root of the contract. Nor is this a contract which, like the one in *Withers* v. *Reynolds* (2), is capable of being divided into as many independent contracts as there are instalments to be prepared for delivery; such a division would be at variance with the primary intention of the contracting parties. According to general principles we think that whenever the primary or general intention is unmistakably clear from the terms of a contract, the subsidiary provisions which it contains must be construed with reference and in subordination to that intention. There is therefore no foundation for the argument that the payment of the balance of price for each instalment was a condition precedent with respect to any part of the obligation to deliver 5,000 bags. Nor does this case fall under the rule that [368] where one party refuses to perform his part of the contract, such refusal may be treated by the other party as setting him free or releasing him from the future performance of his part of the contract. It is argued that, in connection with this rule, the fact that there was a part-payment made in advance is immaterial, since a party may refuse to perform his part of the agreement either in its entirety or in respect of so much of it as may still remain to be performed. However

(1) L.R. 9 C.P. 208.

(2) 2 B. and Ad., 882.

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this may be, we do not consider it necessary to decide this question for the purposes of this appeal. Adverting to the rule, Coleridge, C.J., said, in *Freeth* v. *Burr* (1), "It is in substance, as we understand it, that you "must look at all the circumstances of the case, in order to see whether the "one party to the contract is relieved from its future performance by "the other; you must examine what that conduct is so as to see whether "it amounts to a renunciation, to an absolute refusal to perform the "contract such as would amount to a rescission if he had the power to "rescind, and whether the other party may accept it as a reason for not "performing his part." This rule was adopted by Selborne, L.C., in the *Mersey Steel and Iron Company* v. *Naylor Benson and Co.* (2).

Having regard then to the circumstances of the present case, it is not possible to hold that the appellants' conduct amounted to a *renunciation* of the contract, or to an *absolute* refusal of future performance. Several of their letters, those of the 1st, 7th, and 25th May, and of the 27th June, show that they were most anxious that the entire contract should be performed. It was only natural that they should have so desired, seeing that the market was steadily rising. They were, at first, averse to granting an extension of time, but in this they did not go beyond their rights under the contract. It is, no doubt, true that they broke the contract in withholding payment of proportionate price on 3,000 bags, but the respondent intimated to them that he could not arrange for the purchase of 2,000 bags, unless the time was extended to the 20th June. This extension they were not bound to grant, and the failure to purchase them gave them reason to apprehend that they might sustain loss by having to pay dead freight and penalty. Exhibit V shows that they hesitated to pay, only because the respondent had not bought 2,000 bags. As matters then stood, the **[369]** respondent had over Rs. 2,000 with him in excess of the value of the 3,000 bags purchased by him. He stated in his letter of the 3rd May that he would have purchased the 2,000 bags if he had been paid. Why did he then ask for an extension of time only seven days before? The correspondence conveys the impression that, on the one hand, the appellants intended to withhold payment of the balance of price until the respondent was in a position to assure them that he could purchase the 2,000 bags in time for their shipment on board the *Macedonia*, and that no heavy loss would be entailed on them; while the appellants, who were unable to arrange for their purchase owing to the then state of the market, took advantage of the postponement of payment for which his own conduct gave occasion, to set himself free from the remainder of the obligation, especially when the letter of the 1st May suggested disastrous loss as the probable consequence of his failure to arrange for the purchase of 2,000 bags. Whatever counter-claim the respondent might then have had for the delay in payment, and for breach of that portion of the contract which relates to it, the appellants' conduct does not amount to a renunciation of the contract or to an absolute refusal of future performance. The result then is that the decree will be varied so as to award Rs. 875 instead of Rs. 500 as damages, that the appeal will be allowed to this extent only, and that the memorandum of objections and the rest of the appellants' claim will be dismissed.

We give the appellants the costs of this appeal.

Attorney for plaintiffs: *Wilson.*

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(1) L.R. 9 C.P. 208. (2) L.R. 9 App. Cas. 434.

9 M. 369 = 1 Weir 331.

1886 March 29.

Appel-late Criminal.

9 M. 369 = 1 Weir 331.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

QUEEN-EMPRESS *v.* ADEMMA.* [29th March, 1886.]

Penal Code, Section 312—*Miscarriage—With child—Stage of pregnancy immaterial.*

A woman is with child within the meaning of Section 312 of the Indian Penal Code as soon as she is pregnant.

[370] *Held*, therefore, where a woman was acquitted on a charge of causing herself to miscarry, on the ground that she had only been pregnant for one month and that there was nothing which could be called even a rudimentary fœtus or child, that the acquittal was bad in law.

In criminal case 80 of 1885, on the file of the Sessions Court of North Arcot, the prisoner Bandi Ademma was acquitted on a charge of causing miscarriage under Section 312 of the Indian Penal Code.

The Sessions Judge (H. T. Knox) held that, as the prisoner had only been pregnant for one month, she could not be said to have been with child within the meaning of Section 312.

The record having been called for and notice given to the accused who did not appear, the Court (MUTTUSAMI AYYAR and BRANDT, JJ.) delivered the following

JUDGMENT.

The Sessions Judge finds that the accused, Ademma, being pregnant, used artificial means to cause herself to miscarry, and that she did, in consequence, get rid of the contents of her uterus; but he acquitted her on the grounds that she had been pregnant, according to her own statement, for only a month, and cannot be said to have been with child, for, according to the evidence, what came away was only a mass of blood.

"There was nothing which could be called even a rudimentary fœtus or child."

The term 'miscarriage' is not defined in the Penal Code. In its popular sense it is synonymous with abortion, and consists in the expulsion of the embryo or fœtus, *i.e.*, the immature product of conception. The stage to which pregnancy has advanced and the form which the ovum or embryo may have assumed are immaterial.

Section 312 requires proof that the woman is "with child," but it is enough if the fact of pregnancy and the intentional expulsion of the immature contents of the uterus are established. The words "with child" mean pregnant, and it is not necessary to show that "quickening," *i.e.*, perception by the mother of the movements of the fœtus, has taken place, or that the embryo has assumed a fœtal form.

Having regard to the requirements of the law in this respect, we must, and do, set aside the acquittal in this case, and direct a re-trial.

[371] If the accused be convicted, the Judge will no doubt take into consideration, among other things, the former trial and the time which has elapsed since the offence was committed.

* Criminal Revision Case 43 of 1886.

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9 M. 371.

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APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

AMBU (*Plaintiff*), *Appellant* v. RAMAN AND ANOTHER (*Defendants*), *Respondents.** [1st and 14th April, 1886.]

Malabar law—Otti tenure—Right to make further advance—Second mortgage to stranger without notice to otti holder invalid.

R having conveyed certain land to P on otti tenure (mortgage) in 1852 executed a deed of further charge (ottikampuram) in 1873 to P's widow, and, in 1879, conveyed the jenm (equity of redemption) to her.

Between 1873 and 1879, R mortgaged the same land to A by jenm panayam deed.

In a suit by A to enforce his mortgage:

Held, that inasmuch as R had not given notice to the otti holder, nor given her the option of making the further advance made by A, A had no claim against the land.

[R., 30 M. 388=17 M.L.J. 329=2 M.L.T. 354.]

APPEAL from the decree of H. J. Stokes, Acting District Judge of South Malabar, confirming the decree of O. Chandu Menon, District Munsif of Calicut.

Plaintiff, Ambu Nayar, alleged that in 1881 he obtained a decree upon mortgage (panayam) against defendant No. 1, and attached the land mortgaged in execution of the decree; that defendant No. 2 intervened, claiming to be the owner of the land by purchase from defendant No. 1 in 1879.

The claim was allowed.

Plaintiff now sued to enforce his mortgage against the land.

Defendant No. 2, Annamma, pleaded that the land had been demised on otti to her husband in 1852, that she had since that date made a further advance, and in 1879 purchased the equity of redemption.

[372] The District Munsif, upon the evidence of one witness, found that, according to custom, no jenm panayam can be raised by a jenmi from a third party on land held on otti tenure, and dismissed the suit.

On appeal, the District Judge confirmed the decree, on the ground that, as long as an otti is unredeemed, the otti holder's right to make further advances subsists.

Both Courts found that defendant No. 2 had no notice of, and had not consented to, the advance made to defendant No. 1 by plaintiff.

Plaintiff appealed, on the grounds, *inter alia*, that the right of an otti holder to make further advances was no bar to the sale of the land by a subsequent mortgagee, and that the effect of the right of pre-emption, which vested in defendant No. 2, was not to nullify plaintiff's mortgage, but only to give her the option to purchase that right also.

Sankara Nayar, for appellant.

Sankara Menon, for respondent No. 2.

The Court (COLLINS, C.J., and PARKER, J.) delivered the following

JUDGMENT.

Defendant No. 1 demised the paramba on otti to the late husband of defendant No. 2 in 1852, and in 1873, having received a further

* Second Appeal No. 803 of 1885.

advance, executed an ottikampuram deed to defendant No. 2. He further conveyed the jenm right to defendant No. 2 in 1879.

Between 1873 and 1879, however, the defendant No. 1 executed a jenm panayam deed in favour of plaintiff, who now sues to establish his right to sell the paramba to cover the panayam amount.

Both the lower Courts have dismissed the plaintiff's claim.

For the plaintiff it is contended that the paramba is liable for his lien, unless defendant No. 2 likes to pay him the amount, in which case the amount so paid will be a further charge upon the paramba, in addition to the claim already held by her on otti and ottikampuram.

For defendant No. 2, it is urged that the property cannot be made liable for plaintiff's panayam amount, that deed having been executed without notice to her, and without giving her the option of making a further advance.

The District Munsif found that defendant No. 2 had no notice **[373]** of plaintiff's jenm panayam and did not consent to it, and the District Judge adopts this finding. There was, therefore, no valid opportunity for making a further advance, and the suit was rightly dismissed. *Cheria Krishnan* v. *Vishnu* (1). *Vasudevan* v. *Keshavan* (2) is not in conflict with this view, since in that case the veppu holder and his karnavan had the chance of purchasing at the price offered by the highest bidder at an auction.

The issue referred in *K. T. P. Kunhali* v. *V. V. Kinathe* (3) is not necessary here since the Courts have found that defendant No. 2 had no notice of the panayam.

The second appeal fails and is dismissed with costs.

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9 M. 373 = 1 Weir 757.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

QUEEN-EMPRESS v. KETHIGADU.* [16th and 28th April, 1886.]

Madras Forest Act, Sections 2, 43, *Rules* 10, 13, 23—*Logs permanently fastened to a building cease to be timber.*

The accused were convicted of removing 'timber' vested in the Forest Department, and the convicting Magistrate ordered it to be confiscated:

Held, that having been already permanently fastened to a building it had ceased to be timber within the meaning of Section 2 of the Forest Act, and the order for confiscation was illegal.

THIS was a case referred for the orders of the High Court by C. A. Bird, District Magistrate of Cuddapah.

In case No. 190 of 1885, the Second-class Magistrate of Budvel convicted Kethigadu and two others of an offence punishable under Section 26 of the Madras Forest Act, 1882 (*viz.*, breach of Rule 12 of the Forest Rules passed by the Governor in Council) in cutting "reserved" trees without license and removing the timber.

The Magistrate found that the accused had cut sandal-wood and other logs and built huts therewith.

[374] Under Section 43 of Act, the Magistrate confiscated the "materials" and directed the Forest Ranger to take possession of them.

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* Criminal Revision Case 680 of 1885.

(1) 5 M. 198. (2) 7 M. 309. (3) 3 M. 74.

1886 APRIL 28. — APPELLATE CRIMINAL. — 9 M. 373 = 1 Weir 757.

The Deputy Magistrate, at whose instance the case was referred, was of opinion, that as the timber had been converted into huts and was no longer moveable property, the order under Section 43 was bad in law.

Counsel were not instructed.

The Court (MUTTUSAMI AYYAR and PARKER, JJ.) delivered the following

JUDGMENT.

We are of opinion that logs of wood, when they have become part of a house and permanently fastened to a building attached to the earth, have ceased to be timber within the meaning of Section 2 of the Forest Act, and are therefore not liable to attachment under Section 43 of that Act.

The order for confiscation must be set aside.

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9 M. 374 = 2 Weir 315.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

KOTTALANADA (*Petitioner*) *v.* MUTHAYA AND OTHERS (*Respondents*).*
[16th April, 1886.]

Cattle Trespass Act, Section 20—Criminal Procedure Code, Section 4 (a), Section 250—Illegal seizure of cattle under the Cattle Trespass Act, not an offence within the meaning of the Code of Criminal Procedure.

In a case instituted upon complaint made under Section 20 of the Cattle Trespass Act, the Magistrate acquitted the accused. and being of opinion that the complaint was vexatious, directed the complainant to pay compensation to the accused as under Section 250 of the Code of Criminal Procedure.

Held, that the act complained of was not an offence within the meaning of the Code of Criminal Procedure, and that the order awarding compensation was illegal.

[F., 23 C. 248 (249) ; R , 18 A. 353 (354) = 16 A.W.N (1896) 98 ; 23 C. 442 (445).]

APPLICATION under Sections 435, 439 of the Code of Criminal Procedure to quash an order of the Second-class Magistrate of Tenkasi awarding compensation under Section 250 of the Code of Criminal Procedure to the defendant in case No. 70 of 1885. In that case Kottalanada Pillai preferred a complaint against **[375]** Muthaya Pillai and others, under Section 20 of the Cattle Trespass Act, of illegal seizure of cattle.

The Magistrate having acquitted the defendants, directed the complainant to pay them compensation as for a frivolous complaint.

Mr. *Wedderburn*, for the petitioner, referred to *Pitchi* v. *Ankappa* (1).

Subramanya Ayyar, for respondents.

The Court (MUTTUSAMI AYYAR and PARKER, JJ.) delivered the following

JUDGMENT.

We are of opinion that the illegal seizure of cattle is not an offence within the meaning of the Criminal Procedure Code, and therefore set aside the order awarding compensation, and direct the refund of the money.

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* Criminal Revision Case 21 of 1886.

(1) 9 M. 102.

9 M. 375.

APPELLATE CIVIL.

Before Sir Arthur J.H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

RAMA (*Plaintiff*), *Petitioner v.* KUNJI AND ANOTHER (*Defendants*), *Respondents.** [2nd and 8th April, 1886.]

Legal Practitioners' Act, Sections 27, 28, 30 – *Suit by pleader to recover fee from Client —Contract Act, Section* 70—*Civil Procedure Code, Section* 622.

The Legal Practitioners' Act does not debar a pleader from recovering a fee from his client when no contract in writing is made.

A Small Cause Court having dismissed a suit brought by a pleader to recover from his client a fee claimed for the conduct of a suit on the ground, that such a suit would not lie, because it was leased on an oral contract and such contract could not be enforced by reason of the provisions of the Legal Practitioners' Act, the High Court under Section 622 of the Code of Civil Procedure reversed the decree of the Small Cause Court.

[**Diss.**, 25 C. 805 (806); 136 P.R. 1893; **F.**, 12 A. 169 (173); 27 M. 512 (516) = 14 M.L.J. 274; 1 Ind. Cas. 393 = 1 P.R. 1909 = 21 P.L.R. 1909 = 8 P.W.R. 1909; **R.**, 28 A. 764 (770) = 3 A.L.J. 579 = A.W.N. (1906) 235 = 1 M.L.T. 242; 11 M. 220 (229) = 12 Ind. Jur. 49; 14 M. 63 (65); 15 C.L.J. 660 (662) = 17 C.W.N. 45 (46) = 13 Ind. Cas. 43; 3 N.L.R. 47 (49).]

APPLICATION under Section 622 of the Code of Civil Procedure to set aside the decree of V. P. DeRozario, Subordinate Judge of South Malabar at Palgat, in Small Cause Suit No. 596 of 1885.

[376] The facts are set out in the judgment of the High Court (COLLINS, C. J., and PARKER, J.).

Gopala Nayar, for petitioner.

Respondents did not appear.

JUDGMENT.

The plaintiff sues to recover from his clients Rs. 82-8-5, balance of the "regular fees" as remuneration for his services as defendants' vakil in a certain suit. There was no agreement in writing made between the parties. It is, however, stated in the judgment that defendants' agent promised plaintiff the "regular fee," *i.e.*, the fee prescribed by the High Court as payable to one party by the adverse party.

The Subordinate Judge dismissed the suit, holding the agreement invalid under Section 28 of the Legal Practitioners' Act, not being made in writing or filed in Court.

It is urged upon us that the Subordinate Judge declined a jurisdiction vested in him by law since the Legal Practitioners' Act does not prevent the practitioner recovering a fee from his client when no agreement in writing is made. The plaintiff, it is said, bases his suit upon Section 70 of the Contract Act, as it was never intended that the service should be rendered gratuitously.

The plaint does not shew that the cause of action is based on an oral agreement to pay the "regular fees." Nothing is said about any agreement at all; the suit, as framed, is for work and labour done, and may be brought under Section 70 of the Contract Act. It may be however that, at the hearing, the plaintiff set up an oral agreement to pay the regular fees.

* Civil Revision Petition 30 of 1886.

1886 APRIL 8. — APPELLATE CIVIL. — 9 M. 375.

The fees fixed by the High Court under Section 27 of the Legal Practitioners' Act relate only to fees payable by one party in respect of the fees of his adversary's advocate, and not to the fees payable between a pleader and his own client; Sections 28 and 30 would appear to refer to agreements to pay more than such fees.

The Subordinate Judge has jurisdiction to hear the suit, and must determine on the evidence whether the amount claimed is fair and reasonable.

We set aside the decree and direct the Subordinate Judge to try the cause on its merits. The respondent must pay the costs of this proceeding.

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9 M. 377=2 Weir 427.

[377] APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

QUEEN-EMPRESS *v.* VIRANNA.* [20th April, 1886.]

Criminal Procedure Code, Section 349.

A Second-class Magistrate having convicted a person of theft and sent him to a First-class Magistrate for enhanced punishment as an old offender under Section 349 of the Code of Criminal Procedure, the First class Magistrate returned the prisoner to the Second-class Magistrate and directed that officer to commit the case to Sessions.

On a reference by the Sessions Judge, the High Court, while allowing the committal to stand, directed that, in all cases referred under Section 349 of the Code of Criminal Procedure, the Court to which the case is referred should dispose of the case itself and not send it back to the Court by which the reference is made for committal to Sessions.

[F., 26 A. 344 (345)=A.W.N. (1904) 42; R., 2 L.B.R. 285 (287).]

CASE referred to the High Court by A. L. Lister, Sessions Judge of Godavari, on 30th March 1886.

The material portion of the letter of reference was as follows:—

"The accused was placed before the Sub-Magistrate of Rajahmandri on a charge of theft in a building and convicted, and, as he was an old offender, the proceedings were submitted to the Joint Magistrate under Section 349 of the Code of Criminal Procedure.

The Joint Magistrate by Proceedings, No. 16 of the 10th March, referred the case back again to the same Sub-Magistrate with a direction that he should commit the case to the Sessions Court, and in obedience to that order, the Sub-Magistrate committed the case.

I submit that the order of the Joint Magistrate directing another Magistrate to commit is not according to law, and is *ultra vires*; in Criminal Revision Case 501 of 1882 it was held that such an order is *ultra vires*, and the commitment was quashed."

Counsel were not instructed.

The Court (KERNAN and MUTTUSAMI AYYAR, JJ.) delivered the following

JUDGMENT.

[378] It has been many times ruled by this Court that a Magistrate, to whom proceedings are submitted under Section 349 of the Code of Criminal

* Criminal Revision Case 195 of 1886.

Procedure, is not at liberty to return the case to the submitting Magistrate but must dispose of it himself. He has the power to commit to Sessions if necessary.

1886 APRIL 20.

APPELLATE CRIMINAL.

9 M. 377 = 2 Weir 427.

Very serious inconvenience is the result of the Magistrate's order returning the prisoner and directing committal to Sessions.

We think that we may allow the committal to the sessions to stand.

We desire, however, that in all cases referred under Section 349, the Magistrate, to whom reference is made, shall himself dispose of the case, and shall not return it and the prisoner to the Magistrate by whom the reference is made.

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9 M. 378 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Brandt, and Mr. Justice Parker.

KALANDAN (*Petitioner*) *v.* PAKRICHI (*Respondent*).*
THAMMAYA (*Plaintiff*) *v.* VENKANNA (*Defendant*).†
[9th March and 21st April, 1886.]

Regulation IV of 1816, *Section* 30—*Personal property only liable to attachment in execution of Village Munsif's decree.*

Under Regulation IV of 1816, the decrees of Village Munsifs cannot be executed against other than personal property. Such decrees can be executed by a transferee of the decree and against the representative of a deceased judgment-debtor.

[**N.B.**—See in this connection 9 M. 385 (**F.B.**), *infra.*—ED.]

THESE cases were heard together. The facts in *Kalandan* v. *Pakrichi* were as follows : —

One Mayan, having obtained a decree for Rs. 19-5-10 against the assets of Keloth Kunhi Paki, deceased, in suit 237 of 1885 on the file of the Village Munsif of Tellicherry Amsham on 27th April 1885, the Village Munsif, on the 25th June, attached a valuable house in Tellicherry in execution of this decree. On [379] the 29th June Acharath Pakrichi objected to the attachment on the ground that she had a kanam (mortgage) on the house of Rs. 500, and that the equity of redemption had been sold in execution of a decree of the Subordinate Judge of Tellicherry. She produced a summary decision of the District Munsif's Court allowing her kanam claim and a registered kanam deed, but the Village Munsif disregarded both and rejected her claim. On the 30th June the Village Munsif allowed Mayan to assign his decree to Kunji Kalandan Haji. On the 27th August notice of the attachment was given to the District Munsif's Court, and on the 28th August Pakrichi applied to that Court to refuse execution of the Village Munsif's decree.

The District Munsif, having sent notice to the assignee of the decree, refused execution, holding both the decree and the procedure in execution thereof to be illegal—

(1) because decree was passed against the assets of a deceased debtor ;

(2) because valuable immoveable property had been attached ;

(3) because the validity of a kanam for Rs. 500 had been adjudicated on and the order of a District Munsif declared invalid ;

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* Civil Revision Petition 288 of 1885. † Civil Revision Petition 307 of 1885.

1886 APRIL 21. — FULL BENCH. — 9 M. 378 (F.B.).

(4) because the assignment of the decree had been recognised.

On the 22nd September 1885, Kunji Kalandan Haji presented a petition to the High Court against the order of the District Munsif of Tellicherry refusing to execute the decree on the ground that the District Munsif was bound by law to send a peon to sell the property attached in execution of the decree of the Village Munsif, and that the District Munsif had misconstrued the provisions of Regulation IV of 1816.

This petition was styled a Civil Revision Petition (No. 288 of 1885), but under what provisions of law it was presented was not stated therein.

Mr. *Michell*, for petitioner.

The case was referred to a Full Bench on 3rd November 1885.

In *Thammayya* v. *Venkanna*, the facts were as follows :—

In suit 11 of 1881 on the file of the Village Munsif of Thamarapalli (near Cocanada) the defendant Venkanna agreed to pay to the plaintiff Thammayya Rs. 7-10-0 and prayed the Court [380] to pass a decree in accordance with this agreement. On the 24th January 1883 plaintiff applied for execution of this decree by attachment of the defendant's moveable property. No such property having been found, the plaintiff applied on the 11th July 1884 for attachment of 1·29 acres of defendant's land. On the same day the Village Munsif applied to the District Court for orders as to whether he could attach and sell land, and the District Court, on the 29th July, replied that the Village Munsif had power to sell land, referring to *Ramasami* v. *Angappa* (1).

On 2nd October 1884 the Village Munsif applied to the District Munsif to send a peon to sell the land under the provisions of Regulation IV of 1816. The District Munsif did not send a peon, but referred the matter to the District Court.

On the 17th of July 1885 the District Judge of Godavari (A.L. Lister), in a letter to the Registrar of the High Court, asked whether the rules regarding the proclamation and conduct of sales, which came into force on 1st July 1885, applied to sales of immoveable property conducted by Village Munsifs, and referred to the case of *Thammayya* v. *Venkanna*.

The High Court called for the records in this case, and on 3rd September 1885, the Court (MUTTUSAMI AYYAR, HUTCHINS, PARKER and HANDLEY, JJ.) delivered the following

JUDGMENTS.

MUTTUSAMI AYYAR, J.—I doubt if the decision in *Ramasami* v. *Angappa* (1) is correct. The words used in Section 30, clause 1 of Regulation IV of 1816, are "the property of the party cast," and appear to include immoveable, as well as moveable, property. But Section 5 and Section 27 limit the Village Munsif's jurisdiction to personal property, and the procedure prescribed for the attachment and sale is not what is usually prescribed in regard to immoveable property. The absence of a provision for the investigation of claims has also to be noted. The general scope of the Act is a matter which ought to be kept in view, I think, in construing particular Sections. The reasonable construction, it seems to me, is that the expression 'the property of the party cast' means such property as the Village Munsif has jurisdiction to deal with under the Act. Though the Regulation was passed in 1816, I do not understand that it was usual for Village Munsifs to sell immoveable property until recently.

[381] HUTCHINS, J.—Mr. Lister is of course mistaken in asserting that Mr. Webster had placed no construction on the Regulation ; he had

(1) 7 M. 220.

1886 APRIL 21. — FULL BENCH. — 9 M. 378 (F.B.).

set aside a Village Munsif's refusal to proceed against immoveable property; whether, as District Judge, he had power to make such an order is of course quite another matter. I cannot see that any inference can be drawn from the concluding words of clause 5, Section 30. The whole question seems to turn on this as pointed out in our judgment. Can we say that 'property' means moveable property only? If any of my learned colleagues can see their way to say that it does, I shall be only too glad to withdraw the decision and agree with Messrs. Lister and Weir.

Neither this Court nor Government can deprive the Munsifs of their legal powers. The only remedy (supposing one to be necessary which is by no means proved by anything beyond Mr. Lister's apprehension) would be a legislative enactment.

PARKER, J.—I also, with Mr. Justice Muttusami Ayyar, am inclined to doubt whether the decision in *Ramasami* v. *Angappa* was correct. Unfortunately the case was not argued, but it is certainly arguable that a Regulation which, by its preamble and every other section, gave a Village Munsif power to deal with personal property only, did not intend any other kind of property to be attachable under Section 30.

HANDLEY, J.—I agree with Mr. Justice Muttusami Ayyar and Mr. Justice Parker in doubting the soundness of the decision in referred Case 8 of 1883.

Looking at the whole scope of the Regulation, the wording of Section 30 and the absence of any of the usual provisions relating to sales of immoveable property, it seems to me a not unreasonable construction to put upon the Regulation to hold that the word 'property' in the sections relating to execution of decrees does not include immoveable property.

And the fact, if it be so as I understand, that the power to attach and sell immoveable property has not been exercised until recently by Village Munsifs, would go to show that such was the view formerly taken by the Courts of the Presidency.

On the 19th of September the case was referred to a Full Bench by KERNAN, OFFCIATING C. J.

On 9th March 1886 these cases were argued before the Full Bench (COLLINS, C.J., KERNAN, MUTTUSAMI AYYAR, BRANDT and PARKER, JJ.).

[382] Mr. *Michell*, for petitioner in C.R.P. 288.

The *Acting* Advocate-General (Mr. *Shephard*), for respondent.

In C.R.P. 307 the *Acting Advocate-General* (as *amicus curia*) argued the case.

JUDGMENT.

The judgment of the Full Bench (COLLINS, C.J., KERNAN, MUTTUSAMI AYYAR, BRANDT and PARKER, JJ.) was delivered by

KERNAN, J.—There is one question common to these cases, and that is, whether the decree of a Village Munsif, passed under Regulation IV of 1816, can be carried out by attachment of any property except personal property, or by attachment of property in land or houses. This depends on what is the proper construction of the Regulation in respect of the word 'property' mentioned in Section 30. That section provides that, if the decree amount be not paid, the Village Munsif shall attach the property of the party cast, and fix a day for the sale, and shall send notice thereof to the District Munsif, who shall send a peon to sell the attached property, and parts 2, 3 and 4 of Section 30 provide that the peon so sent shall sell the property and receive the purchase money and pay the creditor, and the balance, after deducting expenses, to the party cast.

1886 April 21. — Full Bench. — 9 M. 378 (F.B.).

There is no doubt that the word 'property' is a generic term, of which personal or moveable property and real or immoveable property are species, and, therefore, under the word property all sorts of property might be included; but whether the word property was used in its general sense or as meaning personal or moveable property only, must depend upon the intention of the Legislature, to be discovered from the language used, having regard to the subject legislated for. Section 5 empowers Village Munsifs to hear and determine, of their own authority, suits without appeal for sums of money or other *personal property* not exceeding 10 Arcot rupees against persons resident within their jurisdiction. Section 11 prescribes that the plaint shall describe, amongst other things, the "total amount or value of the property" claimed. It is clear that under Section 5 'property' in Section 1 must mean *personal* property and cannot mean real or immoveable property, as no other than sums of money or other personal property can be claimed. It is an ordinary canon of construction that, whenever a particular word is used, having in an Act a defined meaning, and is used afterwards in the Act, the same meaning shall be given to it all through, unless from the context or otherwise the word, **[383]** when elsewhere used, appears to have been used in a different sense from that in which it was formerly used. Why then should the word 'property' in Section 30 have a different meaning from the same word in Section 11?

This view receives strong corroboration when it is recollected that, under Section 5, a suit before the Village Munsif can only be brought for money or for personal property.

Now, if a suit cannot be brought for real or immoveable property, would it not be quite inconsistent to allow execution to be issued against such real or immoveable property? To allow this to be done would be to effect indirectly what could not be done directly. Assuming the case of an attachment of immoveable property and that any person not the defendant was *bona fide* entitled to and in possession of it, could the Munsif determine that claim? If he could, would not that power be inconsistent with Section 5, as he would practically determine a suit *not* for personal property but for real property; but no provision is made in the Regulation in such circumstances. Again, suppose the Village Munsif had no power to entertain the claim of such a *bona fide* owner, could it be supposed that the Regulation contemplated that such claim was to be disregarded and the property of the wrong person sold without enquiry?

No doubt if personal property, say, a cow, not belonging to the debtor, is seized, the true owner, it might be contended, would have no right to stop the sale; but this seems to us a wrong view because the Village Munsif has power to determine as to personal property. In the case of personal property, the enquiry is in most cases simple; generally the right of property is accompanied by possession, and such possession is not subject to mortgage or assignment to another person. In the case of land, the possession may be in one man and the right of property in that land may be in another. The Regulation was suitable to the recovery of very small claims by remedy against personal property, but is wholly unsuited for the recovery of claims against immoveable property. Could it be reasonably contended that an interest in immoveable property is to be sold by a peon who is to receive the produce of the sale and pay the debt to the creditor and the balance to the debtor? What interest in the immoveable property should be sold, and how is the peon to know what such interest was?

1886 APRIL 21. — FULL BENCH. — 9 M. 378 (F.B.).

[384] The contemporaneous legislation shows that, when the Legislature intended that real or immoveable property should be liable to be sold by District Munsifs, express power to that effect was given. See Regulation VI of 1816 (passed on the same day as No. IV), Section 45. From the District Munsifs' Courts appeal lay to other Courts as provided by the Regulation. There is neither express power to sell land, nor is there an appeal given by the Regulation IV of 1816. There appears, therefore, very good reason to believe that the Legislature did not intend, by the use of the word 'property' in Regulation IV of 1816, to authorize the sale of real or immoveable property under a decree by a Village Munsif. If, therefore, such was not the intention of the Legislature, then the power is not given by the Regulation.

Long usage, save in only one case, so far as the High Court knows, from 1816 up to within the last two or three years, has been to treat the Regulation as not conferring this power—see also the Circular Orders of 1829 prohibiting Village Munsifs from executing decrees against land.

Mr. Webster, when Judge of Coimbatore, stated in a case before him that the word 'property' was large enough to include land. The case of *Ramasami* v. *Angappa* (1) was not argued, and the Court merely say they are not prepared to say that Mr. Webster's judgment was incorrect, and observe that the word 'property,' without qualification, applies to property of all kinds.

The several Procedure Codes never were applicable to the Village Munsifs' Courts. The Code provides for all cases of seizure and sale of lands, and for adjudication of claims to land and appeals in respect thereof, so as to do complete justice between suitors. In the absence of such powers from Regulation IV, is it not therefore possible to hold the law has vested in Courts, exercising such limited and petty jurisdiction, the power of executing decrees against land which may be subject to mortgage, lien, charges and limitations of interest, without appeal.

We hold, therefore, that the Village Munsif's decree could not be levied by seizure or sale of land in C.R.P. No. 288, and dismiss it.

As to the suit No. 11 of 1881, so far as it sought a decree [385] against a personal representative, we do not see why a decree should not lie under the Regulation, nor do we see any objection to a transferee of a decree obtaining execution of it. Both the above cases, so far as they are for small sums, are within the object and intention of the Regulation.

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9 M. 385 (F.B.) = 10 Ind. Jur. 291.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Brandt, and Mr. Justice Parker.

RAMAN (*Petitioner*) v. PAKRICHI (*Respondent*).*
[9th and 31st March, 1886.]

Regulation IV of 1816, *Sections* 29, 35—*Remedy confined to parties to suit.*

The remedies provided by Section 35 of Regulation IV of 1816 against Village Munsifs are confined to persons who are parties to suits before such Village Munsifs.

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* Civil Revision Petition 355 of 1885.
(1) 7 M. 220.

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9 M. 385
(F.B.) =
10 Ind. Jur.
291.

APPLICATION under Section 622 of the Code of Civil Procedure to set aside an order of the Subordinate Judge of North Malabar passed on a petition presented by Acharath Pakrichi under Sections 29 and 35 of Regulation IV of 1816, complaining against the Village Munsif of Tellicherry Amsham, Kunhi Raman Nayar.

The Subordinate Judge (K. Kunjan Menon) awarded Rs. 25 damages and costs against the Village Munsif.

This case being connected with Civil Revision Petition 288 of 1885(1) was heard with it and disposed of by the Full Bench.

The facts necessary for the purpose of this report are as follows:—

The Village Munsif (petitioner) having attached a house in execution of a decree passed by him in a suit to which Acharath Pakrichi (the respondent) was no party, she objected to the attachment on various grounds which were overruled by the Village Munsif.

She thereupon complained to the Subordinate Judge that she had been injured by the conduct of the Village Munsif.

[386] The Subordinate Judge held that she could not come in under Section 29 (2) of the Regulation, not being a party to the suit, but that she could complain under Section 35 (3) as being a party injured by an oppressive and unwarranted act within the meaning of that section.

Mr. *Michell*, for petitioner.

The Acting Advocate-General (Mr. *Shephard*), for respondent.

The Full Bench (COLLINS, C. J., KERNAN, MUTTUSAMI AYYAR, BRANDT and PARKER, JJ.) delivered the following

JUDGMENT.

We are of opinion that the words in Section 35 of Regulation IV of 1816 "by the party injured" must be restricted to parties to the suit, and

(1) 9 M. 378.

(2) The decisions of Village Munsifs, either as Munsif or arbitrator, shall not be carried into execution by them in less than thirty days after the date on which copies of the decrees may have been furnished or tendered to the parties or to their vakils, should either party present a petition to the Zilla Judge within that period, charging the Village Munsif with corruption or gross partiality, the Zilla Judge shall order execution of the decree to be stayed, and if the charge of corruption or partiality be proved to the full satisfaction of the Zilla Judge by the oaths of two credible witnesses at the least, he shall annul the decision.

(3) *First.*—Village Munsifs shall be liable to prosecution in the Zilla Court for corruption in the discharge of their trust by either party in the suit, and for any oppressive and unwarranted act of authority by the party injured, and upon proof of the charge to the satisfaction of the Judge, he shall, in the first-mentioned case, adjudge the offender to pay the prosecutor three times the amount or value of the money or property corruptly received, with all costs of suit; and in the second, award such damages and costs to the party injured as may appear to him equitable; but no Village Munsif shall be liable to be prosecuted for want of form or for error in his proceedings or judgment; nor shall any process whatever be issued against a Village Munsif who may be charged with corruption, or any oppressive and unwarranted act of authority, unless the Judge shall be previously satisfied by sufficient evidence that there is probable cause to believe that the charge is well founded, and unless the charge shall be preferred within three months from the date of the act complained of.

Second.—The Zilla Judge shall, on charges of corruption, fine the party by whom or for whom the corruption may have been practised in the suit, provided he shall have assented to such corruption, in a sum equal to the value of the thing or sum of money which the Village Munsif may be proved to have so corruptly received.

Third.—If the corruption charged against any Village Munsif shall not be proved to the satisfaction of the Zilla Judge, he shall award full costs and such damages to the Village Munsif as may appear to him equitable, and he shall levy a fine from the party making such groundless charge, not exceeding the value of the thing or sum of money charged to have been corruptly received.

cannot be applied, as they have been by the Subordinate Judge, to any and every person alleging that he has been injured by proceedings of a Village Munsif under the Regulation.

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9 M. 385 (F.B.) = 10 Ind. Jur. 291.

Village Munsifs are liable to prosecution "for corruption in the discharge of their trust," "by either party to the suit," and [387] "for any oppressive and unwarranted act of authority by the party injured."

To a successful prosecutor on a charge of corruption three times the value of the money or property corruptly received may be awarded, and "to the party injured" damages and costs may be awarded: and not only may a Village Munsif be mulcted for corruption, but also "the party by whom or for whom the corruption may have been practised," if privy to such corruption; in each instance in which the words are used in the section they appear to be used with reference to a party to the suit.

The Subordinate Judge had then no jurisdiction to award damages against the Village Munsif in this case at the instance of a person who came in with a claim in respect of certain property attached by the former.

We should, moreover, have felt in any case constrained to hold that the Village Munsif is not shown to have acted in an oppressive manner, even if his action was not warranted by law.

We must set aside the order and direct repayment to the Village Munsif of the sum levied from him. We shall, however, allow no costs as it is stated that the Village Munsif treated the representations of the claimant and the order of the District Munsif with a want of due consideration.

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9 M. 387 = 1 Weir 375.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

RAMASAMI v. LOKANADA.* [11th March, 1885 and 12th April, 1886.]

Penal Code, Section 500, *Defamation—Newspaper libel—Act XXV of* 1867, *Sections* 5, 7—*Burden of proof—Statutes*—38. *Geo III*, c. 78, *Section* 14—6 *and* 7, *Vict. c.* 96, *Section* 7.

On the prosecution of the editor of a newspaper for defamation under Section 500 of the Indian Penal Code by publishing a libel in his paper, an attested copy of a declaration made by the editor under Section 5 of Act XXV of 1867 to the effect that he was the printer and publisher of the newspaper, was produced in evidence by the com-[388] plainant. The Editor having been convicted by the Magistrate, the Sessions Court, on appeal, quashed the conviction, on the ground that there was no evidence that the Editor was the writer of the libel or permitted its publication:

Held, that in the absence of proof to the contrary, the declaration was *prima facie* proof of publication by the Editor.

Held also, that it would be a sufficient answer to the charge if the Editor proved that the libel was published in his absence and without his knowledge, and that he had in good faith entrusted the temporary management of the Newspaper during his absence to a competent person.

[F., 2 Ind. Cas. 193 (194); R., 22 B. 152 (158); 32 M. 338 (340) = 9 Cr. L.J. 506 = 5 M.L.T. 415.]

APPLICATION under Sections 435 and 439 of the Code of Criminal Procedure to revise the proceedings of J.A. Davies, Sessions Judge at

* Criminal Revision Case 438 of 1885.

1886 APRIL 12. — APPELLATE CRIMINAL. — 9 M. 387 = 1 Weir 375.

Tanjore, in Appeal 13 of 1885 quashing the conviction of Lokanada Nadan under Section 500 of the Indian Penal Code by Krishnasami Ayyar, Sub-Divisional Magistrate of Tanjore.

The facts necessary for the purpose of this report are set out in the judgment of the High Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.).

Bhashyam Ayyangar and *Desikacharyar*, for the complainant Ramasami Pillai.

If a man employs an agent to publish a newspaper, he is responsible criminally for any libel published by such agent.

The publication of the agent is that of his principal, who must be held to intend the consequences of the Act. Hawkins' Pleas of the Crown, Vol. II, p. 131. Roscoe Crim Ev., p. 977. *Queen* v. *Holbrook* (1), *Empress of India* v. *McLeod* (2) and other cases were referred to in argument.

Lokanada Nadan did not appear.

JUDGMENT.

On the 29th December 1884, a defamatory article appeared in the *Kshattriyanubalani*, a Newspaper published once a week at Porayar in the district of Tanjore. The accused admitted that he was the Editor and Proprietor of that Newspaper, and an attested copy of the declaration made by him under Section 5 of Act XXV of 1867 to the effect that he was its printer and publisher, was also produced in evidence for the prosecution. The First-class Magistrate of the Tanjore Division convicted him of defamation, and sentenced him to four months' simple imprisonment, and to pay a fine of Rs. 100.

On appeal, the Sessions Judge set aside the conviction and acquitted the accused. The Judge agreed with the Magistrate **[389]** that the matter published was defamatory, and that it referred to the petitioner; but he observed that there was no evidence that the accused was its writer, and that there was no proof whatever that he was personally aware of the publication and permitted it. He further remarked that the Criminal law aimed at individual responsibility, and that in order to support a conviction of a criminal offence, it was necessary to show that there was guilty knowledge or intention. The accused stated in his defence that he was absent from Porayar in December 1884, that by his desire one Martanda Nadan managed the paper during his absence, that the defamatory article was contributed by one Narayanasami Pillai, the 4th witness for the defence, and that Martanda Nadan published it without the accused's knowledge or privity. The Magistrate considered that the evidence produced by the accused to prove his absence from Porayar was *not* trustworthy, that Narayanasami Pillai was *not* the person who wrote the defamatory matter, and that the *accusedhimself wrote the article or that it was written at his instigation by some one else.* The Judge did not discuss the evidence or record a distinct finding as to the weight due to it, probably on the ground that there was no evidence for the prosecution that the accused was the real publisher, or that the publication was made with his privity or knowledge. He states in his judgment that "all that is alleged is that the accused was technically the publisher for the purposes of Act XXV of 1867, not that he actually knew of the publication."

It is no doubt true that in order to sustain a conviction for defamation it must be shown that there was a publication by the accused in fact, for

(1) 4 Q.B.D. 42. (2) 3 A. 342.

1886 APRIL 12. — APPELLATE CRIMINAL. — 9 M. 387 = 2 Weir 375.

by Section 499 of the Indian Penal Code the offence is thus defined—"Whoever by words spoken or intended to be read makes or publishes any imputation concerning any person *intending* to harm or knowing or having reason to believe that such imputation will harm the reputation of such person (except in certain specified cases) is guilty of defamation." But the Judge has apparently overlooked the provisions of Section 7 of Act XXV of 1867, which enacts that "in any legal proceeding whatever, civil as well as criminal, the production of an authenticated copy of the declaration shall be held (unless the contrary be proved) to be sufficient evidence as against the person whose name shall be subscribed to such declaration that the said person was printer or publisher [according as the words of the declaration may be] of **[390]** every portion of every periodical work, whereof the title shall correspond with the title of the periodical work mentioned in the declaration."

This Act was passed like 38 Geo. III, c. 78, Section 14, for the purpose of preventing the mischief arising from printing and publishing Newspapers by persons not known, and it was intended to facilitate proceedings, Civil and Criminal, against the persons concerned in such publications. For this purpose, as was observed by Justice Bailey in *The King* v. *Hart* (1) with reference to the English Statute, the Act required that a declaration be made and subscribed before a Magistrate, and directed that the production of an attested copy of that declaration shall be sufficient evidence as against every person who subscribed to it, that he was the *printer* or *publisher* or *printer* and *publisher* (according as the words of the declaration may be) of the paper containing the libel provided that its title corresponded to the title of the paper mentioned in the declaration, and provided also that the contrary was not proved.

The intention was to constitute the declaration into *prima facie* evidence of publication, and thereby to throw on the accused the burden of showing that the actual publisher of the libel was *not* the person mentioned in the declaration. The declaration was then *prima facie* evidence of publication by the accused, and if no contrary evidence was produced, or if the contrary evidence produced by him was *not true*, as held by the Magistrate in this case, it became conclusive so as to sustain the conviction.

It was then urged for the petitioner, that it was not sufficient for the accused to show that the libel was published without his knowledge or privity, but that he must go further and prove that the publication did not also arise from want of *due care* or *caution* on his part, and our attention was called to the provisions of 6 & 7 Vict., c. 96, Section 7. It was pointed out by Lush J. in *The Queen* v. *Holbrook*, that under the Common Law of England, the proprietor of a Newspaper was criminally responsible for the publication of a libel in its columns, whether the libel was inserted with or without his knowledge, that the intention of the Legislature in passing the Statute 6 & 7 Vict., c. 96, was to mitigate the rigor of the Common Law, and to give the proprietor the benefit of the presumption, that when one person employs another to do a lawful **[391]** act, he is to be taken to authorize him to do it in a lawful and not in an unlawful manner, and that the Statute declared for that purpose that it was competent to the proprietor to prove that the libel was published without his authority, consent or knowledge, that the publication did not arise from want of due care or caution on his part.

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(1) 10 East 98.

1886 APRIL 12. — APPELLATE CRIMINAL. — 9 M. 387 = 1 Weir 375.

In substance, the statute modified the grounds on which the proprietor was criminally liable for a libel published in his paper according to the Common Law of England. But we cannot hold that the provisions of that Statute are applicable to this country, and we must determine whether the accused is or is not guilty of defamation with reference to the provisions of the Indian Penal Code. We consider that it would be a sufficient answer to the charge in this country if the accused showed that he entrusted in good faith the temporary management of the newspaper to a competent person during his absence, and that the libel was published without his authority, knowledge or consent. As the Judge has however misapprehended the effect of Act XXV of 1867, we shall set aside the order of acquittal made by him and direct him to restore the appeal to his file, to consider the evidence produced by the accused and then to dispose of the appeal with reference to the foregoing observations.

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9 M. 391 = 10 Ind. Jur. 370.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

READE (*Defendant*), *Appellant v.* KRISHNA (*Plaintiff*), *Respondent.**
[4th February and 5th March, 1886.]

Guardian—Custody of minor—Change of religion—Act IX of 1875, *Section* 2, *Clause (b).*

A Brahman boy, 16 years of age, having left his father's house went to and resided in the house of a Missionary, where he embraced Christianity and was baptized.

In a suit by the father to recover possession of his son from the Missionary :

Held, that the question whether the boy was a minor, was to be decided not according to Hindu law, but by Act IX of 1875 ;

[392] (2) that the claim was not affected by Section 2, Clause (*b*) of that Act ;
(3) and that the father was entitled to a decree that his son should be delivered into his custody.

[R., 16 B. 307 (318).]

APPEAL from the decree of J. Hope, District Judge of South Arcot, confirming the decree of the District Munsif of Cuddalore in suit No. 21 of 1884.

This case came before the High Court on Second Appeal in March 1885, and is reported at p. 31 of the Indian Law Reports, 9 Madras Series.

The facts and arguments so far as they are necessary for the purpose of this report appear from the judgment of the Court (MUTTUSAMI AYYAR and BRANDT, JJ.).

The Acting Advocate-General (*Mr. Shephard*), for appellant.
Rama Rau, for respondent.

JUDGMENT.

The respondent Krishnachari is a native of Cuddalore and has a minor son named Subba Rau. Subba Rau joined the Mission School in New Town in July 1881, and continued to study in it till 1883. In the latter part of that year he went often to the appellant's house and attended the religious meetings and class which she used to hold. In January 1884, he renounced his father's religion and embraced Christianity, and

* Second Appeal 701 of 1885.

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at his request the appellant caused him to be baptized. Prior to his baptism, he left his father's home and protection, and he since lived in the appellant's house and under her care. Thereupon, the respondent sued in the Court of the District Munsif of Cuddalore, to recover possession of the minor, alleging that, as the minor's father, he was the legal guardian, and that the appellant unlawfully took the boy out of his protection and detained him against his father's will. He stated also that the appellant caused damage to the minor's religion and person, and claimed Rupees 100 as compensation for the expenses of expiatory ceremonies which it was necessary to incur in order to take the boy back into the Hindu religion. But both the Courts below dismissed this claim, and the respondent has not appealed from so much of the decree as related to it. As to the right to the custody and control of the minor, the appellant asserted that Subba Rau was not a minor, and that he had sufficient discretion to act for himself in matters of religion. She denied that she either took him wrongfully out of his father's protection or unlawfully detained him, and relying [393] on Act IX of 1875, contended that District Munsif had no jurisdiction to entertain the suit. The District Judge at first upheld the plea to the jurisdiction, and his decision on this point came under our consideration in *Krishna* v. *Reade* (1).

We then held that according to the true construction of Act IX of 1875, it merely provided a special and prompt remedy by application on petition, and that it was not the intention, and that there were no words of which the effect was to take away the ordinary remedy by regular suit, in cases in which the special procedure prescribed by the Act was not availed of. Though in connection with the petition of Second Appeal now before us, it was again urged as an additional ground that the District Munsif had no jurisdiction, the learned Advocate-General did not press it upon us at the hearing. As to the plea that Subba Rau was not a minor, the Judge considered that it was not proved, and observed that the utmost use he could make of Doctor Robertson's professional evidence was to accept the minimum fixed by him, *viz.*, 16, as the probable age in 1884. We are bound to accept this finding on a question of fact in Second Appeal. Adverting to the contention that the question raised in the suit was not one of Subba Rau's majority or minority, but substantially one of religion in regard to which he was entitled to make a free choice, the Judge observed that the case before him was not that of interfering with any one's religion, and even supposing that the father would make efforts to bring about a change in the son's religious views, it could not be accepted as a sufficient ground for taking away the right of the former to the custody and control of the latter. With reference to the argument that the appellant did not actually detain the minor, the Judge remarked that the boy had in law no will of his own, and that there was improper detention because the appellant kept him in her house contrary to his father's will. In the result, the Judge confirmed the decree of the District Munsif which directed "that defendant do deliver to plaintiff the minor Subba Rau."

It is urged in the petition of Second Appeal—

(I) That Act IX of 1875 does not apply to a case where religion is in question, and that under Hindu law Subba Rau was not a minor;

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(1) 9 M. 31.

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[394] (II) Even if he were a minor, the respondent would not be entitled to his custody unconditionally and absolutely;

(III) That the appellant did not actually detain the minor and there is no evidence of such detention; and

(IV) That at any rate no decree ought to have been passed in the form in which it has been made.

At the hearing, the learned Advocate-General strongly objected to the form of the decree, and argued that guardianship for nurture ceased at 14, that a minor who had attained the age of discretion was not liable to be compelled to return to his father against his will, and that though there may be a decree to release him from improper custody, there ought to be no decree for his delivery to the respondent. He drew our attention to *The King* v. *Greenhill* (1), *The Queen* v. *Clarke* (2), *In re Shannon* (3), *In re Connor* (4), and *The Queen* v. *Vaughan* (5).

On the other hand it was contended for the respondent that the rule as to discretion has no application in this case, and reliance was placed on *The Queen* v. *Nesbitt* (6), *In re Hemnath Bose* (7), and *In re Calloor Narainsawmy* (8), *R.* v. *De Manneville* (9), *In re Clarke* (2), *In re Elizabeth Daley* (10), and *The Queen* v. *Howes* (11).

There can be no doubt that a minor under 14 years of age has no will of his own, or that his detention against his father's will is unlawful. In *Ratcliff's case* (12) it was held that guardianship for nurture continues until the child attains the age of 14. In *Howes case* (13), however, it was considered by analogy to penal enactments to extend to 16 years in the case of girls.

With reference to the offence of kidnapping from lawful guardianship, the Indian Penal Code, Section 361, fixes the age at 14 in the case of a boy, and 16 in the case of a girl. As observed by Lord Campbell in *The Queen* v. *Clarke* (2), the guardian for nurture has by law a right to the custody of the child and may maintain an action of trespass against a stranger who takes the child. With reference to such child brought up on a writ of *habeas corpus*, the learned Chief Justice said :—"the child is [395] supposed to be unlawfully imprisoned when unlawfully detained from the custody of the guardian, and when it is delivered to him the child is supposed to be set at liberty." He deprecates the contention, that the capacity of the child to make a choice for itself should be tested by the Judge, and observes that "the consequences which would follow from allowing such a choice would be most alarming." Nor is there room for doubt that when the father is entitled to the custody of the child, the proper mode of enforcing his right consists in a decree for its delivery. The order usually made on a *habeas corpus* when the child is too young to elect its own custody, is a direction that the child be delivered to its lawful guardian. The same is the case when the Court of Chancery interferes on petition for the possession of a child. The substantial question then for decision is, what is the law of guardianship applicable in a civil suit in respect of the right to the custody and control of minors. There may be guardianship by nature, by nurture, and by personal or statute law. The English cases cited by the learned Advocate-General no doubt show that a child over 14 is

(1) 4 A. & E. 624. (2) 7 E. & B. 186. (3) 20 L. T. 183.
(4) 16 Ir. C.L R. 112. (5) 5 B.L.R. 418. (6) Perry O.C. 103.
(7) 1 Hyde 111. (8) Mayne's P.C s. 361 notes. (9) 5 East 220.
(10) 2 F. & F. 258. (11) 30 L.J. (M.C.) 47.
(12) 3 Rep. 38; vol. 2, p. 105 of *Thomas & Fraser's* edition. (13) 3 E. & E. 332.

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allowed to choose his residence when he is brought up on a writ of *habeas corpus*. But they show also that the *ratio decidendi* is the limited purpose for which the writ is designed. To quote from Coleridge, J., in *The King* v. *Greenhill* (1), "*a habeas corpus* proceeds on the fact of an illegal restraint. When the writ is obeyed, and the party brought up is capable of using a discretion, the rule is simple, *viz.*, the individual who has been under the restraint is declared at liberty, and the Court will even direct that the party shall be attended home by an officer to make the order effectual. But where the person is too young to have a choice, we must refer to legal principles to see who is entitled to the custody, because the law presumes that where the legal custody is, no restraint exists; and where the child is in the hands of a third person, that presumption is in favour of the father. But although the first presumption is that the right custody according to law is also the free custody, yet if it be shown that cruelty or corruption is to be apprehended from the father, a counter-presumption arises." Again in *The Queen* v. *Vaughan* (2) which is the leading Calcutta case cited on the appellant's behalf, Phear, J., **[396]** says, "The writ of *habeas corpus ad subjiciendum* is in its aim single. It has for its object the vindication of the right of personal liberty. It is issued for the purpose of taking care that no subject of the Queen is illegally confined against his will. It is issued on behalf of the person illegally confined, and not issued for the purpose of lending the arm of law to any person claiming authority over him. It is only where the person confined is under any personal disqualification the guardian or protector is looked to, and in such a case the Court considers that it sets the person confined at liberty by handing him over to the charge of his rightful guardian." He also remarks in his judgment that he was not adjudicating upon a question of civil right between party and party. On the other hand, Rawlinson, C.J., and Bittleston, J., held in September 1858 in *Calloor Narainsawmy's case* (3), that a Hindu youth of the age of 14 who had gone to the Scotch Missionaries should be given up to his father, though he had become a convert to Christianity and desired to remain with his new protectors. A similar decision was passed in Calcutta by Sir Mordaunt Wells in regard to a boy over 15 and under 16 years of age (*In re Hemnath Bose*) (4). Though in *Nesbitt's case* (5) the boy brought up on *habeas corpus* was only 12 years of age, the learned Judges pointed out the extreme undesirability of emancipating a minor from parental control on the ground of discretion in this country. In the note subjoined to that case, reference is made to the Code Civil, and the practice on the Continent being in accord with Hindu law which recognizes no such choice as is contended for on behalf of the appellant. In passing, we may also state that Lord Campbell refers to this case and to the opinion thereon of Patterson, J. That eminent Judge observed to Sir Erskine Perry: "I cannot doubt that you were quite right in holding that the father was entitled to the custody of his child, and enforcing it by writ of *habeas corpus*. The general rule is clearly so, and even after the age of 14, whereas this boy (Shripat) was only 12." The result then of the examination of the authorities to which we were referred is, that according to the latest decision in this Presidency and Bombay, a minor though over 14 is not at liberty to choose his own custody as against the father, even when brought up on

(1) 4 A. & E. 643. (2) 5 B.L.R. 418, (427). (3) Mayne's P.C. sec. 361, notes.
(4) 1 Hyde 111. (5) Perry O.C. 103.

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the writ of *habeas corpus*, that the decisions to the [397] contrary proceed on the view that the writ is not the appropriate remedy prescribed for enforcing the authority of the father over his son, and that when the son is over 14 and competent to make a choice, its purpose is satisfied by allowing him to choose his own custody, and leaving it to the father to vindicate his right by a civil suit. It follows then that the contention that according to general principles the father's guardianship ceases (*quoad* his right to custody) when the son completes his 14th year, cannot be supported. It may cease for the purpose of visiting third parties with penal consequences, and for the purpose of a writ of *habeas corpus*, but that cannot preclude a father from asserting his right by a civil suit even against the sons's choice to this lawful custody and control.

It is regarded by the Court of Chancery acting as *parens patriæ* as a settled rule that except under special circumstances a minor must be brought up in his father's religion. As to what are to be recognized as special circumstances warranting a departure from the general rule, James, L.J., says in *Hawksworth* v. *Haksworth* (1) that the Court will be reluctant to depart from the general rule unless the impressions produced on the child's mind by the course of education which he is receiving, are so great and permanent as to induce the Court to fear lest any attempt at altering them would do more harm than good, and would end in unsettling the child's faith altogether and so produce a fatal result in that respect. Again in *Curtis* v. *Curtis* (2), Kindersley, V.C., says, "After hearing so much about the father's religious principles it is proper for me to say that I cannot act on those principles unless they are such as are contrary to the law of the land. The only view in which they are material is that a father may permit his child to be brought up by other persons of a particular profession so as to make it difficult for the Court not to see that the happiness of the children must be affected in the course of their education in those principles."

Nor do we see our way to uphold the contention that it is the Hindu law and not Act IX of 1875 that governs this case in regard to the age at which minority ceases. It is no doubt true that under Hindu law a boy or girl was *sui juris* on the completion of his or her 16th year, but Act IX of 1875 altered this. The [398] Act is applicable to all persons domiciled in British India, and it provides (Section 3, paragraph 2) that every person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of 18 years and not before. The suit before us is one brought by the father to enforce his parental right to the custody and control of his minor son, and as that right is an incident of guardianship, and as it is not excepted from the operation of the Act, we cannot say that the case falls to be decided under Hindu law as to the age of majority. The personal law applicable to Hindus has been repealed, and a territorial law has been substituted for it, and our decision must be in accordance with the latter.

As a minor may be *sui juris* for some purposes, though not for others, the next question for decision is, whether the father's right is specially taken away by the Act in any case. It is provided by Section 2 "that nothing contained in the Act shall affect (*a*) the capacity of any person to act on the following matters, *viz*.: marriage, dower, divorce and adoption; (*b*) the religion or religious rites and usages of any class of Her Majesty's subjects in India; or (*c*) the capacity of any person, who, before this Act

(1) L.R. 6 Ch. 539. (2) 5 Jur. N.S. 1147.

comes into force has attained majority under the law applicable to him." The construction suggested for the appellant is that when a Hindu youth of 16 changes his religion, his father's right to custody ceases; and adopting as we must do, the finding of the District Judge that the youth had completed his 16th year, he was according to Hindu law *sui juris* and therefore competent to change it; still this would not affect the right of the father to the custody and control of his minor son, and that right is not taken away by the Act; and in this suit the question with which we have to deal is, as the District Judge very properly remarks, not a question of interference with the right of a Hindu son to change his religious persuasion, but whether a Hindu father is entitled to the custody of his son and to such control over him as he may lawfully be entitled to exercise.

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On these grounds we are of opinion that this appeal fails, and we dismiss it with costs.

We think, however, that the decree may be more appropriately worded by directing "that the son be delivered into the *custody* of the plaintiff;" and we direct that it be amended accordingly.

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9 M. 399 (F.B.) = 10 Ind. Jur. 409.

[399] APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kernan, Offg. Chief Justice, Mr. Justice Muttusami Ayyar, Mr. Justice Hutchins, Mr. Justice Parker and Mr. Justice Handley.

CHRISTACHARLU (*Plaintiff*), *Appellant v.* KARIBASAYYA (*Defendant*), *Respondent.** [6th November, and 1st December, 1885.]

Fraudulent alteration of document, Effect of—English Law how far applicable in Mufassal.

Ramasamy Kon's case (3 *M.H.C.R.* (247) *discussed.*

In a suit brought to recover Rs. 815, principal and interest due according to the terms of a registered mortgage bond, it was found that the plaintiff had fraudulently altered the terms of the bond prior to registeration (1) by inserting a condition, making the whole sum payable upon default of payment of any instalment, and (2) by doubling the rate of interest.

The defendant admitted in his written statement that he had received a certain portion of the consideration for the bond from the plaintiff.

At the trial the plaintiff claimed to amend the plaint and recover the first instalment according to the terms of the bond as executed by defendant:

Held, by the Full Bench (Kernan, Offg. C.J., Muttusami Ayyar, Hutchins, Parker and Handley, JJ.) that the suit must be dismissed.

Per Kernan and Muttusami Ayyar, JJ. The decision in *Ramasamy Kon's case* is in conformity with the law of England.

Per Kernan, Hutchins, Parker and Handley, JJ. The rule in *Master* v. *Miller* is in consonance with equity and good conscience and applicable to the Mufassal.

Per Muttusami Ayyar, J. That rule is more penal than equitable, but having been adopted by the Courts since 1866 must be followed.

[F., 12 M. 239 (240); 12 C.P.L.R. 33 (35); R., 25 A. 580 (605) (F.B.); 15 M. 70 (72) 23 M. 137 (149); 9 C.W.N. 695; 19 Ind. Cas. 616 (620) = 6 S.L.R. 228 (240).]

APPEAL from the decree of J.D. Goldingham, District Judge of Bellary, confirming the decree of B. Ramasami Nayudu, District Munsif of Bellary, in suit 272 of 1883.

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* Second Appeal 370 of 1885.

1885 DEC. 1. — FULL BENCH. — 9 M. 399 (F.B.) = 10 Ind. Jur. 409.

The plaintiff, Penukonda Christacharlu, sued the defendant, Pasupati Mattam Karibasayya, for Rs. 815, principal and interest due by him according to the terms of a registered mortgage bond, dated 7th April 1883.

According to the terms of the bond defendant promised to pay Rs. 750 with interest at 12 per cent. by annual instalments, of which the first, Rs. 200, was unpaid at date of suit.

[400] The bond contained a proviso that on default of payment of any instalment, the whole sum with interest at 12 per cent. became exigible.

Defendant pleaded that the bond had been altered materially after execution and before registration—(1) by the insertion of the proviso that on default of payment of any instalment the whole sum became due, (2) by alteration of the rate of interest from 6 per cent. to 12 per cent.

The District Munsif found that the defendant's plea was proved, and dismissed the suit on the ground that the bond became void by reason of the alterations.

He was of opinion that the plaintiff could not be allowed to amend the plaint, and claim the amount payable according to the original terms of the bond—*Gogun Chunder Ghose* v. *Dhuronidhur Mundul.* (1)

On appeal it was contended that the plaintiff was entitled at all events to recover Rs. 230, which the defendant alleged in the written statement was all the consideration to which plaintiff was entitled, the rest of the sum secured by the bond being due to two other persons.

The District Judge held that there was no admission that this sum was then due to plaintiff, and confirmed the decree on the ground that the bond had been altered in a material manner with fraudulent intent.

Plaintiff appealed on the grounds—

1. That the altered bond could be used as evidence of the transaction between the parties.
2. That plaintiff was entitled to a decree for the first instalment, with interest under the contract according to the bond in its original state.
3. That the ruling in *Gogun Chunder Ghose's case* was not in conformity with the ruling in *Ramasawmy Kon's case.*
4. The plaintiff was entitled to Rs. 52 paid by him to Government for arrears of revenue on the mortgaged property.

The case was argued before a Divisional Bench (HUTCHINS and PARKER, JJ.) on August 20th 1885.

Bhashyam Ayyangar, for appellant.

[401] *Rama Rau*, for respondent.

On the 24th August the following judgments were delivered:—

JUDGMENTS OF THE DIVISIONAL BENCH.

HUTCHINS, J.—The appellant brought this suit to recover the whole principal of a mortgage bond together with interest. The plaint set out the several provisions of the bond, and among them that it was payable by instalments, but that, on default of any instalment, the whole was to become due at once with interest at 1 per cent. per mensem. The whole sum was claimed in consequence of the time for payment of the first instalment having expired.

(1) 7 C. 616.

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The respondent pleaded and both the Courts below have found, that the bond has been fraudulently altered by, or with the connivance of the appellant in two material particulars. The stipulation making the whole payable at once on default of a single instalment has been interlined. The rate of interest has been altered from ½ to 1 per cent.

According to the contract executed by the respondent the first instalment only could have been recovered with interest at ½ per cent. at the date the suit was instituted. The question raised for our determination is, whether the Courts below were right in dismissing the whole claim on the ground that the fraudulent alterations vitiated the entire contract, or whether a decree should not have been given for whatever amount might be due according to the true contract, and the appellant punished by such order as the Court may think fit to make as to costs.

The Courts below have acted on the authority of *Gogun Chunder Ghose* v. *Dhuronidhur Mundul.* (1) The bond in that case, originally executed by one of three brothers, had been altered by the addition of the two others as obligors. The learned Chief Justice [Field, J., concurring] held that the instrument was vitiated as against even the first brother; that this was the rule of English law (*Davidson* v. *Cooper*) (2); and that the rule was consistent with the principles of equity and good conscience and ought to be applied in this country; and he referred to the case of *Gardner* v. *Walsh* (3) in which Campbell, C.J., held a promissory note to be wholly vitiated by another party being added. Like the leading * of *Master* v. *Miller*, (4) *Gardner* v. *Walsh* was a case of a negotiable instrument as to which the law has always been very **[402]** strict. There has never been any doubt as to the effect of an alteration on a negotiable instrument since the case of *Master* v. *Miller*, and the Indian law relating to such cases is now contained in Sections 87-89 of the Negotiable Instruments Act, 1881.

GARTH, C.J., added that, looking at the question as one of proof merely, the plaintiff must fail, because he had not proved the instrument on which he founded his claim; he had, in fact, alleged a joint contract by three, but had attempted to prove an entirely different agreement. This point may prove of importance, but it is of course impossible to deny that the rule in *Master* v. *Miller* is in accordance with equity and good conscience.

And the same view seems to have been taken in other High Courts also. In *Sitaram Krishna* v. *Daji Devaji* (5) the plaintiff had not altered the contract itself, but merely added the name of an attestor with the view apparently to call him as a witness if the bond was denied. The Bombay Court held that the suit on the bond so altered was rightly dismissed. The case was not argued, and I observe that here there was no alteration of the contract itself.

Ganga Ram v. *Chandan Singh* (6) was a case before the Allahabad Court. That was a suit on a hypothecation bond, and the relief sought was to recover the amount by sale of the property hypothecated. It was found that the extent of the property had been fraudulently increased; the plaintiff sought to bring 5 *biswas* to sale when only 5 *biswansis* had been pledged. The Court declined to allow him to revert to the true

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* Case, ED.

(1) 7 C. 616.

(2) 11 M. & W. 778 = 13 M. & W. 343.

(3) 24 L. J. Q B, 285 = 5 E. & B. 83.

(4) 1 Smith's L. C. 871 (Ed. VII).

(5) 7 B. 418.

(6) 4 A. 62.

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contract. "It seems to us," it was said, "that on all grounds of equity and good conscience the bond now produced by the plaintiff should be discarded as evidence of the hypothecation of land, and this being so, the claim as brought falls to the ground " But the learned Judges declined to consider whether the plaintiff might not recover his money debt due on the same bond, they contented themselves with rejecting the bond as evidence of the hypothecation of land.

In this Court the English doctrine has not as yet been pressed so far. On the contrary it was held in *Ramasawmy Kon* v. *Chinna Bhavani Ayyar* (1) that, notwithstanding alterations in a very material part, *viz.*, the date fixed for payment, the documents might [403] be used as evidence of the debt between the parties and also of the creation of a charge upon the property hypothecated. And in one of the suits, actually brought to enforce the terms of a document so altered, a decree was passed for the full amount due against the property: according to the true date the personal remedy was barred, and that part of the claim was of course disallowed.

I am not aware that the correctness of that decision has ever been impugned in this Presidency. I find it quoted without disapproval in *Paramma* v. *Ramachandra* (2) and it seems to have been followed in Second Appeal 696 of 1878 (not reported, but see *Valiappa* v. *Mahommed Khasim, in arguendo*) (3). As a decision of this Court it is of course binding on all the Courts of the Madras Presidency whatever opinions may have been expressed by other High Courts, and the course adopted by the Lower Courts in this case can only be justified by assuming that they overlooked it. I also note that in none of the cases from other Presidencies was this authority cited or considered, and it is impossible to say how it might have affected the decision if it had been brought to notice. The fact, however, that all the other High Courts have taken a different view of the law has led me to examine the grounds of the decision closely, and I cannot but admit that the Court seems to have supposed that it was keeping within the rule established by the English cases, although it actually gave a decree to enforce the terms of the instrument on which the suit was based, and ignored the fraudulent alteration. It seems clear that no English Court would have passed such a decree.

It has, however, occurred to me that it may be possible to reconcile the decision with the English cases and the notes to *Master* v. *Miller* on which it professes to be based, by assuming that the Court intended to decide that after all the matter is more one of pleading than anything else—except perhaps in the case of negotiable instruments and possibly other contracts which the law requires to be in writing—and the strict rules of English law relating to pleading have never been enforced in this country. Bittleston, J., in his judgment quoted and relied on the words of Lord Abinger in *Davidson* v. *Cooper* that the altered document may be used "as a proof of some right or title created [404] by, or resulting from, its execution"—a distinction subsequently adopted in *Green v. Attenborough* (4). So very careful a Judge can hardly have overlooked the fact that the decision *Davidson* v. *Cooper* itself was that no relief could be given in a suit based on the altered instrument, and that the saving clause which he quoted related only to collateral purposes. The earlier case of the *Earl of Falmouth* v. *Roberts* (5) is a good example of the extent to which the English Courts allowed an altered document to be used by a

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(1) 3 M.H.C.R. 247. (2) 7 M. 302. (3) 5 M. 166. (168).
(4) 3 H. & C. 468. (5) 9 M. & W. 469.

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plaintiff. An altered lease was then admitted to prove the terms on which the tenant was holding over as a tenant from year to year, on the express ground that it did not contain the subsisting contract which the plaintiff was seeking to enforce, but only the contract relating to the term which had expired.

It is, however, the concluding part of the note to *Master* v. *Miller* which may have suggested to Bittleston, J., that the rule is really one of pleading. I quote from the 5th edition of Smith's Leading Cases, where the learned author refers to several cases, "from which it is clear that, where the count is framed upon the instrument in its original state, an alteration which does not render a new stamp necessary cannot be taken advantage of under a plea denying the contract.—Where, on the other hand, the plaintiff declares upon the instrument as altered, then the defendant may raise any available defence arising out of the alteration under a plea denying the contract; for he has not authorised the alteration, and so, never having made any such contract as that declared upon, must succeed in substance."

In this country it is not necessary that the whole of the contract sued on should be proved to entitle a plaintiff to recover a part. If the contract alleged in this plaint had been an oral one, and if the appellant had established a promise to pay by instalments with interest at 6 per cent., but not the penal condition nor the higher rate of interest, he would have been entitled to recover the first instalment. The parts of the contract declared upon, essential to show that the first instalment was due, would have been proved, and not any other contract, although other parts of the contract alleged had not been proved. And perhaps the same result should follow, though the contract be in writing, if the alteration does not change the essential nature of **[405]** the contract, and if it be once admitted that the writing is not wholly vitiated and avoided by the alteration but is still admissible to prove what the contract really was.

The decision in the Calcutta case might still be supported on the ground that the contract proved was essentially different from that alleged. That, however, is not the only, or even the chief, ground on which it has been put. As it stands, it is directly opposed to *Ramasamy Kon's case* and the latter is also in conflict with the Allahabad and Bombay authorities to which I have referred, as well as with the rule of the English Courts which it professes to follow.

In these circumstances, it seems right to refer to a Full Bench the question how far the decision of this Court in *Ramasamy Kon's case* should be followed.

PARKER, J.—I take it there is no doubt that according to the English doctrine the plaintiff could not recover upon the bond now sued on, it having been altered by the plaintiff without the knowledge of the defendant in a material part. There is also no doubt that according to the doctrine laid down by the High Courts at Calcutta, Allahabad and Bombay (1), the plaintiff could not recover. The Bombay case was not argued, and it might perhaps be argued that the alteration there under consideration was not a material alteration. But from the observations of the learned Judges I gather they would certainly have followed the English doctrine with regard to an alteration so material as the present one.

The Madras High Court in *Ramasamy Kon's case* did, however, allow a plaintiff to recover upon an hypothecation bond in which a

(1) See cases above cited.

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material alteration, *viz.*, as to the due date, had been made. In that case the plaintiff sued upon two documents executed on the same date: one a simple bond and the other an hypothecation bond. The alteration was made for the purpose of avoiding the law of limitation, the personal remedy having become barred. There had been fraudulent conduct on both sides, and the Court allowed the plaintiff a decree upon the second bond against the hypothecated property only. A suit as against that property would not have been barred had no alteration been made at all.

The judgment in that case was given by Bittleston, J., who, referring to the leading case of *Master* v. *Miller*, held that the [406] rule of English law, if applicable to the Mufassal, "does not go beyond this, that the alteration of an instrument renders it invalid as the foundation of a suit by the party who has altered it, or in whose custody it was when altered. It does not render it void for all purposes; and the altered document may be used as proof of some right or title created by, or resulting from its having been executed (per Lord Abinger in *Davidson* v. *Cooper*)."

I gather from this that the learned Judge intended to follow the English rule, and considered that he was doing so in holding that the altered document might be used as evidence of the debt between the parties and also of the creation of a charge upon the property hypothecated.

With all deference I cannot but think that the English Courts would have decided otherwise. In *Master* v. *Miller* it was most distinctly held that no action could be sustained upon the altered document, and that the principle applied equally to bills of exchange as to deeds. Kenyon, C.J., observed that "no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event when it is detected." And Ashurst, J., says to the same effect: "A man shall not take the chance of committing a fraud, and when that fraud is detected, recover on the instrument as it was originally made." The notes to *Master* v. *Miller* show that alteration in the date, sum, or time of payment have always been held material alterations; and the only cases in which such altered deeds have been admitted in evidence are cases in which they have not been sued on as the foundation of the contract, but are merely produced in proof of some right or title created by, or resulting from, their having been executed. If the plaintiff claims upon the contract in its original state, the defendant cannot take advantage of the alteration under a plea of denying the contract, but if, as in the present case, the plaintiff declares upon the instrument as altered, the defendant may raise any available defence arising out of the alteration under a plea of denying the contract.

Seeing then that every other High Court in India has adopted the English doctrine, and that in the only case in point in the Madras reports the learned Judges apparently intended to follow the same doctrine, though interpreting it differently in the particular case before them, I think that the question before us should be referred to a Full Bench.

[407] On the 6th of November 1885 the case was argued before a Full Bench (KERNAN, Offg. C.J., MUTTUSAMI AYYAR, HUTCHINS, PARKER, HANDLEY, JJ.)

Bhashyam Ayyangar and *Desikacharyar*, for appellant.

The question is whether the English decisions as to alteration of documents are applicable in India. *Ramasamy Kon's* case is said to be a deviation from the English Law. The Division Bench did not attach

much weight to it. It is in conformity with English Law. If so, I am entitled to a decree.

The English decisions fall under three heads.

(1) Where title passes on execution of a document, subsequent alteration of the document does not divest an estate. The document is mere evidence of the title.

(2) Where evidence as to a contract sued on as by reference contained in a document which has been altered, such alteration will not prevent that document being used in evidence.

(3) Those which refer to questions of pleading, *e.g.*, where a party brings a suit on an altered document and defendant pleads—*non assumpsit.*

The cases cited in the notes to *Master* v. *Miller* were referred to *in extenso.* Also Taylor on Evidence, Vol. 2, 1621. Bullen and Leake, p. 486. The Legislature has adopted the English rule in the Negotiable Instruments Act, but not in the Contract Act.

An attempt to support a claim by perjury or forgery does not differ in principle. A just claim supported by false witnesses is decreed, without objection. The punishment for both is provided by the Penal Code.

Civil Courts should recognise the rights of parties and leave the Criminal Courts to punish crime.

Alteration of a document is said to be a discharge by some writers on English Law. The Contract Act does not adopt this view.

On the question of pleading there is no reason why the plaintiff should not recover the first instalment.

Suppose there had been a power of sale, the plaintiff could have used the altered bond, as evidence that a certain estate had vested in him according to the English Law.

[408] *Rama Rau*, for respondent.

The Transfer of Property Act requires this bond to be in writing and registered. A hypothecation deed in India creates no title in the property, it only gives a right to get the property sold.

The decision in *Davidson* v. *Cooper* is not applicable to this case.

In *Ramasawmy Kon's case* the suit ought to have been dismissed.

Bhashyam Ayyangar in reply.

The Transfer of Propery Act is satisfied by the conveyance having been reduced to writing. There is nothing in the Code of Civil Procedure or Contract Act to support the defendant's contention.

JUDGMENT OF THE FULL BENCH.

KERNAN, Offg. C.J.—It is stated in the plaint that the defendant executed a hypothecation bond to the plaintiff, dated the 7th April 1883, for Rs. 750, payable by instalments as follows :—

June 1883, Rs. 200	June 1885, Rs. 200
Do. 1884, ,, 200	Do. 1886, ,, 150

with a proviso that in default of payment of any instalment, the whole amount of the bond should be paid at once with interest at 12 per cent. per annum.

It has been found by both the lower Courts that the original bond was altered without the assent of the defendant in the following material particulars, *viz* :—

(1) by inserting the proviso that on a default the whole sum should be paid at once ;

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(2) by changing the rate of interest from 6 per cent. to 12 per cent.

The alterations are visible.

Default was made in payment of the first instalment. The plaint was filed on the 20th of December 1883, and prays for payment of Rs. 815, the whole sum due for principal and at the altered rate of interest. This action was brought to recover the whole sum, as payable under the *altered* provision for default and for interest and for relief against the hypothecated property and by personal decree against the defendant.

It is clear that there was no contract by parole or otherwise in the terms of the altered instrument. The action is founded solely on the altered bond as altered. An application was made to the Munsif to amend the plaint, to enable the plaintiff to sue on the bond in its original state, but that application was refused.

[409] The Lower Courts dismissed the suit on the ground that the alteration had been made, and that the cause of action alleged was not proved and referred to—*Gogun Chunder Ghose* v. *Dhuronidhur Mundul.*

In second appeal it was contended that, though the plaintiff stated in his plaint and relied solely on the contract as altered, yet that relief should be given for one instalment on the admitted contract, which plaintiff did not sue on. This contention violates the fixed rule that a party can only recover or defend—*secundum allegata et probata.* Section 50 of the Code requires the circumstances constituting cause of action to be stated. When a plaint or defence is inartificially drawn and not in very clear language, Courts have to examine and find out what the substance of the plaint or defence is, and if in this case it appeared on the plaint that the plaintiff's cause of action was the debt as created by the original bond, even though the plaintiff might also have claimed to sue on the altered bond, then the plaintiff would be entitled to relief for the first instalment.

In this case the plaint is very clear, and it is plain that the plaintiff neither stated in the plaint the original contract nor did he claim the debt as created thereby ; nor did he intend to do so. He sued on the instrument as altered, and on it alone. When that bond was held to be invalid on the ground that it was altered, his entire case failed in *this* action.

The third ground of appeal is that the decision in *Gogun Chunder Ghose* v. *Dhuronidhar Mundul* is not in conformity with the decisions of this Court and the plaintiff relied on the decision in *Ramaswamy Kon's case* as an authority to justify his appeal to be declared entitled to a decree for payment of the first instalment due before suit. This hearing arises from a reference by a Division Bench to have a decision whether that case was decided in conformity with the English authorities and those in the three other Presidencies. The judgment in *Ramaswamy Kon's case* was pronounced in two appeal cases relating to the same point. One was Appeal 331 in Original Suit 100 and other Appeal 333 in Original Suit 95. In Suit 100 the plaintiff sued, as the report states, for recovery of Rs. 1,217 and odd. In suit 97 the plaintiff sued to recover Rs. 1,253 and odd from the defendant personally and also from property hypothecated. Decrees were made by the Court of Principal Sadr Amin for the plaintiff. The **[410]** Civil Judge in appeal discovered that in each bond the day of payment had been altered by changing the date from 1854 to 1861 with the apparent object of getting rid of the effect of the Limitation Act, and dismissed both suits on the ground that the bond had been altered, following the decision in *Master* v. *Miller.*

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This Court in appeal, admitting the principle of the decision of *Master* v. *Miller*, stated "that the alteration of the instrument rendered it invalid as the foundation of a suit by a party who altered it, but that the alteration did not render the instrument void for all purposes and that the altered document might be used as proof of some right or title created by, or resulting from, its having been executed," and referred to *Davidson* v. *Cooper*. This Court held that the document in its original state might be evidence of the *debt* between the parties, and of the creation of a charge upon the property hypothecated, and so using then the personal demands were barred by limitation. But as Suit No. 97 [Appeal 333] was to recover the principal debt and interest from the immoveable property hypothecated, this Court held the execution of the instrument created a charge upon the property which the subsequent alteration of it did not destroy, and that the suit, so far as it sought to enforce that charge and to render the property available to discharge the debt, was not barred by limitation, which was 12 years. A decree was made accordingly.

It will be observed that this Court in appeal considered that the suit was not founded on the instrument as altered, but was to enforce a debt which was created by, and resulted from, the execution of the instrument as it was when originally executed. On this view the Court appears to me to have decided exactly according to the rule established by *Davidson* v. *Cooper*, which has been followed ever since that decision was made.

The exact frame of the plaint in *Ramasawmy Kon's case* is not stated in the report, and whether the Court was right in holding that the suit was, as the plaint was framed, not founded on the altered instrument, we cannot now tell. But no doubt the plaint was before the Court, and they considered that the plaint was founded on the debt created by, and resulting from, the execution of the instrument as it originally stood. This suit is not founded on the debt created by, or resulting from, the execution of the instrument as it originally stood, but is founded on the instrument as altered, and on nothing else. The debt in the form now **[411]** sued for was not created by, and did not result from the execution of the original instrument. In this suit the plaint not being framed on any debt, right or title, created by, or resulting from the execution of the original instrument, the material circumstances of that case and of this case are entirely different. The decision in that case is therefore no authority for the plaintiff, but is an authority against him. This case comes within the decision in *Master* v. *Miller* as a suit on an altered agreement, and on it alone.

The case of *Master* v. *Miller*, was an action on a promissory note by an endorsee against the acceptor.

After the note in that case was made, it was altered by the holder, who endorsed it to the plaintiff. Lord Kenyon says, "the question is whether this action can be sustained on this instrument, *i.e.*, as altered."

The case of *Davidson* v. *Cooper* was action on a guarantee required by the Statute of Frauds to be in writing, which had been altered after it was made without the assent of the defendant.

Gogun Chunder Ghose v. *Dhuronidhur Mundul* was an action against three defendants on a bond, to which, it was found, the names of two of the defendants were forged, and that those names were not in the bond when it was originally executed by the defendant, who admittedly executed it. The Court decided: 1st, that the addition of the two forged names was an alteration in a material particular and that the bond was thereby invalidated, and that no action could be maintained on *it* even against

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the defendant who executed it; 2ndly, that the English Law stated in *Master* v. *Miller*, was a rule of equity and good conscience, which was applicable in this country; 3rdly, that an amendment could not in such a case be allowed; and 4thly, that the plaintiff had not proved the instrument on which he founded his claim.

Sitaram Krishna v. *Daji Devaji* was an action on an instrument required by law to be attested, and the obligee of the bond, the plaintiff, without the assent of the defendant, got a person to attest it who had not in fact witnessed the execution of it, and the action was on that bond and not on the consideration of it, or supposed to be created by, or resulting from its execution in its original state. The Court held that the plaintiff could not sue upon the bond.

Ramasawmy Kon's case as reported, and in the view which **[412]** this Court took of the plaintiff's cause of action, was quite in conformity with the English decisions, all collected in *Master* v. *Miller*, and also with the Calcutta and Bombay cases, and is in my judgment right.

Ganga Ram v. *Chandar Singh*, was an action on a bond hypothecating certain portion of land and claiming Rs. 607 and interest to be recovered by sale of the hypothecated lands. It was proved that the bond as originally executed, hypothecated only a portion of the lands alleged in the plaint to have been hypothecated, and that the bond had been altered without the consent of the defendant by altering the statement of the original quantity of land to a greater quantity. The defendant admitted he owed Rs. 352 and odd on the bond, *i.e.*, as originally executed. The suit was dismissed by the two lower Courts, and the plaintiff appealed on the ground that the alteration of the bond did not justify the dismissal of the suit *altogether*, and that the suit as regards the claim for money due should have been decided on the merits. On appeal, the Court decided that on the form of his claim, the plaintiff, appellant, should not be allowed to succeed, as his suit was "instituted upon an instrument which had been intentionally altered in a material particular by the plaintiff or with his knowledge, for his advantage and to the detriment of the defendant, and that the plaintiff could not be allowed to revert to the contract that originally was made." The decision so far is in accordance with the cases already cited. But the Court of Appeal then decided that the bond "should be discarded as evidence of the hypothecation of land." If the Court meant to decide that the bond in its unaltered form should not be admitted in evidence of the hypothecation of land, such decision appears to me inconsistent with the decision in *Davidson* v. *Cooper*, because, by the execution of the original bond, the hypothecation was a right and interest created by, and resulted from, the execution of the original instrument, and that right and interest was not destroyed or divested by the alteration of the bond. See *Davidson* v. *Cooper*. That case was not cited to the Allahabad Court, and the Court apparently did not consider it, or any of the authorities in which it has been followed, or the principle upon which it is founded. In my judgment *Ramasawmy Kon's case* is not in conflict with the decision in I.L.R., 7 Cal., 616, or the decision in I.L.R., 7 Bom., 418, or with the first point decided in I.L.R., 4 All., 62, though it is in **[413]** conflict with the second point decided in that case, assuming the Allahabad Court held that the bond as originally executed could not be admitted as evidence of the hypothecation. In this conflict, I think the decision of the Madras Court followed exactly the rule laid down in *Davidson* v. *Cooper*, and the Allahabad Court did not do so. But *Davidson*

v. *Cooper* was not cited to and apparently was not considered by the Allahabad Court, and it cannot be held that the Court declined to follow *Davidson* v. *Cooper*. I think, however, that the real ground on which the Allahabad Court decided the case was that the shape in which the plaintiff framed his plaint was such that his action was brought upon the bond as *altered*, and as that bond was not only not proved but was proved to be false, therefore his case failed.

The correctness of that view, if such was the view of the Court, cannot be questioned. In this case, the plaint is framed and the action brought solely on the altered bond, and therefore plaintiff's case failed.

I do not doubt that the principle of the decision in *Master* v. *Miller* is a rule of equity and good conscience which applies in this country, and that the rule in *Davidson* v. *Cooper* equally applies.

MUTTUSAMI AYYAR, J.—This reference arises from a suit instituted by the appellant to recover the debt due under a mortgage bond together with interest The debt was payable by instalments and the interest stipulated was 6 per cent. per annum. The bond was since altered without the privity of the obligor. A stipulation that on default of any instalment the whole sum was to become due at once with interest at 12 per cent. per annum was interlined and the rate of interest was altered from ½ to 1 per cent. per mensem. According to the instrument, as it stood originally, the first instalment was due at the date of the suit together with interest at 6 per cent. per annum. The lower Courts dismissed the whole claim on the ground that the fraudulent alteration rendered the entire contract void *ab initio*. The alteration was made before the instrument was registered, and under Section 59 of the Transfer of Property Act there can be no valid mortgage or charge for more than Rs. 100, unless the instrument is registered. There was no valid charge before registration, because registration is of the essence of the transaction, and there was no valid charge after the document was registered, because the registered document was not the one which was executed by the respondent. There is no **[414]** doubt that the suit was properly dismissed in so far as it sought relief against the hypothecated property. Nor could it be maintained in its present form as a suit to recover the debt due at the date of the plaint under the instrument as it stood prior to the alteration. The only ground of action disclosed by the plaint is that which is founded on the altered instrument. The principal and interest claimed are what are due upon it, and the plaint contains no averments which can be accepted as disclosing a ground of action independent of the instrument. In all the English cases in which there was judgment for the plaintiff upon the instrument in its original condition, there was a separate count which did not refer to the instrument in its altered condition as the cause of the obligation which it was desired to enforce. On the ground that the only case disclosed by the plaint is the one resting on the altered instrument, the suit must also be held to have been properly dismissed in so far as it sought to recover the debt. Though in this view it is not necessary to determine the question referred to the Full Bench, still it is desirable to do so. The question is one of importance, it is likely to arise often, and the observations of the Division Bench tend to throw doubt upon the soundness of the decision in *Ramasawmy Kon's case* which has hitherto been regarded as a leading decision. The law as to the effect of a fraudulent or negligent alteration of an instrument in a material point is stated in that case in the following terms: "The rule, assuming it to be applicable to a case in the Mufassal between Hindus does not go beyond this, that the altered instrument

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renders it invalid as the foundation of a suit by a party who has altered the instrument or in whose custody it was when it was altered. It does not render it void for all purposes, and the altered instrument may be used as proof of some right or title created by or resulting from its having been executed. * * The document may be used as evidence of the debt between the parties and also of the creation of a charge upon the land hypothecated."

Now, the first part of the rule is that the altered instrument cannot be relied on as the foundation of the right or liability which is sought to be enforced. It bars a suit, (I) where the instrument is of the essence of transaction as under the Registration Act, or (II) where the instrument is the only mode of proof prescribed by any legislative enactment such as the Statute of Frauds, or (III) where the right sought to be enforced is one resting in [415] contract or covenant and not a vested interest. In the first case, the right or duty arises on the instrument itself, and this is the ground on which the Court of Exchequer Chamber rested the rule in *Master* v. *Miller* and to which Lord Abinger called attention in *Davidson* v. *Cooper*. In the second case, the ground of decision is that the writing is the only evidence declared admissible by a statute. *Davidson* v. *Cooper*, in which the transaction sued upon was a guarantee, and *Powell* v. *Divett* (1) which was an action brought on a bought-and-sold note, are cases in point. In the third case, the ground is that the document could have no future operation after it was altered and the covenant could not be proved without the instrument. Lord Abinger mentions as an instance in *Davidson* v. *Cooper* a covenant in an altered lease and release.

It is also necessary to see to what cases the rule was considered not to be applicable. It does not apply (I) when the suit is based on some antecedent transaction for which the instrument was given as a security, (II) when a right or title or legal relation or character is created and becomes a vested interest from the instrument having been executed, and the duty sought to be enforced attaches to it either from operation of law or a legislative enactment as an incident. In the first case, the ground is that the suit is not by reason of the instrument, and in the second case it is because the alteration of an instrument does not divest an estate or an interest or a legal character which has already vested or attached. *Earl of Falmouth* v. *Roberts*, in which a parole demise was the basis of the suit, *Gould* v. *Coombes* (2) in which the action was sustained upon an account stated, and *Sutton* v. *Toomer* (3), where the suit was rested upon deposit of money, may be referred to as cases which illustrate one class of exceptions to the rule. In *Davidson* v. *Cooper*, Lord Abinger refers to the transfer of ownership from the execution of lease and release, as an example of another class of exceptions. Thus, when property or some interest in property is actually transferred, the right to the possession of such property or to the recovery of such interest is an incident attaching to the vested estate or interest which the subsequent alteration cannot operate to divest. Again, in *The Agricultural Cattle Insurance Company* v. *Fitzgerald* (4) the legal relation or character of a shareholder was considered to have attached on the execution of the deed [416] of settlement which was since altered, and the liability to pay calls was treated as an incident annexed by an Act of Parliament to such legal character. In that case, Lord Campbell said, "we must consider for what purpose the deed was offered in evidence. It was only to prove that the

(1) 15 East 29. (2) 1 C.B. 543. (3) 7 B. & C. 416. (4) 16 Q.B. 432.

defendant was a shareholder. At all events, the erasure does not prevent the deed being given in evidence to show that the defendant who executed it is a shareholder. There is no ground for saying that if a deed is altered in a material part, it is rendered void from the beginning. It ceases to have any new operation, and no action can be brought in respect of any pending obligation which would have arisen from it if it had remained entire. It may still be given in evidence to prove a right or title created by its having been executed or to prove any collateral fact." Another question which is necessary to consider in connection with this rule is to what extent the altered instrument is admissible in evidence and what is meant by a collateral fact. In the *Earl of Falmouth* v. *Roberts*, it was used as evidence of the stipulation in regard to the mode of tillage. In *Gould* v. *Coombes* it was admitted to prove that the person who stated the account was the principal debtor. In *Sutton* v. *Toomes* it was used as evidence to prove the terms of the deposit of money. The terms "collateral fact" must be taken to refer to any material fact other than the cause of the liability sought to be enforced. In this view, if the liability is deduced either from an antecedent transaction or from some property or some legal character which vested on the execution of the instrument, it may be used as evidence to show the collateral incidents which attached to that liability. In the *Earl of Falmouth* v. *Roberts*, when the altered instrument was admitted to prove the stipulation as to tillage which it contained, Parke, B., said, after explaining that the action was not by reason of the instrument but of a parole demise, "that the alteration of the instrument could not make the defendant hold according to the custom of the country instead of according to the terms of his agreement."

The observation then contained in *Ramasawmy Kon's case*, it seems to me, is in accordance with English authorities. The legal character of debtor and creditor attaches to the parties concerned on the very execution of the instrument. Hence Bittleston, J., said that a debt was created from the instrument having been executed. The debt being once created, the liability **[417]** to pay it would attach from the operation of law. Thus the cause of the liability being *dehors* the instrument, the question is how far the instrument is admissible in evidence. As observed by Parke, B., in the *Earl of Falmouth* v. *Roberts*, the debtor cannot be treated as bound to pay the debt in any other manner than according to the real agreement between him and the creditor, and the instrument, though altered, is admissible in evidence to show what that agreement was. It seems to me therefore that *Ramasawmy Kon's case* states the rule in accordance with English cases. The leading case in this Presidency was decided in 1866, and it has since been followed. I consider it too late now to begin to examine whether the rule is consistent with equity and good conscience, and whether the course of decisions should be unsettled. If we are, however, at liberty to consider the question, I should certainly say that the rule is rather penal than equitable, and we should seek a justification for it rather in considerations of public policy than of equity and good conscience. It was admitted by Lord Kenyon in *Master* v. *Miller* that when the rule was first laid down in *Pigott's case* (1) in regard to deeds, forgery was only a misdemeanour and that the punishment of the law might have been considered too little, unless the deed also was avoided. Buller, J., showed how the rule was inconsistent with equity and good conscience. The Court of error, Lord

(1) 11 Co. 27.

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Abinger stated in *Davidson* v. *Cooper* rested the decision in *Master* v. *Miller* not on the wider considerations of public policy, but on the fact that the duty arose on the instrument itself. He also observed that its extension to simple contracts created difficulties, but added that *Divett* v. *Powell* was decided more than 40 years before and that it must be followed. After the rules of the Hilary Term were framed, several cases were decided in which the obligation as it stood before the instrument was enforced on the technical ground that the fraudulent alteration was not specially pleaded. The Indian Legislature did not insert the rule in the Indian Contract Act, although it inserted it in the Negotiable Instruments Act. The general rule of Private Law is that fraud shall not be a source of gain, that no one shall be permitted to take advantage of his own fraud, and that it shall form a ground for compensating for any loss which may actually result from it to others. If the fraud **[418]** committed was flagrant and required to be punished, for the sake of example, it was the public law that stepped forward and punished the delinquent. The rule, in its practical operation, entails hardship in several ways. In the first place, it is unequal in its operation, for the proportion between the gain which the fraud is practised to secure and the penalty inflicted by the rule varies in different cases. Secondly, it is certainly good policy to punish fraud, but it tends to encourage speculative litigation by making the fraud of one a means of enriching another. Thirdly, the rule operates with peculiar harshness, in that it places negligence on the same footing with wilful fraud. If the question was *res integra*, I should very much hesitate to advocate the introduction of the rule into this country on considerations of equity or good conscience as contradistinguished from those of public policy. As already observed, I consider it is too late to depart from *Ramasawmy Kon's case*. On these grounds I would say in answer to the question referred to us that *Ramasawmy Kon's case* was decided in accordance with English decisions.

HUTCHINS, J.—I shall deliver the judgment which I had prepared in this case, although, since writing it, I have had the advantage of reading the very lucid judgment which Mr. Justice Muttusami Ayyar has just delivered, and, as I shall point out, I now feel some doubt whether I have not taken too narrow a view of the rights of a creditor who has altered the written instrument constituting the evidence of the debt.

All the English authorities quoted in the argument are collected in the notes to *Master* v. *Miller* in Smith's Leading Cases, and it seems unnecessary to refer to them in detail. They clearly establish the following propositions upon which the answer to this reference will be found to depend :—

(I) Where the effect of a document has been to transfer, and vest in the transferee, a right to property, such right will not be affected by any subsequent alteration of the document, and the document may be given in proof of the creation and extent of the right. In such a case, as stated by Lord Abinger in *Davidson* v. *Cooper*, the altered deed is not relied on as the foundation of the action, but the moment after execution it became valueless except as evidence of the fact that it had been executed and of the right result-**[419]**ing from its execution. But even in such a case the suit must be framed on the transferred right, not on the altered document.

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(II) Where the altered document is of such a character that no other evidence of the obligation sought to be enforced is legally admissible, the suit must be dismissed. As where the plaintiff sues on a guarantee or other contract which the Statute of Frauds requires to be in writing. To quote Lord Abinger again, written instruments constituting the evidence of contracts, are within the rule of law that a material alteration is fatal to validity.

(III) Where the obligation existed before the execution of the altered document and it is open to the obligee to sue on the original obligation, and he does so, the document may be adduced in proof of the nature and extent of the obligation. So in a suit on an account stated, an altered promissory note, given as security for the amount, is admissible to prove the settlement and the amount due, although it could not have been made the foundation of the action.

The present suit, it is quite clear, was brought on the written contract of the 7th April 1883, and upon that ground its total dismissal seems perfectly correct. By that contract the defendant acknowledged that he owed the plaintiff Rs. 650 on a decree, as well as Rs. 100, which the plaintiff then undertook to pay on his behalf to a third party; for these debts he pledged certain immoveable property, and he agreed to pay in certain instalments; upon default of any instalment it was to carry interest at 6 per cent. But this clause has been altered since execution and now stipulates, that, on default of any instalment, the whole amount shall at once become due with interest at 12 per cent. It was upon this altered clause that the suit was brought for the whole amount.

The alteration was made before registration, and therefore the real contract has not been registered, but some other contract to which the defendant never assented. The contract bears date after the Transfer of Property Act came into force, which was on the 1st July 1882. This point was not brought to the notice of the Division Bench, but it has an important bearing on the plaintiff's right [420] to recover, assuming that he could recover at all, on his present plaint. At the time the contract was made, a hypothecation, or simple mortgage as it should now be called, could only be effected by a registered instrument signed by the mortgagor and attested by two witnesses, Section 59. No instrument so signed and attested was registered, but some other contract which had not been signed and attested. There is therefore no valid mortgage at all, and the question whether the plaintiff can have a decree against the land for the instalment overdue does not really arise.

If, however, the alteration had been made after registration, a mortgage interest would have become vested in the plaintiff directly the instrument had been registered. The case would then have fallen under the first proposition just enunciated, and if the plaint could have been amended, a decree might have been made for the first instalment against the mortgaged property. To this extent the doctrine laid down in *Ramasawmy Kon's case* is, I think, certainly correct. The actual decree in that case was against the mortgaged property only, and if it is open to any objection, it is only that it departed from the strict rule of pleading, or in other words, that it gave relief upon a right which had become vested, although the suit was apparently framed on the bond which had been fraudulently altered.

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But the judgment of Bittleston, J., certainly goes much further than the decree. It dealt with two cases, in the former of which there was only a personal bond for money, and it shows clearly that a personal decree would have been given but for the circumstance that the personal remedy had become barred by limitation. The report does not show the exact nature of the plaint or of the debt for which the bond was given, and it is impossible now to say whether it was open to the plaintiff to sue, although I think it can be gathered that he had not sued, upon a debt antecedent to, and independent of, the bond. The judgment states that, on the English cases. "the document might be used as evidence of the debt between the parties." According to my view, this was quite correct, if the debt had any independent existence and was capable of being enforced by a suit not based on the document itself, and since reading Mr. Justice Muttusami Ayyar's judgment, I hesitate to say that the doctrine is inaccurate even when stated absolutely. I think this point may well be left open for consideration when a plaint has been framed by a creditor to enforce not [421] his bond, but the liability attaching to the debtor by virtue of his legal character as such. It may be that there would be some difficulty in formulating and proving such a cause of action, and possibly it may be found as hinted in my remarks when making this reference, that after all it is a question of pleading, and that even a suit founded on the altered bond would succeed, if what is sought to be recovered is due on the contract as originally executed. It would seem that the present plaintiff is not in a position to sue at all, except upon the contract of April 1883. A suit on the judgment-debt for Rs. 650 would be barred by Section 244 of the Code, and the defendant was under no obligation to pay plaintiff the Rs. 100 except upon the promise contained in the altered document itself. It thus becomes unnecessary to consider whether the document is such that its execution would prevent the plaintiff from reverting to the original consideration, or whether the plaintiff should be allowed to amend the plaint and ask for the recovery of the first instalment; but he has taken his chance and failed, and I entirely agree that no amendment should be permitted.

I entertain no doubt that the doctrine established by the English authorities is in consonance with equity and good conscience and applicable to the Mufassal, unless it is proved that the alteration was made accidentally or innocently.

PARKER, J.—After hearing the argument, I remain of much the same opinion as when the case was first argued before the Division Bench. It was not on that occasion brought to our notice that the mortgage sought to be enforced was executed after the Transfer of Property Act came into force. The alteration was made before the registration of the document, and hence the real contract made has never been registered. The document therefore can have no force as a mortgage, but the question remains whether the alteration will vitiate the document as evidence of a debt, and disentitle plaintiff to a money-decree for the first instalment.

The contract between the parties has been reduced to writing and the writing is the evidence of the contract. The debt has no existence independently of the document. It seems to me that if plaintiff recover at all upon the suit as framed, he must recover upon the writing.

But according to English law the plaintiff could not recover upon the written contract as it has been altered in a material part, [422] and the only cases quoted to us at the bar in which such altered deeds have been admitted in evidence are cases in which they have not been sued on

as the foundation of the contract, but are merely produced in proof of some right. or title created by, or resulting from, their having been executed.

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The question therefore does not really arise in this suit whether the decision of Bittleston, J., in *Ramasawmy Kon's case* is correct, and as it does not, I would hesitate to lay down that the doctrine of Lord Abinger in *Davidson* v. *Cooper* can be pushed so far as to allow a plaintiff to recover upon a conveyance altered by himself in a material part (declaring upon the document as altered) when the document must necessarily be proved to enable him to succeed at all. To push the doctrine so far would be practically to nullify, in the most important class of cases, the equitable doctrine laid down by Lord Abinger, that "no man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event when it was detected." The English decisions have not carried Lord Abinger's *dictum* so far, and it may be doubted, if the point were to arise, whether the Courts would do so. I can see no reason why the rule of *Master* v. *Miller* should not apply to the Mufassal in India. It is consistent with equity and good conscience, and seems to me a just and wholesome rule to apply in a country in which such fraudulent practices are unhappily far from uncommon. I would confirm the decision of the Courts below, and dismiss the Second Appeal with costs.

HANDLEY, J.—As I understand *Ramasawmy Kon's case*, all that it was necessary to decide was that the hypothecation bonds, though altered in a material part, might be used as evidence of the charge on the land created by them. The personal remedy against the defendant for the debt was barred by limitation, and therefore it was unnecessary to consider whether it might have been inferred in that suit, notwithstanding the alteration in the bonds. The judgment therefore is only a binding decision, so far as it lays down that the rule of English law as to material alterations in documents, established by *Pigott's case* and extended to documents other than deeds, by *Master* v. *Miller*, and the subsequent cases, does not prevent an altered hypothecation bond from being given in evidence of the charge upon the hypothecated property created by its execution. So far I think the case may have been well decided upon the principle enunciated by Lord Abinger in [423] *Davidson* v. *Cooper*, though even so far I think the decision pushes the exception to its extreme length in allowing a person who based his suit upon a fraudulently altered document as altered to succeed even in part in a suit so framed. I doubt whether any English case can be found which departed so far from the principle of *Pigot's case* and *Master* v. *Miller* as this. However, I am not prepared to say that, adopting the principle of the exception as laid down by Lord Abinger in *Davidson* v. *Cooper*, the decision in *Ramasawmy Kon's case* was not logically correct. But in holding that the altered bonds might be used as evidence of the debt between the parties, it seems to me that the learned Judges who decided the Madras case were going far beyond the English cases and were practically setting aside the rule of *Pigot's case* and *Master* v. *Miller*. In doing so, they were, as I have before observed, deciding a point which it was not necessary for them to decide, and I think their decision is in that respect not good law and should not be followed.

As to the general question of the applicability of the rule of English law as to altered document to this country, the rule seems to me to be eminently in accordance with equity and good conscience so far as it relates to fraudulent alterations of documents and affects the parties to such frauds; and the reasons of public policy for maintaining the rule to that extent are to my mind of special application to this country. Whether the rule should

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be followed to the extent of the English cases in applying it to innocent or accidental alterations and to innocent parties is, I think, open to question. My own view is that it would be more in acccordance with equity and good conscience to restrict the application of the rule to fraudulent alterations and to the parties to the fraud. The Legislature has no doubt carried the rule to its full extent as to negotiable instruments (Sections 87 to 89 of Negotiable Instruments Act, 1881), but there are reasons for greater strictness as to such instruments which do not apply to other documents.

In the present case the hypothecation deed was registered as altered, the defendant protesting. Upon the facts as now found, therefore, the instrument of hypothecation as originally signed by the parties was never registered and therefore created no interest in the land. Plaintiff therefore cannot enforce his charge upon the land even if the decision in *Ramasawmy Kon's case* is followed. And for the reasons I have before given I would not follow it so as **[424]** to allow him to give the altered document in proof of the debt and to recover in this suit. I do not see how he could possibly in any view recover the first instalment, for the obligation to pay that and the other instalments at certain times was entirely created by, and depends upon, the document. If *Ramasawmy Kon's case* is to be followed as to the debt, it would seem that the document can only be used as evidence of a pre-existing debt (if any). But the parties having by contract in writing fixed the amount of debt and the periods for its payment, and that contract having become by the fraudulent act of one of the contracting parties incapable of being enforced, how can the Court now declare what is the debt, and when and how it is to be paid? Or if it can do so, shall it do so in this suit expressly framed for the enforcement of a contract found never to have existed between the parties? I think the suit was rightly dismissed by the lower Courts, and I would dismiss the second appeal with costs.

Appeal dismissed with costs.

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9 M. 424.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

NARASANNA (*Plaintiff*), *Appellant* v. GURAPPA AND OTHERS (*Defendants*), *Respondents*.*

[21st April and 15th July, 1886.]

Hindu Law—Decree against father—Sale of ancestral estate in execution of money-decree—Son's liability and rights.

A sale of ancestral property in execution of a money-decree obtained against a Hindu father will, if the debt was neither immoral nor illegal, pass to the purchaser the entire interest of which the father could dispose, *i.e.*, his son's as well as his own share, provided the purchaser has bargained and paid for such interest.

The son not being bound by the decree against his father may contest the sale by suit, but unless he proves that the debt was not such as to justify the sale, he cannot succeed.

The revised ruling of the Full Bench in *Ponnappa* v. *Pappuvayyangra*, I.L.R. 9 Mad. 343 as to sales in execution of money-decrees against the Hindu father

* Second Appeal 926 of 1885.

has been overruled by the decision of the Privy Council in *Mussamut Nanomi Babuasin* v. *Modun Mohun*, L.R. 13 I.A. 1=I.L.R. 13 Cal. 21.

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[R., 11 M. 64 (67); 4 Bom. L.R. 587 (597)=12 Ind. Jur. 15; D., 10 M. 316 (318).]

APPELLATE CIVIL.

9 M. 424.

[425] APPEAL against the decree of F. E. Gibson, Acting District Judge of Kurnul, reversing the decree of P. V. Rangacharlu, District Munsif of Nandyal, in suit 229 of 1884.

The facts of the case appear from the judgment.

Srirangacharyar, for appellant.

Visvanatha Ayyar, for respondent.

The Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.) delivered the following

JUDGMENT.

The appellant Narasanna resides in the district of Kurnul, and his family, which consists of himself, his two brothers and his father, is governed by the Mitakshara law. In original suit 125 of 1871 on the file of the District Munsif of Nandyal, the respondent No. 1 obtained a decree for a sum of money against the father of the appellant. Neither the appellant nor his brothers were parties to that suit. The judgment-creditor brought to sale certain lands belonging to the joint family by execution proceedings instituted against the father, and the respondents Nos. 2 and 3 became the purchasers. The appellant then brought the present suit to have it declared that the lands which had been sold were his self-acquired property. He stated in his plaint that he had divided from his father about 20 years prior to the suit and that he had acquired the lands in dispute with his own funds.

Respondent No. 1, who alone resisted the claim, denied the alleged division and contended that the lands which he brought to sale were ancestral property. The District Munsif upheld this contention and decided that the appellant was not entitled to the declaration that the lands were his exclusive property. The District Munsif then proceeded to consider whether the appellant was entitled in part to the declaration he asked for on the respondent's own showing. The appellant did not allege that the decree was for a debt which a son would not be liable to pay under the special rule of Hindu law relating to the obligation of sons to pay their father's debts. The District Munsif, however, considered himself bound to follow the Full Bench decision of this Court, in *Ponnappa* v. *Pappuvayyangar* (1) and held that the appellant's interest in ancestral estate did not pass by the Court sale, and that such interest was not liable to be sold in execution of a money-[426] decree against the father. Accordingly he made a decree declaring that the appellant was entitled to a quarter-share, and that the Court sale did not affect the appellant's interest in ancestral estate. From this decree the respondent No. 1 appealed. The Judge reversed it on the grounds that he was not aware of the recent decision of this Court on which the District Munsif relied, and that the son's interest also passed by the Court sale. He relied on the decision of the majority of the Judges of this Court in *Ponnappa Pillai* v. *Pappuvayyangar* (2).

It is from this decree of the Lower Appellate Court that this second appeal is preferred.

It is urged on behalf of the appellant that his undivided interest in ancestral estate did not pass by the Court sale in execution of the money-decree against his father. The respondents support the decree, not only

(1) 9 M. 343. (2) 4 M. 1.

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on the ground that the son's interest passed by the sale, but also on the further ground that the District Munsif was not justified in decreeing in the appellant's favour on a case not disclosed by his plaint.

It is no doubt true, as alleged for the respondents, that the appellant stated in his plaint that the lands in dispute were his self-acquisition and that he failed to prove his averment. But this was certainly no ground for dismissing his suit altogether if he was entitled in part to the relief sued for on the facts admitted by respondent No. 1 himself. His admission is clearly evidence in favour of the appellant, and the latter is entitled to claim relief to the extent to which it may be lawfully adjudged by virtue of such admission. The question then on which our decision must depend is one of Hindu law as already stated. It is a question which frequently occurs in this country, and the decisions in regard to it are not on all points in harmony either in India or in the Privy Council. The leading case on this subject in this Presidency is *Ponnappa Pillai* v. *Pappuvayyangar*. It was decided on the 1st April 1881, and the judgments delivered in that case contain a full exposition of the Hindu law on the subject and of the course of decisions in India and before the Privy Council.

It was decided by the majority of the Court in that case (I) that the son was bound to pay his father's personal debt out of ancestral property derived through the father, and (II) that the [427] father was competent to sell ancestral property to pay his own antecedent debts provided they were such as the son would be bound to pay under the special rule of Hindu law. These two propositions of law were since approved by the Privy Council in *Muttayan* v. *Zamindar of Sivagiri* (1), which was decided in May 1882.

As to the interest which passed by a Court-sale in execution proceedings, it was held that when the decree against the father was founded upon a mortgage and when it contained a direction that the mortgage property be sold on default of payment, the son's interest would not pass by the Court-sale, for, the right of redemption which the son had could not be foreclosed except by a decree to which he was made a party. In regard, however, to money-decrees against the father, it was decided that the entire ancestral property inclusive of the son's interest passed by the Court-sale. In appeal 71 of 1880, it was held by a Division Bench of this Court that when it appeared from the execution proceedings that the purchaser intended to buy only the father's interest. the son's interest, did not pass. The course of decisons was in accordance with these propositions of law, until the decision of the Privy Council in *Hardi Narain Sahu* v. *Ruder Perkash Misser* (2). In that case the Judicial Committee held that the son's interest did not pass by a sale in execution of a money-decree and referred to their decision in *Deendyal* v. *Jugdeep Narain Singh* (3). They further hinted that, if the decree were founded on a mortgage and contained a direction in regard to the sale of the mortgaged property, the son's interest might also pass by the execution sale. In advertence to this case, the decision of the Full Bench of this Court passed in 1881 was reconsidered in S.A. 703, 704 and 705 (4).

It was decided that when there was a money-decree the father's interest was alone liable to be sold in execution, and that when there was a mortgage-decree the entire estate was liable to be sold. It was considered that in the one case, the right, title and interest of the judgment-debtor was the right of the father as an individual co-parcener, and that in the

(1) 6 M. 1 (16). (2) 10 C. 626. (3) L.R. 4 I.A. 247. (4) 9 M. 343.

other the Court by its decree executed the father's mortgage. But in December 1885, the [428] Privy Council laid down the law differently in *Mussamut Nanomi Babuasin* v. *Módun Mohun*. In that case, the question raised for decision was, as in this, whether anything passed by the sale except such share as the father would have taken on partition. and the Judicial Committee held that the entire ancestral estate passed though there was only a money-decree against the father. They observed as follows: "There is no question that considerable difficulty has been found in giving full effect to each of two principles of the Mitakshara law, one being that a son takes a present vested interest jointly with his father in ancestral estate, and the other that he is legally bound to pay his father's debts, not incurred for immoral purposes, to the extent of the property taken by him through his father." "Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debtor against the creditors' remedies for their debts, if not tainted with immorality." The Judicial Committee do not think that the authority of the *Deendyal's case* bound the Court to hold that nothing but Girdhari's (the father's) coparcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might procure a sale of it by suit. All the sons can claim is that not being parties to the sale or execution proceedings, they ought not be barred from trying the facts or the nature of the debt in a suit of their own. Assuming that they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale. If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or the father's coparcenary interest alone (and in *Deendyal's case* there certainly was an ambiguity of that kind), the absence of the sons from the proceedings may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings. Thus, it is clear that the Courts are now first to ascertain whether the purchaser in fact bargained and paid for the entirety, and if if appears that he did so, then to inquire whether the decree debt is tainted with immorality or one which the son would not be liable to pay, and [429] if the debt is not immoral to hold that the entire ancestral estate and not merely the father's co-parcenary right passed by the sale.

In the case before us the plaint is framed on the view that the purchasers bought in fact the entire estate, and the appellants did not even allege that the decree debt was tainted with immorality. Though there was only a money-decree, the father could sell the entire ancestral estate to pay his antecedent debt, and by the execution sale, therefore, the entire interest over which he had disposing power passed to the purchasers.

For these reasons, we confirm the decree of the Judge, though the grounds on which he rested it cannot be supported and dismiss this appeal. Having regard, however, to the decision of this Court in *Ponnappa* v. *Pappuvayyangar* (1), we direct each party to bear his costs of this appeal.

(1) 9 M. 343.

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9 M. 429.

9 M. 429.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

QUEEN-EMPRESS *v.* O'SHAUGHNESSY.* [12th July, 1886.]

Madras District Municipalities Act, 1884—Procedure to compel payment of tax—Distress.

Under Section 103 of Act IV of 1884 (Madras), a prosecution for default of payment of tax cannot be instituted unless the tax cannot be recovered by distress and sale of moveable property of the defaulter as provided in that section.

APPEAL under Section 417 of the Code of Criminal Procedure against the order of W. E. Clarke, First-class Magistrate of Nilgiris, in calendar case No. 11 of 1885, acquitting J. E. O'Shaughnessy charged under Section 62 of the Towns' Improvement Act, 1871 (Madras Act III of 1871) with having exercised his profession as Civil Engineer within the municipality of Ootacamund for more than two months in the official year 1884-85 without paying tax in respect thereof as required by Section 58 of the Act.

[430] The Acting Public Prosecutor (Mr. *Powell*), for the Local Government.

Subramanya Ayyar, for O'Shaughnessy.

The facts, necessary for the purpose of this report, appear from the judgment of the Court (COLLINS, C. J., and BRANDT, J.).

JUDGMENT.

This case was argued before us on the assumption that it fell to be decided under Madras Act IV of 1884, and on that assumption we dispose of it.

Section 112 provides that all arrears of taxes or other payments due to the Municipal Council at the time when the Act comes into operation in any municipality where (as in the case of Ootacamund) the Towns' Improvement Act, 1871, was previously in force may be recovered as though they had accrued under Act IV of 1884; but under the latter Act the procedure prescribed for the recovery of such taxes and for infliction of a penalty for exercising a profession or trading without having paid profession or trade tax is different from that provided in Act III of 1871.

Section 103 of the present Act provides that, if the tax is not paid within fifteen days from presentation of service of a bill or notice prescribed, and if cause be not shown by the person called on to pay it to the satisfaction of the Chairman why it should not be paid, the Chairman may proceed to recover the amount together with costs (1) by distress and sale of the moveable property of the defaulter, or if the defaulter be the occupier of any building or land, in respect of which such tax is due, by distress or sale of any property found in or on such building or land; (2) if the amount of such tax cannot be recovered by distress or sale of the moveable property of the defaulter, by prosecuting the defaulter before a Magistrate; and Section 111 provides that any person bound to pay any tax, who shall be prosecuted under Section 103 before a Magistrate, shall, on conviction, be liable to pay a fine not exceeding twice the amount of the tax found to be due.

* Criminal Appeal 167 of 1886. See 9 M. 36.

No proceedings having been taken under Section 103, and it not appearing that the tax could not be recovered by distress and sale of the moveable property of the defaulter, the prosecution before the Magistrate must fail, and on this ground we dismiss the appeal against the acquittal.

We refrain from expressing any opinion as to the Magistrate's interpretation of the 55th section of the Act.

9 M. 431=1 Weir 852.

[431] APPELLATE CRIMINAL.

Before Mr. Justice Brandt and Mr. Justice Parker.

ROWTHAKONNI, *In re*.* [21st July, 1885 and 27th July, 1886.]

Act IV of 1842 – *Act IX of* 1846 – *Madras Out-ports Boat Rules of* 1st *October* 1867 – *Jurisdiction of Magistrates—Liability of owner under Rule* 7 – *Burden of proof.*

Under Act IX of 1846, the Madras Government is authorized to make in respect of ports in the presidency such regulations for the management of boats and such other matters as are provided for by Act IV of 1842 in respect of the Madras Roads, being similar in principle to the provisions of the said Act, but varying in detail as local circumstances may require.

Act IV of 1842, section 24, empowers a Justice of the Peace of the town of Madras to hear and determine all pecuniary forfeiture and penalties had or incurred under or against that Act:

Held, that it was competent to the Government of Madras to provide that cases cognizable under the rules passed in accordance with Act IX of 1846 should be heard and determined by Magistrates not being Justices of the Peace.

Under rule 7 of the amended rules for the better management of boats, &c., plying for hire at the out-ports of the Madras Presidency, dated 1st October 1867, the owner of a boat is liable to fine on proof of his allowing his boat to ply without the requisite complement of men:

Held, that where it was proved that a boat was plying without its proper crew the absence of proof by the prosecutor that the owner was aware of the fact was no bar to his conviction.

APPLICATION under sections 435 and 439 of the Code of Criminal Procedure to revise the proceedings of F. H. Hamnett, Acting Head Assistant Magistrate of Madura, confirming on appeal the finding and sentence of P. Venkateswara Ayyar, Second-class Magistrate of Tiruvadanei, in case No. 849 of 1884.

The facts and arguments are fully set out in the judgment of the Court (BRANDT and PARKER, JJ.)

Mr. *Norton* and *Venkataramayyar*, for petitioner.

The Acting Government Pleader (Mr. *Powell*), for the Crown.

The judgment of the Court (BRANDT and PARKER, JJ.) was delivered by

BRANDT, J.—The petitioner, Rowthakonni, owner of boat No. 2 at Thondi, has been convicted by the Second-class Magistrate [432] of Tiruvadanei of "plying a boat without the requisite complement of men (an offence) punishable under Boat Rule No. 7," and sentenced to pay a fine of Rs. 25, and in default to ten days' simple imprisonment.

Complaint was laid by a peon of the Sea Customs Office, and his evidence and that of the Assistant Supérintendent of Sea Customs constituted the evidence for the prosecution. On this evidence, the Second-class Magistrate found it proved that on the 1st July 1884, when the

* Criminal Revision Case 218 of 1885.

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petitioner's boat brought timber to the shore from a "dhoni," it was manned by one tindal and four lascars only, while under the license it should have been manned by one tindal and six lascars. On being questioned as to this, the tindal replied that the two absent men had gone to Colombo to earn a livelihood there.

The petitioner's defence was that his boat "always is" manned with the full complement of crew, and that this was a wholly false case brought in consequence of personal spite against him on the part of the Assistant Superintendent of Sea Customs. Three witnesses were called for the defence: one deposed to some incident connected with the landing of some cargo from the petitioner's boat on another occasion when the Assistant Superintendent had objected to its removal, and two, the tindal and a lascar of the petitioner's boat, deposed that the latter always has its full crew.

In appeal the Divisional Magistrate gave his reasons for refusing to believe that the charge was a false charge, and, giving credence to the evidence for the prosecution, dismissed the appeal.

The High Court is moved to exercise its powers of revision on the grounds that even admitting that the boat was undermanned, the owner ought not to have been convicted in the absence of proof of knowledge on his part that the requirements of the rule had not been complied with in this particular instance; and that he was entitled to acquittal on the general principle that a master is not criminally liable for criminal negligence on the part of his servant.

At the hearing it was further contended that the Second-class Magistrate, not being a Justice of the Peace, had no jurisdiction in this case.

No reference is given in the judgment of the Courts below to the rules under which the conviction was had. A summary of **[433]** the boat rules for the out-ports of this presidency is given in the Standing Orders of the Board of Revenue, and search having been made we have found in the *Fort St.George Gazette* of the 15th October 1867 a notification, dated the 30th September 1867, containing "amended rules for the better management of boats and canoes plying for hire at the out-ports of the Madras Presidency." The notification does not specify the authority under which these rules are made, but it is recited that they have received the sanction of the Governor-General in Council and come into force on the 1st October 1867.

Act IV of 1842, "Madras Roads—Boat Regulations," an Act for the better management of boats and catamarans in the Madras Roads, and for the amendment of certain harbour regulations provides among other things that no person either as owner or servant shall use, &c., any boat or catamaran to carry passengers, goods or letters in the Madras Roads unless licensed; it provides for the licensing of boats under certain conditions; for penalties for breach of the conditions stated, on conviction before a Justice of the Peace.

Act IX of 1846 is an Act authorizing the Governor of Fort St George to make from time to time in respect of each port or other place of anchorage in the presidency such regulations for the management of boats and catamarans, &c., and such other matters as are provided for by Act IV of 1842, in respect of the Madras Roads as shall seem to them expedient, "being similar in principle to the provisions contained in the said Act, but varying in detail as local circumstances require such variation."

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It is contended by the learned Counsel for the petitioner that the qualification of the officers by whom cases involving questions as to breaches of the regulations or rules are to be tried is a matter of principle, and that it was not competent to the Local Government to provide that such cases shall be cognizable by Magistrates not being Justices of the Peace.

We do not think that the contention is sound. The local circumstances of the out-ports are very different from those of the presidency port. Had the jurisdiction of the Magistracy been considered a matter of first importance, it is reasonable to suppose that the Act would have contained clear words restricting the jurisdiction to Justices of the Peace. There is nothing in the matters made punishable by fine or otherwise which would appear **[434]** to be of great intricacy or of such importance as to make it essential that they should be adjudicated on by Justices of the Peace alone; it cannot, we think, be said that there is anything in the regulations or rules dissimilar in principle to the provisions contained in the earlier Act. We must further assume that the amended rules of 1867 were made and sanctioned under the authority given in the Act of 1846.

There is more in the other objections urged, *viz.*, that having regard to the general rule which is that in civil actions a master is liable for the acts of his servants, but not in criminal matters for the negligence of his servants to which he has not personally contributed, the word "allow" in the rule for violation of which the petitioner has been convicted cannot be taken as meaning that the owner is liable for a breach of the rule by his servants, without more, but that there must be some proof of wilful, or intentional, or at least positive neglect to take precautions for compliance with the requirements of the rule, and that there is no proof of such in this case.

The general principle "when penal consequences are made to follow acts of omission" is, as stated by Keating, J., in *Dickenson* v. *Fletcher* (1), "that when such consequences are to follow, there must be something in the nature of an actual neglect or default. That a person should be made liable to a penalty without any neglect or default on his part is contrary to the principle so well established by a great number of cases in which the Court, and specially this Court, have held that penalties are not incurred in the absence of *mens rea*," and in that case Keating, Brett, and Denman, JJ., were agreed, the second not however without considerable doubt, that, when the owner of a mine appointed a competent person to examine and lock the safety lamps required in the mine, but such person delivered out certain safety lamps for use in the mine unlocked, in the absence of personal default on the part of the owner he was not liable to a penalty in respect of the act of the person so employed.

The decision in the particular case was, however, to a great extent based upon the particular words in the 22nd Section of the Statute, 23 and 24 Vict., c. 151, "if through the default of the owner or agent" of the mines "any of the general or special rules * * **[435]** be neglected or wilfully violated by any such owner or agent," and regard was also had to the provision contained in subsequent Statutes by which the Statute under consideration was repealed, and in which it was provided that in the event of any contravention of the provisions of the Act, the owner, agent

(1) L.R. 9 C.P. 5.

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and manager of the mine shall be guilty of an offence 'unless he proves that he had taken all reasonable means to prevent such contravention.'

It was moreover not unreasonably contended that the Legislature intentionally created an exception to the general rule, and did enact that the owner of a boat licensed under the special Act and Regulations should be personally liable to a money penalty and to imprisonment in default, as the only means of ensuring compliance with the requirements of the case; and the question cannot be disposed of with reference to the general principle of law only, without due regard being had to the actual words and general provisions of the rules, and to the particular subject-matter and intent of the Act.

No boats are allowed to ply without a license, and it is to be presumed that only so many are licensed as it is estimated will suffice for the requirements of the port; there is then, in some sense, a monopoly, and it may well be that in view of the advantages thereby secured boat owners are willing to subject themselves to considerable liabilities.

Under rule 7 the owner alone is liable to fine on proof of his "allowing" his boat to ply without the requisite complement of men; while under rule 8 it is the tindal of any craft loaded with passengers or cargo in excess of the number or tonnage specified in the license who is primarily liable, "every other person who shall be guilty, either as principal or accessory, of the like offence, after having been duly warned by the tindal or owner" being liable to similar punishment.

Under rule 9, if any tindal, after due warning, plies to and from the shore, after notice given by any of the authorities named that is dangerous to do so, 'shall forfeit all hire,' *and the owner shall be subject to suspension of license.*

By rule 15 any owner of a licensed boat *or person deputed by him* who refuses to let such boat for hire without reasonable and satisfactory cause for such refusal is liable to a penalty.

It must be assumed then that the Legislature advisedly made the owner alone liable under the rule under which the petitioner [436] has been convicted; and it only remains to decide, as a point of law, what effect is to be given to the word "allow."

The case is put of an owner being absent from the port in such circumstances that he could not possibly ensure compliance with the terms of the license; but there is no evidence that this was the case here; and there is no need to determine the hypothetical case put. The petitioner's defence was that his boat was fully manned. It is held proved that it was not. And taking the tindal's first statement as true, which it probably is, that the two missing lascars had gone away to Ceylon, there is no evidence that fact was not or might not have been communicated to the owner nor as to the length of time they had been gone.

It was suggested that a boat might leave the shore with a full complement, and that without default on the part of the tindal or possibility of prevention on the part of the master, some of them might leave the boat before it returned to shore; here again there is no evidence that this was so in this case, nor was it suggested as a defence at the trial.

We must then find that the boat was "plying" without a full crew.

Under rule 6, in the absence of registered tindals or lascars, others may be employed "on an emergency and with the permission of the registering officer," but it is not suggested that any notice had been given of the defection of two of the crew, or that any application had been made to register or employ temporarily others in their place.

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Having regard to the provisions of the rules as a whole, and to the distinction that is made as to the liability of the owner, and of the tindal in some cases, we must hold that by the word "allow," the Legislature intended to create a liability more extensive than would be implied in such words as "if the owner neglects to ensure that the boat is fully manned," and thereby contravenes the provisions of the rules, he shall be guilty of an offence under the rules "unless he proves that he had taken all reasonable means to prevent such contravention."

We do not say that on proof of such means having been taken the merest nominal fine would not suffice, but we are not prepared to hold, having regard to the peculiar language used, and to rules read as a whole, that it was necessary for the prosecution in this **[437]** case, to prove the *mens rea*, or that the conviction, on the special facts of this case, is bad in law.

Having regard, however, to the fact that it is not shown that this boat had been plying undermanned before this occasion, or if so, for how long, and in the absence of proof of any personal knowledge on the part of the owner that it had not its full complement, or that there were any special reasons for making an example in this case, we think that the fine, Rs. 25, being half of the maximum amount, is excessive, and we shall reduce the fine to Rs. 10, and direct that the difference be refunded, if the fine has been paid.

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9 M. 437.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

KUNHAMED (*Petitioner*) v. CHATHU (*Respondent*).*
[16th April, 1886.]

Civil Procedure Code, Sections 315, 622.

Where an order was passed under Section 315 of the Code of Civil Procedure directing refund to a purchaser in execution of a decree in a suit in which a second appeal lay to the High Court:

Held, that under Section 622 of the Code of Civil Procedure, the High Court could set aside the order because, the judgment-debtor having been found to have a saleable interest, the Lower Court had no power to order a refund.

[F., 42 P.R. 1896; R., 28 C. 303 (306); 17 M. 228 (229).]

APPLICATION under Section 622 of the Code of Civil Procedure to set aside an order passed by B. D'Rozario, District Munsif of Cannanore, under Section 315 of the Code of Civil Procedure.

In execution of the decree in suit 354 of 1880, Chathu Kurup purchased the equity of redemption of certain land, the property of the judgment-debtor in that suit for Rs. 970.

In 1883 he brought suit No. 153, to redeem the mortgage (kanam). It was held, however, that he was not entitled to redeem if the mortgagees elected to exercise their right of purchasing the equity of redemption, inasmuch as they were found to be otti and not kanam holders.

[438] In 1885 Chathu Kurup received from the mortgagees Rs. 600 under an order of the Court.

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* Civil Revision Petition 16 of 1886.

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He now claimed under Section 315 of the Code to recover Rs. 370, the balance of the Rs. 970 he had paid in suit 354 of 1880, from Kunhamed, the decree-holder in that suit.

Kunhamed resisted the application on the ground that Section 315 of the Code did not apply to the case, inasmuch as the judgment-debtor had a saleable interest of Rs 600 in the property sold.

The District Munsif held that there was nothing to prevent Chathu Kurup from recovering the sum claimed, and that the objections raised by Kunhamed were frivolous, and directed payment of Rs 370 with interest at 6 per cent from the date of the purchase by Chathu Kurup.

To set aside this order the preseut application was made.

Anantan Nayar, for petitioner, Kunhamed.

Mr. *Wedderburn*, for respondent, Chathu Kurup.

This Court has no jurisdiction, under Section 622 of the Code of Civil Procedure, to revise the order of the District Munsif. The order was passed in a suit in which an appeal lay to the High Court.

The word "case" in Section 622 is a synonym for "suit" (see Sections 617, 618, 619, 620, 621.)

The intention of Legislature apparently was that the High Court should have the power of revision in cases falling under Section 586 of the Code in which no second appeal is allowed.

Again, according to the decision of the Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh* (1), the Munsif had jurisdiction to determine whether a refund could be made. Bad law is not a material irregularity according to that decision.

Anantan Nayar.

This Court has interfered in similar cases.

Sivarama v. *Rama* (2) and C.R P. 294 of 1885.

The Court (COLLINS, C.J., and BRANDT, J.) delivered the following

JUDGMENT.

The respondent himself applied for refund of the sum of Rs. 370, being the difference between the value of the purchase-money paid by him and the sum of Rs. 600 paid to him under order of the Court by the otti-holder.

The District Munsif made an order for the refund accord-**[439]**ingly. That the judgment-debtor had some saleable interest in the property sold is then clear, and in that case the District Munsif had no jurisdiction to make an order under Section 315 for refund of the purchase-money or any part thereof.

No appeal lay against the order passed by the District Munsif; and following the decisions of this Court in *Sivarama* v. *Rama* (2) and Civil Revision Petition 294 of 1885 (3), we deal with the case in revision and set aside the order of the District Munsif, dated 3rd October 1885, with costs throughout.

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(1) 11 C. 6. (2) 8 M. 99. (3) Not reported.

9 M. 439=2 Weir 213.

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APPELLATE CRIMINAL.

9 M. 439= 2 Weir 213.

APPELLATE CRIMINAL.

Before Mr. Justice Parker.

GULAM MUHAMMAD SHARIF-UD-DAULAH, *in re.** [8th January, 1886.]

Criminal Procedure Code, Section 197—Sanction to prosecute Judge for words uttered on the bench.

Where a Judge was charged with using defamatory language to a witness during the trial of a suit:

Held that, under Section 197 of the Code of Criminal Procedure, the complaint could not be entertained by a Magistrate without sanction.

[**Diss.**, 26 C. 852=3 C.W.N. 539; **R.**, 30 C. 927 (933)=7 C.W.N. 750; 13 C.P.L.R. 126 (128); 14 P.R. 1890 Cr.; 29 P.R. 1904=9 P.L.R. 1905.]

THE facts of this case are set out in the judgment of the Court (PARKER, J.).

The Acting Advocate-General (Mr. *Shephard*), for petitioner.

JUDGMENT.

PARKER J.—This is an application to direct the Presidency Magistrate of Black Town to entertain the complaint of petitioner against Mr. Ponnusami Pillai, 3rd Judge of the Madras Court of Small Causes, charging him with defamation and insult under Sections 500 and 504 of the Indian Penal Code. The Presidency Magistrate has refused to entertain the complaint in the absence of the sanction of Government or the High Court under Section 197 of the Criminal Procedure Code.

The petitioner was a witness before the Small Cause Judge in a case tried before him, and the expressions complained of are alleged to have been used by the Judge in addressing the witness in the course of the trial. It is contended by the Advocate-**[440]** General that the expressions were not used by the Judge as a public servant, and, therefore, that no sanction under Section 197 of the Code of Criminal Procedure is necessary, and *Imperatrix* v. *Lakshman Sakharam Vaman Hari and Balaji Krishna* (1) was referred to show that the acts for which sanction to prosecute is required are only acts which would have no special signification except as done by a public servant. It is argued that the words complained of would be equally offensive if used by any one, whether a public servant or not. The ruling quoted was one, given on Section 466 of the old Code (X of 1872), which, though the wording is different, is substantially the same as Section 197 of the present Code.

Reference was also made to the ruling of the Calcutta High Court that the corresponding section in the former Code related only to offences specified in chapter IX of the Penal Code, to which, however, the Bombay High Court has not assented, holding that the section at least applied equally to such offences as are specified in Sections 217—223, which are in chapter XI. These cases are alluded to in Prinsep's Criminal Procedure, 7th edition, page 126. The Bombay High Court agreed, however, in the principle that Section 197 related only to acts and omissions which were offences when committed by a public servant.

If defamatory language were used by a Judge to a person out of Court—when not sitting or actually officiating as a Judge—it seems quite

* Criminal Miscellaneous Petition 105 of 1885.

(1) 2 B. 481.

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clear that no sanction under Section 197 of the Code of Criminal Procedure would be required; but the case as it seems to me, would be different if the same words were used by the Judge in the course of the trial of a suit. He is then acting in his official capacity, and it seems impossible that the words used by him in the course of the trial can be uttered in his private capacity. The words uttered are then uttered as Judge and not as a private individual, and if any criminal offence has been committed in the uttering of them, the offence has been committed as a Judge.

That this is so is clear from the judgment of the Court of Exchequer in *Scott* v. *Stansfield* (1). I must hold that the Presidency Magistrate had no jurisdiction to entertain the complaint without sanction and dismiss this application.

Solicitors for petitioner: *Branson & Branson.*

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9 M. 441.

[441] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

KRISHNAN AND OTHERS (*Defendants*), *Appellants v.* SANKARA VARMA (*Plaintiff's Representative*), *Respondent.**
[22nd March and 19th April, 1886.]

Contract Act, *Sections* 21, 65--*Mistake of law—Agreement to secure repayment of loan, collateral, to primary obligation.*

By an agreement in writing, defendants, trustees of a temple, in consideration of an advance of money which they represented was required to pay off debts incurred for the benefit of the temple granted to plaintiff a lease of the right to manage the temple lands, and plaintiff promised that he would repay himself out of the profits to be derived from the lands and that neither the defendants nor their family property should be made liable for the debt.

In a suit by plaintiff against a tenant of the temple lands, this lease was held to be void for illegality. Defendants subsequently resumed management and plaintiff sued them to recover the money advanced by him.

It was found that the agreement was entered into by both parties under a mistake as to the validity of the lease:

Held, that assuming Section 65 of the Contract Act was not intended to vary the rule that a mistake of law is no ground for relieving a party from his own contract, plaintiff was nevertheless entitled to recover on the ground that the agreement which provided for repayment was collateral and had failed.

An agreement that an obligation which is contracted shall be discharged in some particular mode is collateral to the primary contract which created the obligation, though the two agreements may be mixed up in one contract.

[R., 11 Bom. L.R. 693 (697)=3 Ind. Cas. 761.]

APPEAL against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in suit 5 of 1884.

The plaintiff, Kadathanah Ayanjeri Kovilagath Rama Varma Raja, sued Narayana Mangalath Varieth Krishnan and nine others, members of a Malabar tarwad, to recover Rs. 4,000 lent to defendants under a registered agreement, dated 6th April 1879, with interest at 12 per cent.

The plaintiff prayed that this sum might be recovered by sale of temple properties mentioned in the plaint; "out of the [442] defendants'

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* Appeal 69 of 1885.
(1) L.R. 3 Ex. 220.

pocket," and by granting "other reliefs which he might ask for as the Court might think fit to grant."

The Subordinate Judge decreed payment of Rs. 3,000, with interest at 12 per cent. from February 28, 1882, and declared that the properties of defendants' tarward were liable for the amount decreed and costs.

Defendants appealed and plaintiff filed a memorandum of objections against this decree.

Sankaran Nayar, for appellants.

Gopalan Nayar, for respondent.

The facts necessary for the purpose of this report appear from the judgment of the Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.)

JUDGMENT.

The appellants are the hereditary uralars of the Polur temple in the district of Malabar. They considered that their management was not efficient and they were unable to pay the debts which, as they alleged, they had contracted for the purposes of the devasam. On the 6th April 1879, they and their karnavan, Rama Variar, induced the respondent to advance Rs. 8,000 to enable them to pay those debts. In return for this advance he accepted a lease of the right of management for a period of 96 years, and agreed to repay himself by demising properties belonging to the temple on kanam. The appellants undertook to afford him every facility for so doing, and the respondent agreed that neither they nor the property belonging to their family should be made liable for the debt. To this effect appellants executed document A in respondent's favour on the 6th April 1879. As stated by the respondent, he paid them Rs. 4,000 in cash and executed bond B for the balance of Rs. 4,000. Thereupon, he entered on the management of the temple as the assignee of the urayama right (right of management), and instituted suit 373 of 1880 to eject one of the tenants of the institution who allowed the rent to fall into arrears. The tenant impeached the validity of the assignment or lease, but the representative of the appellant's family affirmed the document in that suit. In February 1882, the suit was, however, finally decided against the respondent, on the ground that the trusteeship of a temple could not be assigned. After this, the appellants resumed the management, and the respondent brought the present suit to recover back Rs. 4,000, with interest at 12 per cent. per annum from the date of the [443] original transfer. The appellants resisted the claim on three grounds, *viz.*, that the amount paid in cash was only Rs. 3,000, that the respondent accepted the transfer of the urayama right with full knowledge of facts, and could not claim to recover back what he had paid with such knowledge, and that they did not repudiate the karar or otherwise act in contravention of its terms. The Subordinate Judge found that Rs. 3,000 only was paid in cash, and that the appellants applied Rs. 2,938 in liquidation of their tarwad debts, and that it was not shown that the money received was used for the benefit of the devasam. He placed reliance on Exhibit D which was an account particular filed by the appellants' karnavan in suit 509 of 1880 between the members of his family, in preference to the oral evidence adduced by the respondent, and considered that Rs. 1,000 was set apart for the expenses incurred in bringing about the assignment of the urayama right for 96 years. The Subordinate Judge then referred to Section 65 of the Indian Contract Act, exonerated the properties of the temple from all liability for the claim, and decreed that the appellants do pay the respondent Rs. 3,000 together with interest at 12 per cent. from

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the date of the final decree in suit 373 of 1880 till the date of payment, and with costs and interest thereon at 6 per cent. per annum from the date of his decree. He declared also that the properties belonging to the appellants' tarwad were answerable for the debt.

Both parties object to this decree so far as it is unfavourable to them. It is urged for the appellants that no suit can be maintained to recover money paid with full knowledge of facts, on the ground that the interest transferred was not in law capable of being transferred, that they did not act contrary to the terms of document A, and that there was no prayer in the plaint that the properties belonging to their tarwad should be rendered liable for the claim. On the other hand, the respondent contends under Section 561 of the Code of Civil Procedure, that the finding as to the non-payment of Rs. 1,000 out of Rs. 4,000 is contrary to the weight of evidence, and that interest at 12 per cent. per annum should have been awarded from the date of document A, instead of from the date of the final decree in Original Suit 373 of 1880. It appears that document A was given and accepted under the erroneous belief that urayama right was assignable in law on a lease of 96 years. We were referred to no evidence upon which [444] we could hold that either the appellants or the respondent knew that the assignment was invalid. The mistake then is a mutual mistake of law in regard to the transfer of a right which is in substance in the nature of a trust. But it was not necessary for the respondent to rely on the transfer for the purpose of showing that the appellants were under an obligation to repay the amount advanced. It is shown by document A that they represented to the respondent that thay needed a loan to pay the devasam debts, and that the amount was advanced to them to pay those debts. If the representation was *bona fide*, and they paid the devasam debts with the money obtained from the respondent, their obligation to repay the loan as uralars out of devasam properties would be complete. If, as disclosed by the facts found, they paid their own tarwad debts, with the money advanced to enable them to pay devasam debts, still their obligation to repay the respondent for breach of their contract would be complete. The agreement in regard to the transfer of urayama right on a lease of 96 years prescribed only a special mode of satisfying that obligation, and if that agreement could not take effect because of its being tainted with illegality, their obligation to repay cannot on that ground be taken to be satisfied. According to the rule laid down by Lord Cairns in *Elkington's case* (1) and in *Bridger s case* (2) an agreement that an obligation which is contracted shall be discharged in some particular mode is collateral to the primary contract which created the obligation, though the two agreements may be mixed up in one contract. Assuming that Section 65 of the Contract Act is not intended to vary the rule that a mistake of law is no ground on which a party can be relieved from his own contract, we are still of opinion that the respondent is entitled to recover back the amount advanced, on the ground that the collateral agreement which provided for its re-payment failed. As to the contention that the Subordinate Judge is in error in declaring that the appellants' tarward property is liable for the debt, we observe that the plaint contains a prayer for such other relief as the respondent may ask for and the Court may deem it fit to grant. The amount borrowed was not shown to have been applied to the payment of the devasam debts, and devasam properties cannot be made

(1) L.R. 2 Ch. 511. (2) L.R. 9 Eq. 75.

liable. On the other hand, Rs. 2,932 out of Rs. 3,000 was proved to have **[445]** been used to pay the debts due by the appellants' tarwad, and such being the case, we consider the tarwad property was properly declared liable for the amount decreed. We accordingly dismiss the appeal with costs.

As to the objections filed by the respondent. There is a conflict of evidence in regard to the payment of Rs. 1,000 in addition to Rs. 3,000, and we cannot say that the Subordinate Judge has not come to a correct finding. As to the interest awarded to the respondent as damages, we see no reason to interfere on appeal. He stated in his plaint that he entered on the management of the temple upon the execution of document A, and the appellants, it appears, resumed the management after the date of the final decree in suit No. 373 of 1883.* The Subordinate Judge then declined to allow interest for the period during which the respondent had presumably the benefit of managing the temple, and we do not consider that he was in error in doing so. We therefore disallow the objections also with costs.

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9 M. 445.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

KARUPPAN *(Plaintiff), Appellant v.* AYYATHORAI *(Defendant No. 1), Respondent.*† [24th July, 1886.]

Civil Procedure Code, Sections 100, 101, 108, 540—*Appeal from* ex parte *decree.*

A defendant against whom a decree has been passed *ex parte*, and who has not adopted the procedure provided by Section 108 of the Code of Civil Procedure can appeal from such decree under the general provisions of Section 540. *Lal Singh* v. *Kunjan* (I.L.R., 4 All., 387) dissented from.

APPEAL from the decree of R. Vasudeva Rau, Subordinate Judge at Negapatam, modifying the decree of V. Mulhari Rau, District Munsif of Mannargudi, in suit 20 of 1885.

The plaintiff Karuppan Chetti, sued the defendants Ayyathorai and Subbu Mudali, father and son, to recover Rs. 1,369-2-6 due on a bond executed by Ramalinga Mudali, deceased son of **[446]** defendant No. 1, and Rs. 163-11-0 due for money lent and goods supplied to Ramalinga Mudali, as manager of the defendants' family.

Defendant No. 1 did not appear.

The issues framed were (1) whether the debts sued for were binding on defendant No. 2; (2) whether the claim on account of goods supplied was barred.

The Munsif decreed payment of Rs. 1,369-2-6 as against defendant No. 1, and dismissed the suit as against defendant No. 2.

Defendant No. 1 appealed.

Respondent objected that no appeal lay, citing the Full Bench decision of the High Court of Allahabad *Lal Singh* v. *Kunjan* (1).

The Subordinate Judge held that he was bound to follow *Anatharama Patter* v. *Madhava Paniker* (2) and, finding that the debt was a mere personal debt of the son, he held that the father was not bound to pay, and dismissed the suit. Plaintiff appealed on the grounds—

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* [1883 seems to be a mistake for 1880.—ED.] † Second Appeal 967 of 1885.

(1) 4 A. 387. (2) 3 M. 264.

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(1) That the issues were not properly framed.

(2) That as defendant No. 1 did not appear and it was understood by the parties and the Court that a decree would be given against him, plaintiff, being content with such a decree, did not let in evidence as to the nature of the debt.

(3) That no appeal lay to the Lower Appellate Court.

Ramachandra Rau Saheb, for appellant.

Subramanya Ayyar, for respondent.

JUDGMENT.

Although the first issue was defective in form, still the appellant had to show, as against defendant No. 2, that the debt was incurred for purposes binding on the family and produced evidence for that purpose. We are not prepared to hold that he has been misled by the frame of the issue. As to the question whether an appeal lies from an *ex parte* decree, it has been held by this Court since 1881 that an appeal does lie, *Anantharama Pattar* v. *Madhava Paniker* (1). The same view appears to have been taken by the Bombay High Court, *Luckmidas* [447] *Vithaldas* v. *Ebrahim Oosman* (2). There is a Full Bench decision of the Allahabad High Court, *Lal Singh* v. *Kunjan* (3), in which a majority of the Court held that no appeal would lie. We are, however, not prepared to dissent from the view taken by the Division Bench of this Court. This second appeal must therefore fail, and we dismiss it with costs.

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9 M. 447.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

RAJAGOPAL AND OTHERS, *in re.** [3rd August, 1886.]

Letters Patent, Section 15—*Civil Procedure Code, Sections* 588, 592.

Section 15 of the Letters Patent of the High Court at Madras being controlled by Section 588 of the Code of Civil Procedure, no appeal lies from the order of a single Judge of the High Court made under Section 592 of the Code of Civil Procedure rejecting an application for leave to appeal *in forma pauperis.*

[**F.**, 11 A. 375=9 A.W.N. (1889) 70; **Appr.**, 20 M. 407; **D.**, 23 C. 361.]

APPEAL under Section 15 of the Letters Patent against an order made by Brandt, J., dated 27th April 1885, rejecting an application for leave to appeal *in forma pauperis*, against the decree in suit No. 74 on the Original Side of the Court.

Ammayi Ammal, next friend of the appellants, Rajagopal Pillai and others, her minor sons, appeared in person.

The facts necessary for the purpose of this report appear from the judgment of the Court (COLLINS, C.J., and PARKER, J.).

JUDGMENT.

An order passed under Section 592 of the Code of Civil Procedure rejecting an appeal *in forma pauperis* is not appealable under Section 588, which provides that no appeal shall lie from orders not specified in that section.

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* Letters Patent Appeal 8 of 1886.

(1) 3 M. 264. (2) 2 B. 644. (3) 4 A. 387.

It has already been decided in *Achaya* v. *Ratnavelu* (1) that Section 15 of the Letters Patent is controlled by a similar section in the Civil Procedure Code which provided that an order shall be final, and that enactments to such effect are not beyond the legislative powers of the Governor-General in Council.

There is no appeal and this application must be rejected.

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9 M. 448=2 Weir 672.

[448] APPELLATE CRIMINAL.

Before Mr. Justice Brandt.

QUEEN-EMPRESS *v.* AHMED.* [1st September, 1886.]

Criminal Procedure Code, Sections 517, 520.

An order passed under Section 517 of the Code of Criminal Procedure may be revised by a Court of Appeal although no appeal has been preferred in the case in which such order was passed.

[R., 14 C.P.L.R. 60 (61); 17 C.P.L.R. 107 (110); 18 Ind. Cas. 171 (174)=24 M.L.J. 1.]

THIS was a case referred to the High Court by F. H. Wilkinson, Sessions Judge of South Malabar.

The facts of the case were stated by the Judge as follows :—

"One Ahmed was charged with the theft of a gold chain. The Magistrate being of opinion that the complainant gave the gold chain to Bava, her paramour, in order that a false case might be concocted against the accused, who was also paying visits to the complainant, acquitted the accused but ordered the gold chain to be restored to complainant.

"His order was, I submit, contrary to the provisions of Section 517 of the Code of Criminal Procedure. There having been no appeal, I am doubtful if, under the provisions of Section 520, I can myself direct the order to be stayed and request the orders of the High Court on both points, *viz.*, (1) the illegality of the Magistrate's order and (2) the power of a Court of Appeal to stay orders under Section 517 and to modify, alter or annul such order, no appeal having been presented."

Counsel were not instructed.

The Court (BRANDT, J.) delivered the following

JUDGMENT.

There are decided cases : *Empress* v. *Joggessur Mochi* (2), *Empress of India* v. *Nilamber Babu* (3) in which the question whether an appeal lies against an order passed under Section 517 of the Criminal Procedure Code, though there be no [449] appeal against the finding in the case in which the order was passed, has been decided in the affirmative, on the ground that the words "Court of appeal" in Section 520 are not to be read as restricted to "a Court of Appeal before which an appeal is pending ;" and it seems to me that the wording of the section is sufficient to show that the Sessions Court, as the Court to which appeals ordinarily lie from the decisions of the 1st-class Magistrate by whom this case was tried, had power to dispose of the question. As to whether the order made by the 1st-class Magistrate should be set aside : here again there is an authority—*in re Annapurnabai* (4)—to the point, in which it is shown

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* Criminal Revision Case 458 of 1886.

(1) 9 M. 253. (2) 3 C. 379. (3) 2 A. 276. (4) 1 B. 630.

1886 SEP. 1. — APPELLATE CRIMINAL. — 9 M. 448 = 2 Weir 672.

that on general principles Courts are bound to restore property to the possession of those from whom it is taken for purposes of justice, unless the Court is of opinion that an offence has been committed in respect of that property or that it has been used for the commission of an offence.

In this case, the finding was that the accused person was innocent, no offence having been committed *by him*, in respect of the gold necklace produced, and it not having been in any way used by him. The Magistrate however had, it appears, reason to suspect or believe that the necklace had been used by the woman Kali, and one of the witnesses for the prosecution, her paramour, Bava, for the purpose of wrongfully obtaining a conviction of the accused; if that is so in fact, then an offence or offences would "appear to have been committed," and the necklace was used for the commission of an offence, and the Magistrate might perhaps on this ground—I do not decide the point—he might, I say, have made an order under Section 517; but if he had done so, an order restoring the necklace to the woman Kali, the owner, would certainly not be the proper order.

There is however practically no doubt that he ordered it to be given back to the woman simply because he found it to be her's; and I am not prepared to say there are sufficient reasons for interference in revision. If the complainant, Kali, and her paramour, Bava, really concocted a false case and used fabricated evidence against Ahmed, there are means of punishment other and more appropriate than the withholding of the necklace.

9 M. 450.

[450] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

VENKATRAYUDU (*Plaintiff*), *Appellant v.* NAGADU AND OTHERS (*Defendants*), *Respondents*.*
[15th and 23rd July, 1886.]

Limitation Act, Section 5—Admission of appeal out of time—Order set aside at hearing.

An order made *ex parte*, under Section 5 of the Indian Limitation Act, 1877, admitting an appeal after the period prescribed therefore, may be set aside on proper cause being shown by the Court which made it.

APPEAL from the decree of W. J. H. LeFanu, Acting District Judge of Kistna, confirming the decision of V. A. Narasimharazu, District Munsif of Karempudi, in suit 175 of 1883.

The plaintiff, Gudipudi Venkatrayudu, sued the defendants, Siddela Nagadu and three others, to establish his right to certain land.

On the 24th September 1883, judgment was given for plaintiff on the ground that defendant "was not ready with his witnesses."

Defendants Nos. 1—3 then prayed for a review, which was granted.

The case was re-heard and the suit dismissed.

Plaintiff appealed.

The appeal was presented out of time, but admitted.

At the hearing, defendants objected that the appeal had been wrongly admitted and plaintiff objected that the Munsif, had wrongly admitted the review.

* Second Appeal 995 of 1885.

1886 JULY 23. — APPELLATE CIVIL. — 9 M. 450.

The Judge held that the Munsif was wrong in admitting the review, and that, on the merits, plaintiff was entitled to succeed; but dismissed the appeal without costs on the ground that it should not have been admitted.

Plaintiff appealed to the High Court on the ground, *inter alia*, that the District Judge had no power to cancel his original order, admitting the appeal, after the said appeal had been placed on the register.

[451] *Subbarayadu* and *Kalianaramayyar*, for appellant.

Venkatasubba Rau, for respondent.

The Court (COLLINS, C.J., and PARKER, J.) delivered the following

JUDGMENT.

The District Judge has dismissed the appeal on the ground that it was presented out of time, and it is urged upon as that he had no power to review his previous *ex parte* order admitting the appeal.

We cannot agree in this contention and we are of opinion that an order made *ex parte* under Section 5 of the Limitation Act may, on proper cause shown, be set aside by the Court which made it—see *Jhotee Sahoo* v. *Omesh Chunder Sircar* (1), *Dubey Sahai* v. *Ganeshi Lal* (2). We do not see that the Judge exercised his discretion in an unreasonable or improper manner, and must dismiss this second appeal; but, under the circumstances, we will make no order as to costs.

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9 M. 451.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

UNNIRAMAN (*Defendant No.* 1), *Petitioner v.* CHATHAN (*Plaintiff*), *Respondent.** [12th July, 1886.]

Civil Procedure Code, Section 622—*Award—Error of procedure—Relief refused on equitable grounds.*

R.M., party to a suit, having authorised his agent to conduct the suit, the agent consented to the case being referred to arbitration by the Court. The arbitration was carried on to the knowledge and with the assent of R.M.

On an application by R.M., under Section 622 of the Code of Civil Procedure, to set aside the award made by the arbitrators on the ground (1) that his pleader had not been authorised in writing, as required by Section 506 of the Code, to apply for arbitration, and (2) that he himself had not consented to the reference: *Held* that, under the circumstances, R.M. was not entitled to relief.

[**F.**, 24 C. 469 (472); **R.**, 1 Bom. L.R. 261; **Expl.**, 8 O. C. 263; **D.**, 5 C.W.N. 268 270).]

APPLICATION under Section 622 of the Code of Civil Procedure to set aside an order of P. J. Ittiyarah, District Munsif of Angadipu-**[452]** ram passed under Section 522 of the Code of Civil Procedure, in suit 176 of 1881.

The plaintiff, Patinjari Kovilagath Vallabhan Chathan Raja, sued Kondipurambath Unniraman Mutba Panikar, defendant No. 1 and 12 others, his tenants, to recover certain land. The case was referred to arbitration and the award was given in favour of plaintiff.

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* Civil Revision Petition 21 of 1886. *Note.*—See also I.L.R. 13 Cal. 78.

(1) 5 C. 1. (2) 1 A. 34.

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APPELLATE CIVIL.

9 M. 451.

Defendant No. 1 applied under Section 522 to set aside the award, and his application was rejected.

The facts appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and BRANDT, J.).

Sankara Menon, for petitioner.

Bhashyam Ayyangar, for respondent.

JUDGMENT.

This is an application by the defendant No. 1. in suit 176 of 1881, under Section 622 of the Code of Civil Procedure, to set aside an award, and the grounds relied on by him are that the case was referred to arbitrators without his knowledge and consent, and that his pleader was not specially authorised in writing as required by Section 506 of the Code. It appears that he authorised his anandravan, Krishna Panikar, to conduct the suit in question for him, and there can be no doubt this man assented to the reference. There can also be no doubt but that defendant No. 1 knew that his agent had assented to the reference, that he ratified that assent and was fully aware that the arbitrators were conducting the reference, and it was not until the award was given against him that he asserted that the reference was without his knowledge or consent. A party applying under Section 622 to the High Court for relief must show that he has not contributed by his own conduct to his being placed in the position he finds himself in; and, we think, it would be inequitable, under all the circumstances of this case, to grant the relief sought. Regard is also to be had to the delay on the part of the petitioner. It is not necessary to say, and we expressly refrain from saying, anything as to the validity of the award.

This petition is dismissed with costs.

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9 M. 453.

[453] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

SUBRAMANYAN (*Defendant*), *Appellant v.* MANDAYAN (*Plaintiff*), *Respondent*.* [4th March and 12th July, 1886.]

Mortgage of seven parcels of land—Sale of equity of redemption of two parcels—Second mortgage of six parcels and redemption of one by mortgagor—Transfer of Property Act, Section 60—Redemption by purchaser of two parcels on payment of proportionate amount of debt, decreed.

In 1873 R mortgaged to S seven parcels of land (items 1—7) for Rs. 300. In 1880, M purchased R's rights in items 1 and 2. In 1881 R redeemed item 5 on payment of Rs. 30 and executed a second mortgage of the rest to S for Rs. 200:

Held that M was entitled to redeem items 1 and 2 on payment of a proportionate amount of the first mortgage-debt.

[N.F., 17 A. 63 (66); R., 17 Ind. Cas. 837 (838) = 23 M.L.J. 576 (578) = 12 M.L.T. 484 = (1912) M.W.N. 1168 (1169).]

APPEAL from the decree of S. Gopalachari, Acting Subordinate Judge of Madura (East), confirming the decree of T. A. Krishnasami Ayyar District Munsif of Sivaganga, in suit 67 of 1883. The facts were as follows:—

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* Second Appeal 774 of 1885.

1886 JULY 12. APPELLATE CIVIL. 9 M. 453.

On the 25th October 1873, Muthu Raman mortgaged to defendant, Subramanyan Chetti, seven parcels of land (items 1—7) for Rs. 300.

On the 14th April 1880, Maudayan, the plaintiff, purchased at a sale, under the Rent Recovery Act (Madras Act VIII of 1865) Muthu Raman's interest in two of the said parcels of land (items 1 and 2).

On the 12th July 1881, Muthu Raman executed a second mortgage to defendant for Rs. 200 of all the said parcels of land, except item 5, which he redeemed paying Rs. 30.

Plaintiff sued to redeem items 1 and 2, offering to pay Rs. 100 as the proportionate amount of the sum secured by the mortgage of 25th October 1873.

The Munsif held that, as the defendant, had himself "split" the security by allowing item 5 to be redeemed, he could not **[454]** compel plaintiff to redeem items 3, 4, 6, 7, and that plaintiff was entitled to redeem items 1 and 2 on payment of Rs. 161, being the proportionate amount of Rs. 300 payable for their redemption according to the relative produce of the seven parcels of land.

The Subordinate Judge, referring to Section 60 of the Transfer of Property Act, held that it did not apply.

On the authority of *Marana Ammanna* v. *Pendyala Perubotulu* (1) and *Chandika Singh* v. *Pohkar Singh* (2) confirmed the decree of the Munsif.

Defendant appealed.

Subramanya Ayyar, for appellant.

Rangacharyar, for respondent.

The Court (COLLINS, C.J., and PARKER, J.) delivered the following

JUDGMENT.

The defendant, the mortgagee, on 12th July 1881, accepted Rs. 30 as the proportionate amount of the mortgage due on one item of land and lent a further sum upon the remaining six items.

By so doing he seems to us to have destroyed the indivisibility of the original contract. The plaintiff, on 14th April 1880, had become the purchaser of the equity of redemption of two items, and hence, we think, he is entitled to redeem those two upon payment of the proportionate amount due thereon—*Maranda Ammanna* v. *Pendyala Perubotulu* (1).

We dismiss this second appeal with costs.

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9 M. 454.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

KOLLU SHETTATI (*Judgment-debtor*), *Appellant* v. MANJAYA (*Decree-holder*), *Respondent*.* [30th July, 1886.]

Civil Procedure Code, Section 230—*Limitation*—12 *years' rule*—"*Law in force*" *prior to that Code*—*Includes Act X of* 1877.

In Section 230 of the Code of Civil Procedure, 1882, the words "law in force" include the Civil Procedure Code, 1877, as well as the Limitation Act then in force :

[455] *Held*, therefore, where an application for execution of a decree of 1872 had been made and granted in January 1882 and under Section 230 of the Code

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* Appeal against Appellate Order 5 of 1886.

(1) 3 M. 230. (2) 2 A. 906.

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of Civil Procedure, 1877, further execution became barred, before the date on which Civil Procedure Code, 1882, came into force, that no application within three years from such date could be granted under Section 230 of that Code.

[R., 11 M. 132 (134).]

APPEAL against an order of H. M. Winterbotham, Acting District Judge of South Canara, confirming an order made by K. Krishna Rau, District Munsif of Udipi, in execution of the decree in suit 157 of 1871.

The decree-holder, Manjaya Shetti, applied on the 18th March 1885 for execution. The decree was passed on the 4th September 1872. The judgment-debtor, Kollu Shettati, pleaded that the application was barred by limitation.

The facts are set out in the judgment of the District Court as follows :—

"The decree (execution of which is sought) was for money, and bears date 4th September 1872.

"The application in question was presented on 18th March 1885. Admittedly the decree is one coming within the provisions of Section 230 of Act XIV of 1882, inasmuch as an application for execution was made and granted under that Section in 1883; but this was before the expiry of twelve years from the date of the decree.

"The second application (now in question) was made after the lapse of twelve years from the date of decree, but within three years from the passing of Act XIV of 1882; and the Munsif held that the application was not barred by the concluding proviso of Section 230, notwithstanding the fact that under the provisions of Act X of 1877 the decree was incapable of execution at the time when this application was made.

"That execution was barred under Act X of 1877, is clear from the fact that on January 26th, 1882, one application for execution was made and granted. I have referred to the record and find that the reason why that application failed was that the decree-holder neglected to deposit process-fees for the arrest of the judgment-debtor.

"Under Act X of 1887, no subsequent application could therefore be granted after the expiration of twelve years from the date of decree.

"The Munsif's interpretation of the last paragraph of Section 230 of Act XIV of 1882 seems to me based on the extraordinary proposition that Act X of 1877 was not part of "the law in force**[456]** immediately before the passing of Act XIV of 1882,' and I had drafted, but had not delivered, a judgment setting aside his order.

"Respondent's vakil has, however, drawn my attention to the ruling of Allahabad High Court reported in I.L.R., Allahabad, vol. 6, page 189, which is precisely to the point.

"In that case three Judges took the same view as the Munsif, and two Judges (one of whom was the Chief Justice) took the view which I should have adopted if I had been left without a guide.

"The Munsif's decision is in accordance with that of the majority of the Court, and under the circumstances I decline to pronounce it incorrect."

This appeal must be dismissed with costs.

Kollu Shettati appealed.

Srinivasa Rau, for appellant.

Gopala Rau, for respondent.

The Court (MUTTUSAMI AYYAR and BRANDT, JJ.) delivered the following

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JUDGMENT.

The expression "Law in force" as used in Act XIV of 1882, Section 230, must be taken to include all the rules of limitation which were in force immediately before the passing of that Act. In this view it would include Act X of 1877 as well as the general Act of limitation. In our judgment this is the natural result of the rules of grammatical interpretation which we are bound to follow. The expression as used in Act X of 1877 would, no doubt, refer only to the general Act of limitation, because the special rule in regard to twelve years was brought into operation for the first time by that enactment.

We agree with the learned Judges who decided *Goluck Chandra Mytee* v. *Harapriah Debi* (1), and with the minority of the learned Judges who took part in *Musharraf Begam* v. *Ghalib Ali* (2). It is conceded by the learned pleader for the respondent that, if the interpretation we are inclined to place on the last clause of Section 230 of Act XIV of 1882 were to prevail, the application for execution would be barred.

We set aside the orders of the Courts below and direct that the respondent's application for execution be dismissed with costs throughout.

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9 M. 457.

[457] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

VENKATAPATHI AND ANOTHER (*Plaintiffs*), *Appellants v.* SUBRAMANYA AND OTHERS (*Defendants*), *Respondents.**
[14th April, 1886.]

Limitation Act, Schedule II, Articles 12-95 —*Revenue Recovery Act* (*Madras*), *Section* 59 —*Suit to set aside fraudulent revenue sale—Limitation.*

Suit to set aside a sale of land, sold as if for arrears of revenue under Act II of 1864 (Madras), on the ground of fraud, and to recover possession of the land from the purchaser who was alleged to be party to the fraud :

Held, that the suit was governed by Article 95 of Schedule II of the Indian Limitation Act, 1877.

Article 12 of that schedule which prescribes a period of one year for suits to set aside sales for arrears of revenue is intended to protect *bona fide* purchasers only.

[**Appr.**, 34 C. 241 (245)=5 C.L.J. 385 ; **Expl.**, 12 M. 168 (178) (**F.B.**) ; **D.**, 3 M.L.J. 255 (257).]

APPEAL from the decree of S. Gopalachari, Acting Subordinate Judge of Madura (East), confirming the decree of S. Krishnasami Ayyar, District Munsif of Dindigul, in suit 193 of 1883.

The plaintiffs, Venkatapathi and Lakshmana Nayakan, were brothers. They alleged that they bought certain land from Virannan (defendant No. 4) in 1864, enjoyed it and paid revenue on it till September 1882 ; that in May 1882 they learnt that the village officers, Subramanya Ayyar (defendant No. 1), late karnam, and Minakshi Ayyan (defendant No. 2), late nattamgar, had fraudulently caused the land to be sold as if for arrears of revenue and to be purchased by Sundaramayyan (defendant No. 5), brother-in-law of the karnam, for Rs. 10, the real value being Rs. 320

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* Second Appeal 737 of 1885.

(1) 12 C. 559. (2) 6 A. 189.

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and without first attaching the moveable property of plaintiffs or of the registered holder (defendant No. 4) as required by the Revenue Recovery Act; that they had obtained no redress from the Sub-Collector (defendant No. 6) and that the cause of action arose in May 188? when defendant No. 1 prevented their servants from ploughing the land.

[458] The plaintiff claimed to have the revenue sale set aside and to be put in possession of the land or to recover Rs. 320, the value of the land and damages. Defendant No. 4 was *ex parte*. Defendant No. 5 denied that there was any fraud and pleaded limitation.

Defendant No. 6 pleaded that the sale was good and valid. Defendants 1 and 2 pleaded that there was no cause of action against them.

Defendant No. 3, the present nattamgar, pleaded ignorance of the sale.

The sale took place on the 8th October 1881 and the suit was brought in April 1883.

The Munsif held that if the six months' limitation prescribed by Section 59 of the Revenue Recovery Act did not apply, the plaintiffs not having been parties to the sale proceedings, the suit was barred by Article 12 of Schedule II of the Limitation Act, 1877.

He found that the sale had been fraudulently connived in by defendants 1 and 2, that defendant No. 5 had been a party thereto, and that defendants 3, 4 and 6 were not shown to have incurred any liability.

Plaintiffs appealed, making all the defendants respondents to the appeal.

The Subordinate Judge did not consider it necessary to decide whether Section 59 of the Revenue Recovery Act barred the suit. He held it was barred by Article 12 of Schedule II of the Limitation Act. If Article 95 of that Schedule was applicable, he was of opinion that plaintiffs were bound to prove that they discovered the fraud within three years of the date of suit, and found that this was not proved.

The appeal was dismissed.

Plaintiffs appealed on the grounds—

(1) that defendant No. 5 having been found to have bought benami for defendant No. 1, plaintiffs were entitled to recover the land within 12 years;

(2) that if it was not so, Article 95 of Schedule II of the Limitation Act applied;

(3) that no issue was raised as to when the plaintiffs first became aware of the fraud, and that the Subordinate Judge ought to have allowed evidence to be let in on the point;

(4) that plaintiffs were at any rate entitled to damages.

[459] All the defendants were made respondents to this appeal.

Subramanya Ayyar, for appellants.

The Acting Government Pleaded (Mr. *Powell*), for respondent No. 6.

Ths other respondents did not appear.

The Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.) delivered the following

JUDGMENT.

This is a second appeal from the decree of the Subordinate Judge of Madura, who, on appeal, concurred in the opinion of the District Munsif of Dindigul that the appellants' claim was barred by limitation. The land in dispute originally belonged to respondent No. 4. In March 1864

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he sold it to appellant No. 2 and placed him in possession. The appellants, who are brothers, have continued to hold possession, but they did not get the patta altered to their names. They paid the assessment due on the land for faslis 1289 and 1290 to respondents Nos. 1 and 2, who were the karnam and nattamgar of the village in which the land is situated. These village officers fraudulently omitted to remit the money to the taluk treasury and made it appear that there were arrears of revenue, the land was ordered to be sold and the notice of sale was served on the respondent No. 4, who was the registered holder. It was sold by public auction in October 1881 and respondent No. 5, who was the highest bidder, was accepted as the purchaser. It is found, however, by the District Munsif, that respondent No. 5 is a relative of respondents Nos. 1 and 2, that he was also a party to the fraud and that he purchased it benami for respondents Nos. 1 and 2. But the Subordinate Judge does not distinctly record a finding on this point. He considers that, assuming that it was so, it could not save the limitation. Shortly after the sale, the appellant No. 1 endeavoured to induce the respondent No. 5 to give up the land; but as his attempt proved ineffectual, the present suit was instituted in April 1883. The Courts below relied on Article 12, Schedule II of Act XV of 1877 and dismissed the suit with costs.

It is urged in appeal that the appellants had either twelve or three years to sue, and that at all events their claim to damages is not barred. The interest that was sold was the appellants' proprietary right and the sale was ordered on the supposition that the assessment due by them was in arrear. They are not entitled to a decree for possession, on the ground that the ownership was **[460]** vested in them prior to the sale, unless they showed also that the sale was invalid. We must hold that the suit was properly held not to fall under the twelve years' rule. But we are of opinion that the suit is governed by Article 95. Article 12 is intended to protect *bona fide* purchasers only, but when the purchaser is a party to the fraud, Article 95 will alone apply, otherwise the purchaser will be enabled to take advantage of his own fraud for the purposes of limitation. We shall therefore ask the Subordinate Judge to return a finding on the question whether the respondent No. 5 was a party to the fraud, and whether he made the purchase really for the respondents Nos. 1 and 2. The issue will be tried on the evidence on the record and on such further evidence as the parties may adduce and the finding will be submitted within three months from this date, when ten days will be allowed for filing objections.

We are satisfied, however, that respondents Nos. 3, 4 and 6 were unnecessarily made parties to this appeal, and we dismiss the appeal as against them and direct the appellants to pay the cost of respondent No. 6 in this Court.

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APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

NILAKANDAN (*Plaintiff*), *Appellant v.* THANDAMMA AND OTHERS (*Defendants*), *Respondents.** [21st and 27th July, 1886.]

Limitation Act, Schedule II, Article 12—Sales of land in execution of decree—Suit by third party to recover—Adverse possession—Burden of proof.

In a suit to redeem certain land demised on kanam in 1850 by A, to the predecessor of B, C, who was in possession of the land, was made a defendant. A proved his title to the land and possession up to 1850. C pleaded title to the land and denied that B had ever been in possession. Both pleas were found to be false. It was found, however, that C had been in possession from 1869 to 1885, and that in 1876 the land had been sold in execution of a decree against C (to which A was not a party) and purchased by D who resold to C in 1879.

[461] The Lower Court held that C's possession must be taken to have been derived from B, till the contrary was proved; but that the suit was barred by Article 12 of Schedule II of the Indian Limitation Act, 1877, because it had not been brought within one year from the date of the sale in 1876:

Held, that the suit was not barred by limitation, and that the burden of proving that his possession was not derived from B lay upon C.

[R., 17 M. 189 (192).]

APPEAL from the decree of V. P. de'Rozario, Subordinate Judge at Palgat, reversing the decree of P. Govinda Menon, District Munsif of Chowgat, in suit 523 of 1884.

The plaintiff, Nilakandan Nambudri, sued Thandamma, defendant No. 1 and eleven others, the vicar, wardens and tenants of the Kotappadi church, to recover two plots of land demised on kanam to Tarathu, the deceased brother of defendant No. 1 in 1850. Defendant No. 1 pleaded that neither she nor Tarathu ever were in possession, and that the land belonged to the church.

Defendant No. 5, the vicar, Paranju Kathanar, pleaded that the land was the ancient jenm of the church, and had been in its possession for a very long time. The Munsif found that only one plot had been demised to Tarathu and decreed redemption on payment of Rs. 331 for improvements.

The vicar and church wardens appealed, and the Subordinate Judge dismissed the suit.

Plaintiff appealed.

Gopalan Nayar, for appellant.

Sankara Menon, for respondents.

The facts necessary for the purpose of this report appear from the judgment of the Court (COLLINS, C. J., and MUTTUSAMI AYYAR, J,)

JUDGMENT.

This second appeal relates to tak or tract No. 1 of the schedule attached to the plaint or to the plot marked A in the plan. It is found as a fact by both the Courts below that the land in question was originally the appellant's jenm. It is also found that it was demised on kanam first to a Malabar family called Vettipara tarwad, and next to one Tarathu,

* Second Appeal 85 of 1886.

the brother of respondent No. 1. This individual executed exhibit A in 1850 in favour of the appellant's brother, Sriman Nambudri, acknowledging that he held the land on the kanam which the appellant brought this suit to redeem. It is found that Tarathu was in possession in 1850 under the appellant's tarwad, and that the land passed into the possession of respondents 2 to 5, the trustees of the Kotappadi church about 17 years ago. It was not, however, [462] shown how it passed from the possession of Tarathu's family into that of the trustees. The District Munsif held, that after Tarathu's death the respondent No. 1 got into possession, and that she was evidently colluding with the other respondents.

On appeal, the Subordinate Judge adverted to the fact that the trustees did not show either that the land was their jenm or that they asserted their jenm title prior to 1877, and considered that their possession must be taken to have been derived from Tarathu unless they showed (which they did not) that it was hostile for more than 12 years before suit. But it was also in evidence that the land in suit was sold in execution of the decree in original suit 75 of 1876 * on the file of the Subordinate Court as the jenm of the trustees, and that it was purchased by one Lazar prior to June 1877 and re-sold by him to the trustees in June 1879. Referring to these transactions, the Munsif remarked that the sale and the re-sale were a mere contrivance resorted to by the trustees of the church in conjunction with those interested in the church, that the purchaser, Lazar, was one of the managers of the church, and that the appellant was not a party either to the suit or to the proceedings in execution. The Subordinate Judge, however, considered that the appellant adduced no evidence to show that the sale and re-sale were collusive, and that the suit which was not brought within one year from the date of the sale was barred by Article 12 of the second schedule of the Limitation Act. He relied on the decision of this Court. It is urged in second appeal that the appellant was not bound to set aside a sale in execution of a decree obtained by one stranger against another, and that their wrong can be no valid ground for dealing with his claim under the one year's rule.

We were referred to *Venkata Narasiah* v. *Subbamma* (1), *Sadagopa* v. *Jamuna Bhai* (2), *Suryanna* v. *Durgi* (3). On the other hand it is contended for the respondents that even if the one year's rule did not apply, the Subordinate Judge was wrong in holding upon the facts found that the respondents got into possession under Tarathu.

In the case of *Suryanna* v. *Durgi* the decision proceeded on the ground that what was sold was not the right, title and interest of the judgment-debtor, but the property on which the arrear of [463] revenue which was sought to be recovered was a charge. It is not shown in this case that anything more than the right, title and interest of the judgment-debtor in Original Suit 75 of 1866 † was liable to be sold. This case falls, therefore, to be decided on the principle laid down in *Venkata Narasiah* v. *Subbamma*, and *Sadagopa* v. *Jamuna Bhai* which were not overruled by the decision in *Suryanna* v. *Durgi*.

We see no reason to think that the Subordinate Judge was in error in presuming that the respondents got into possession under the first respondent's father. The trustees, it must be observed, pleaded that Tarathu

* [Referred to at 9 M. 463 as Original Suit 75 of 1866.—ED.]
† [Referred to at 9 M. 462 as Original Suit 75 of 1876.—ED.]
(1) 4 M. 178. (2) 5 M. 54. (3) 7 M. 258.

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was never in possession, and that the land was the ancient jenm of the church and that both of those statements were found to be untrue.

We set aside the decree of the Subordinate Judge and restore that of the District Munsif. The respondents will pay the appellant's costs both in this Court and in the Lower Appellate Court.

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9 M. 463 = 10 Ind. Jur. 374.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

ADAMSON (*Defendant No.* 1), *Appellant v.* ARUMUGAM AND OTHERS (*Plaintiffs*), *Respondents.** [4th March and 12th July, 1886.]

Suit for obstruction of highway—Special damage—Civil Procedure Code, Section 30.

The rule of English law that no action can be maintained by one person against another for obstruction to a highway without proof of special damage should be enforced in British India as a rule of "equity and good conscience."

Section 30 of the Code of Civil Procedure was not intended to allow individuals to sue on behalf of the general public, but to enable some of a class having special interests to represent the rest of the class.

[N.F., 6 Ind.Cas. 285 = 7 M.L.T. 222; Appr., 20 C. 397 (408); 14 M. 177 (180); R., 33 C. 905 (912) = 10 C.W.N. 867; 31 M. 54 (57) = 17 M.L.J. 537 = 2 M.L.T. 461; 7 C.P.L.R. 97 (98); 9 M.L.J. 93 (97); 2 N.L.R. 110.]

APPEAL from the decree of K. R. Krishna Menon, Subordinate Judge at Tinnevelly, reversing the decree of V. Srinivasacharlu, District Munsif of Tuticorin, in Suit 188 of 1883.

The plaintiffs, Arumugam Pillai and 8 others, as representatives of the villagers of Podiamputhur, sued the Revd. Thomas [464] Adamson, to obtain a declaration that certain land enclosed by him was public property, to recover possession thereof and to remove an obstruction placed on a certain road. The plaintiffs alleged that the land was used by the villagers in common for a cartstand and other purposes.

The defendant pleaded that the land was the property of a Society called the "Society for the Propagation of the Gospel in Foreign Parts."

The Munsif issued a proclamation under Section 30 of the Code of Civil Procedure to the villagers.

Upon this twelve persons appeared, opposed the claim and were made defendants.

The Munsif found that the land belonged to a zamindar, and that a road over it which had been obstructed was vested in the Local Fund Board under Section 8 of the Madras Act IV of 1871.

The suit was dismissed on the ground that the Court had no jurisdiction to entertain it, and to issue an injunction to defendant No. 1 to re-open the road for public use. The Munsif held that the plaintiff's remedy was by indictment only.

On appeal, the Subordinate Judge held that, as the plaintiffs were the major portion, if not the whole body of the public who have occasion to use the thoroughfare, they sustained special damage from the obstruction. As to the right to the land, the Subordinate Judge held that plaintiffs claimed an easement and had not lost their right by non-possession for

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* Second Appeal 792 of 1885.

1886 JULY 12. — APPELLATE CIVIL. 9 M. 463= 10 Ind. Jur. 374.

20 years. A decree was passed directing defendant No. 1 to remove the obstruction he had raised on the road.

Defendant No. 1 appealed.

Mr. *Powell*, for appellant.

Ramachandra Rau Saheb, for respondents.

The Court (COLLINS, C.J., and PARKER, J.) delivered the following

JUDGMENT.

This was an action for the obstruction of a public highway, and the appeal is against the judgment of the Subordinate Judge in deciding that the plaintiffs had a cause of action and in ordering the removal of the obstruction. No proof of special damage was given by the plaintiffs.

The English law upon the subject is that no action can be maintained by an individual against another for obstruction to a highway without proof of special damage, and it is founded on **[465]** adequate reasons of public policy. Though no Madras case has been cited at the bar, we find that the Indian Courts have generally adopted the English rule. The whole subject is exhaustively discussed in the judgment of the Bombay High Court in *Satku Valad Kadır Sausare* v. *Ibrahim Aga Valad Mirza Aga* (1) with which we entirely agree, and we find that the High Courts at Calcutta and Allahabad have come to the same conclusion, *Raj Koomar Singh* v. *Sahebzada Roy* (2), *Karim Baksh* v. *Budha* (3), *Fazal Haq* v. *Maha Chand* (4), per contra *Basaruddin Bhuiah* v. *Bahar Ali* (5), *Askar Mea* v. *Sabdar Mea* (6), have been quoted. We find, however, that in the first of these the Magistrate held that *prima facie* the road was not a public road, but had been a road through private land and was given up by special arrangement.

In the latter case the Magistrate held it was doubtful whether there ever had been a public road in the place at all. These cases therefore do not really conflict with the earlier rulings of the Calcutta Benches, *Buroda Pershad Moostafee* v. *Gora Chund Moostafee* (7), *Raj Luckhee Debia* v. *Chunder Kant Chowdhry* (8), *Trilochun Doss* v. *Gugun Chunder Dey* (9). It may well be that when a Magistrate finds that it is doubtful whether there is or has been a public road at all, he may refuse to make an order under the Criminal Procedure Code until the complainant has established the fact by a suit in a Civil Court alleging special damages.

It was urged upon us that the Indian Courts should be chary of applying English common law doctrines to the very different society which exists in this country, and we were referred to the case of *Shama Churn Bose* v. *Bhola Nath Dutt* (10). In that case the Court allowed a civil action for the seizure of a cow notwithstanding that the act amounted to theft, and it was urged that the party injured by the felonious act should first satisfy the justice of the country with respect to the public offence before seeking civil redress for himself. That objection was based upon the English law of felony which does not obtain in this country. The rule that a man who may have committed some public injury shall not **[466]** be harassed by innumerable actions by persons who have not sustained any damage embodies equitable doctrine and should, we think, be enforced in this country in whose Courts the rules of equity and good conscience apply.

(1) 2 B. 457. (2) 3 C. 20. (3) 1 A. 249.
(4) 1 A. 557. (5) 11 C. 8. (6) 12 C. 137.
(7) 12 W.R. 160. (8) 14 W.R. 173. (9) 24 W.R. 413.
(10) 6 W.R. C.R. 9.

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Nor do we think that the observance of the formalities of Section 30 of the Code of Civil Procedure will enable the plaintiffs to bring the suit. That section is rather designed to allow one or more persons to represent a class having special interests than to allow such persons to sue on behalf or the general public to which the notices prescribed by that procedure would be inapplicable.

The plaintiffs' suit must therefore fail. Though we are constrained to dismiss it on this technical ground, we cannot but express our regret that the litigation should have been persisted in after the concurrent finding of two Courts that the road in dispute was a public road and that plaintiffs were entitled to use it. We must reverse the decree of the Lower Appellate Court and restore that of the District Munsif, which dismisses the suit. But we will make no order as to costs.

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9 M. 466.

ORIGINAL CIVIL.

Before Mr. Justice Parker.

ADMINISTRATOR-GENERAL OF MADRAS *v.* ANANDACHARI AND OTHERS.* [29th July, 1886.]

Hindu Law—Marriage—Consummation—Succession Act, 1865—*Succession to estate of intestate Native Christian.*

According to Hindu Law, a marriage between Brahmans is binding, although the consummation ceremony or consummation never takes place.

If a Hindu becomes a convert to Christianity and dies intestate, succession to his estate is governed by the Indian Succession Act, 1865.

A.K., a Brahman, went through a Hindu marriage ceremony with S, a Brahman girl of eight years of age, in 1850. The marriage was never consummated nor was the consummation ceremony performed.

In 1851, A.K. was converted to Christianity. S refused to live with him, because he was an outcaste, and in 1857 S renounced all claims on him or his estate.

In 1858, A.K. went through a Christian form of marriage with M. In 1881, [467] A.K. died intestate, and possession was taken of his estate by the Administrator-General. S claimed the estate from the Administrator-General.

Her suit was dismissed on the ground that A.K. having died an outcaste and degraded, and his degradation not atoned for under Hindu law, no right of inheritance remained to her. Before judgment was delivered S died and the suit abated.

In a suit filed by the Administrator-General to have the estate administered by the Court, the claimants were (1) the father of A.K., (2) the brother of A.K. undivided from his father, and (3) the executor of M:

Held, that S was the wife of A.K. when he went through the form of marriage with M, and that, but for the fact that S had relinquished her rights, S would have been entitled on the death of A.K. to such portion of his estate as the law assigned to her as his widow:

Held, also that under Section 35 of the Indian Succession Act, 1865, the father of A.K. was entitled to the whole of the estate.

[**F.**, 18 C. 264 (269); 17 M. 235 (239); **R.**, 25 B. 644 (656); 31 C. 11 (18); 23 M. 171 (176); 12 C.L.J. 459 = 15 C.W.N. 158 (161) = 8 Ind. Cas. 41; 11 M.L.T. 232 (238) = (1912) M.W.N. 386 (391); 4 N.L.R. 31 (39); P.L.R. (1900), 251 (269); U.B.R. (1897—1901), Vol. II, at p. 490; **Expl**, 49 P.R. 1907 = 83 P.L.R. 1908 = 110 P.W.R. 1907; **D.**, 28 C. 37 (50).]

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* Civil Suit No. 333 of 1885.

1886 JULY 29. ORIGINAL CIVIL. 9 M. 466.

THE facts appear from the judgment of the Court (PARKER, J.).

Mr. *Norton*, for plaintiff.

Mr. *Shaw* and Mr. *Grant*, for defendant No. 1.

M. O. Parthasaradi Ayyangar, for defendant No. 2.

Mr. *Branson*, for defendant No. 3.

JUDGMENT.

PARKER, J.—This is a suit by the Administrator-General to obtain the direction of the Court in administering the estate of the late Arthur Kristnama, who died in December 1881. The facts are as follow:—Arthur Kristnama was by brith a Brahman, but was converted to Christianity in 1851, being then a young man, about sixteen years of age. Before his conversion he was married in 1849 or 1850 to one Sinammal, a Brahman girl of about eight years old. The marriage was never consummated, since Sinammal refused, when she grew up, to live with Kristnama, because he was an outcaste. On the 26th January 1857 Sinammal gave to Kristnama a farikhut (deed of release) in which she stated that she had no intention of living with him, and renounced all claims whatever against him and those connected with him. About a year after this, *viz.*, on January 14th, 1858, Kristnama was married to, or went through the ceremony of marriage with one Mangalam, according to the rites of the Presbyterian Church. This marriage appears to have been entered into by both parties, in the *bona fide* belief that it was a valid marriage. There was no issue of this union. Kristnama died as a Deputy Collector in Tanjore in December 1881, and the present plaintiff (the Administrator-General) on the 24th March 1882 took out letters of administration to the estate, which was [468] worth some Rs. 40,000. and had been acquired by Kristanma in Government service, and after his conversion to Christianity. About a year after Kristnama's death Sinammal brought a suit *in forma pauperis* in this Court (C.S. No. 16 of 1883*), in which she described herself as a Brahman widow and laid claim to the whole of Kristnama's estate as his widow, or—in the event of his second marriage with Mangalam being also held valid—to a moiety of it. Mangalam was the second defendant in the suit, and maintained that she was legally married to Kristnama according to the forms of the Free Church of Scotland, and claimed the whole estate. The natural father of Kristnama—Anandachari—the present defendant No. 1, was made a party to that suit at his own request, and claimed to be solely entitled to the estate, or jointly with Mangalam, should her marriage be held valid. The suit was heard by Kernan, J., in April 1883, and judgment was reserved. Before judgment was delivered, Mangalam died in September 1883, but the suit was revived, and the present defendant No. 3 included as Mangalam's representative and executor. Judgment was finally delivered on February 27th, 1885, the learned Judge evidently not being aware that the plaintiff Sinammal had died just a month previously, *viz.*, on 2nd January 1885. In that judgment it was held that, according to Hindu law, Kristnama died an outcaste and degraded, and that as his degradation was unatoned for, the marriage became at his death absolutely dissolved, and no right of inheritance remained to Sinammal (1).

The persons now contending for the estate are (1) defendant No. 1, the natural father of the late Kristnama, (2) defendant No. 2, his natural brother, who is undivided with defendant No. 1, and (3), defendant No. 3, the executor and representative of Mangalam. Defendant No. 1 contends

* [Referred to as O.S. 16 of 1883 at 9 M. 471.—ED.]

(1) See *Sinammal* v. *The Administrator-General of Madras*, 8 M. 169.

1886 JULY 29. — ORIGINAL CIVIL. — 9 M. 466.

that Kristnama's marriage with Mangalam was invalid, and that he is entitled to the whole estate, whether the succession is governed by the Succession Act or by Hindu law; and that, if Mangalam's marriage be held valid, he is at any rate entitled to a moiety. Defendant No. 2 denied the validity of Mangalam's marriage; maintained that Kristnama's education was received from family funds, and that Kristnama had in his life expressed his wish that defendants Nos. 1 and 2 should inherit his estate; that Kristnama had never [469] elected to become subject to the Succession Act, and therefore his property should be distributed, according to Hindu law, between his father and brother. No attempt was made to substantiate any of these pleas by evidence. Defendant No. 3 contended that Kristnama's marriage with Sinammal was never completed, and that by the former's conversion to Christianity he became, as a Hindu, civilly dead; hence, that his marriage with Mangalam was a valid marriage, and that she became entitled to the whole of his property at his death, since his Hindu relations were not capable of inheriting an estate to which the succession was governed by the Succession Act.

On the 13th April I settled the following issues:—(1) whether there was a valid subsisting marriage with the Hindu wife on the date of Kristnama's marriage with Mangalam; (2) whether the property left by the late Kristnama is governed by Hindu law or by the Succession Act; (3) who are entitled, and in what shares? At the hearing, the following additional issue was framed, in consequence of its having come to light that Sinammal had died before the delivery of the judgment in C.S. No. 16 of 1883* *viz.*, whether it is *res judicata* in C.S. No. 16 of 1883* that Sinammal was the wife of Kristnama until his death? With regard to this, I may as well say at once that I think the death of the plaintiff before judgment was delivered caused that suit to abate, and therefore that nothing can be taken to be judiciously decided therein. The plaintiff was the sole plaintiff, with a personal cause of action, and the right to sue did not survive (Section 361 of the Code of Civil Procedure.)

The first point then to be determined is whether the marriage of Kristnama with Sinammal in 1849 was ever a valid and completed marriage. Evidence has been called to prove that the usual ceremonies of a Brahman marriage were performed, and the terms of the farikhut, in January 1857, show that Sinammal at any rate then regarded Kristnama as her husband. Some doubt was raised as to whether the ceremony of Saptapadi, or "seven steps" was observed. The evidence is not very precise on this point, but I should gather that the ceremony was probably duly performed, and in any case, the fact of the celebration of the marriage being admitted, the presumption would be that all necessary ceremonies were performed in the absence of evidence to [470] the contrary—*Brindaban Chandra Kurmokar* v. *Chundra Kurmokar* (1). It is admitted, however, that the consummation ceremony and consummation never took place, and it is therefore contended on behalf of defendant No. 3 that the marriage was never completed, since Sinammal never entered into her husband's gotram. In answer to the objection that the same plea might be urged in the case of the natural death of the husband before consummation, the learned counsel for defendant No. 3 argued that in that case there was no incapacity to complete the marriage tie, whereas in Kristnama's case there was incapacity by reason of his apostacy. At the moment

* [Referred to as O.S. 16 of 1883 at 9 M. 471.—ED.]

(1) 12 C. 140.

1886 JULY 29. — ORIGINAL CIVIL. — 9 M. 466.

of Kristnama's baptism he became—according to this argument—civilly dead, his Hindu relations might have divided his property and celebrated his funeral obsequies, he could no more inherit the property he might have inherited in their family since he had ceased to be a relative, or, as far as they were concerned—to exist, from the date of his conversion. His natural family, Mr. Branson argued, could have no more to do with his property than if he had died a Sanyasi. I am not able to find any authority in support of this view, and it appears to me to be opposed to well-known principles of Hindu law. Had Kristnama died in 1851 without embracing Christianity, no doubt would have been entertained regarding Sinammal's status as his widow. His conversion to Christianity, according to Hindu law, rendered him an outcaste and degraded. But according to that law, the degradation might have been atoned for, and the convert re-admitted to his status as a Brahman, had he at any time during his life renounced Christianity and performed the rites of expiation enjoined by his caste. *The Government of Bombay* v. *Ganga* (1) and *Bisheshur* v. *Mata Gholam* (2) are authorities for the proposition that among Hindus the degradation of apostacy does not of itself dissolve the marriage tie. Nor could Sinammal—by refusal to cohabit with her husband and renouncing all material claims upon him—herself dissolve it. The passages from Vyavastha Chandrika and Manu, quoted by Kernan, J., in C. S. 16 of 1883* are authorities for holding that Sinammal was justified in her desertion of Kristnama without the dissolution of the marriage tie, and it was precisely to meet circumstances such as these, that the Native Converts' Marriage Dissolution Act (XXI of 1866) was **[471]** passed by the Legislature. I am of opinion, therefore, that the marriage of Kristnama and Sinammal was valid and subsisting in 1858, and hence that the form of marriage celebrated between Kristnama and Mangalam in the Free Church of Scotland Mission Hall could not constitute a valid marriage.

The next point is whether the property left by Kristnama is to be governed by Hindu law or the Succession Act, and *Ponnusami Nadan* v. *Dorasami Ayyan* (3) is conclusive of the point, that Native Christian families are not at liberty to adhere to the Hindu Law of Succession since the passing of the Indian Succession Act. I do not think there is anything in the argument that Hindus are incapable of inheriting the property of a Christian under the Indian Succession Act. It does not follow that because Kristnama may have been incapable of inheriting to his father under Hindu law that his father is incapable of inheriting to him under the Succession Act, for in the one case the inheritance follows in the line of the funeral oblation, while in the other it is governed by blood relationship. Section 331 of the Succession Act exempts the property of Hindus from the operation of the Act, but there is no prohibition to a Hindu succeeding under the Act to the property of a Christian. When, therefore, Kristnama died in 1881 he left him surviving (1) Sinammal, to whom he had been legally married in 1849, which marriage had never been legally dissolved, (2) Anandachari, his father (defendant No. 1), and (3) his brother, defendant No. 2. Obviously the brother has no claim at all, and the same would have been the case had the property been regarded as self-acquired property and governed by Hindu law. But had Sinammal still been living, I should have

* [Referred to as O. S. 16 of 1883 at 9 M. 471.—ED]

(1) 4 B. 330. (2) 2 N.W.P. 300. (3) 2 M. 209.

1886 July 29. — Original Civil. — 9 M. 466.

felt somewhat embarrassed by the judgment in O.S. 16 of 1883.* In that case, however, the learned Judge based his opinion entirely upon the incapacity of Sinammal to inherit in the character of a Hindu widow. While I can understand the argument, it seems to me that there would be the further question whether Sinammal could not inherit under the Succession Act. There is no argument founded on the degradation of Kristnama—so it seems to me that would be valid for excluding her, which would not be valid for excluding his father also; and as far as the Succession Act is concerned it appears to me that if Sinammal was Kristnama's [472] lawful wife up to the moment of his death, she must have become his widow at his decease, and entitled to such portion of his property, as his widow, as the law assigned to her. Had it not been for the farikhut which she gave Kristnama in 1858, I should have been inclined to think that half of Kristnama's estate had vested in her at his death. But the fakikhut is an absolute renunciation of all claims, present and future, so that under Section 35 of the Succession Act the father becomes entitled to the whole. The direction to the plaintiff must be given in accordance with these findings.

With regard to costs, those of the plaintiff (the Administrator-General) will of course be paid out of the estate, and I do not think I should be wrong, at any rate in this suit, in making the same order with regard to the cost of defendant No. 3. The circumstances are very peculiar. Defendant No. 3 was bound to propound Mangalam's will and claim for her estate property which undoubtedly would have been hers had she been a wife. That for 25 years she believed herself to be a wife and her marriage a valid marriage, there is no reason to doubt, and had she been living she would, though not a wife—have had far stronger moral claims upon Kristnama for provision of support than the Hindu relatives, who discarded and outcasted him during his life, though they are now willing to benefit by his death. Defendant No. 2 must bear his own costs, and those of defendant No. 1, will necessarily be paid out of the estate which he now inherits.

By the decree it was declared that the marriage of Sinammal and Arthur Kristnama was valid and subsisting when the latter went through the form of marriage with Mangalam: that the marriage with Mangalam was invalid: that Sinammal had relinquished all right to the estate of Arthur Kristnama: that succession to the estate of Arthur Kristnama was governed by the Indian Succession Act, 1865: that Anandachari, father of the intestate, was entitled to the whole of his estate in the hands of the Administrator-General: subject to payment of costs, &c., and that the residue should be paid to him accordingly.

Branson & Branson, Solicitors for plaintiff.
Grant & Laing, Solicitors for defendant No. 1.
Alagasingarachari, Solicitor for defendant No. 2.
Carr, Solicitor for defendant No. 3.

* [Referred to as O.S. 16 of 1883 at 9 M. 468, 469, 470.—Ed.]

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LATE
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9 M. 473.

9 M. 473.

[473] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

KELU (*Defendant No.* 1), *Appellant v.* PAIDEL AND OTHERS (*Plaintiffs*), *Respondents.** [29th March and 5th April, 1886.]

Malabar Law—Suit by anandravans to set aside sale in execution of decree against their karnavan, when maintainable.

The plaint lands being the jenm of a devasam were sold in execution of a decree obtained by defendant No. 1 against the uralars. Plaintiffs being the anandravans of the uralars sued to set aside the sale alleging that the debt was not contracted for devasam purposes and that the decree was collusive :

Held, that the decree was binding on the plaintiffs unless it had been obtained by fraud and collusion.

[**F.**, 1 M.L.J. 390 (391) ; **D.**, 14 M. 425 (429).]

ORIGINAL Suit 480 of 1876 was brought by defendant No. 1 against defendants Nos. 2, 4, 6 and 7. He obtained a decree in execution of which jenm properties of the devasam were attached. Defendants 3, 5 and 8, the remaining uralars, objected to the attachment. Their objection was allowed and the attachment released. Thereupon defendant No. 1 sued defendants Nos. 2—8 in O.S. 570 of 1881 for a declaration that the devasam properties were saleable in execution of the above decree, and obtained the declaration, and the properties were accordingly sold. The plaintiffs who are the anandravans of defendants Nos. 2, 3, 6, 7 and 8, respectively, brought this action, to set aside the sale.

The suit was dismissed by A. Annasami Ayyar, District Munsif of Pynad.

The plaintiffs appealed.

K. Kunjan Menon, Subordinate Judge of North Malabar, allowed the appeal on the ground that the debt on which the decree in O.S. No. 480 of 1876 was obtained was not contracted for devasam purposes.

Defendant No. 1 appealed to the High Court.

The Acting Advocate-General (Mr. *Shephard*) and *Narayana Rau*, for appellant.

[474] *Bhashyam Ayyangar* and *Srinivasa Rau*, for respondents.

The Court (COLLINS, C. J., and PARKER, J.) delivered the following

JUDGMENT.

The appellant in a suit to which all the uralars were parties obtained a decree declaring the lands of the devasam liable to his claim. In the uralars is vested the property of the devasam—*Patinharipnt Krishnan Unni Nambiar* v. *Chekur Manakkal Nilakadnam Bhattathiripad* (1). The decree against them is binding on all future representatives of the devasam unless set aside on the ground of fraud and collusion in a suit properly framed for that purpose.

There is a considerable difference in the position of respondents as possible future uralars and as anandravans of the tarwads of which defendants 2—8 are karnavans, but we are not prepared to hold that their interest in the devasam is not sufficient to enable them to maintain the

* S. A. 682 of 1885.

(1) 4 M. 141.

1886 APRIL 5. — APPELLATE CIVIL. — 9 M. 473.

suit. The action, however, of their karnavans is binding upon them unless they can set it aside on the ground that the karnavans were in collusion with the appellant against the interest of the devasam.

The decree in O.S. 570 of 1881 was given on the merits on issues properly framed, and, if the contending defendant was absent at the final hearing, it is nowhere alleged in the present plaint that his absence was due to fraud or collusion with the appellant. There are, it is true, vague allegations of fraud made in the plaint, but no particulars of fraud are alleged, nor at the time of settlement of issues did respondents seek to have the decree set aside on any definite allegation of fraud.

The Subordinate Judge has disposed of the appeal upon a wrong issue; the point being not whether the debt was properly binding on devasam, but whether the decree, which declared that it was so binding, had been obtained by the fraud and collusion of the uralars with the appellant. On that ground alone would the respondents have been entitled to succeed.

We must set aside the decree of the lower appellate Court and restore that of the District Munsif. The respondents must pay appellant's cost in this and in the Lower Appellate Court.

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9 M. 475.

[475] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

SIMSON AND OTHERS (*Plaintiffs*), *Petitioners v.* VENKATAGOPALAM AND ANOTHER (*Defendants*), *Respondents.** [2nd and 12th April, 1886.]

Civil Procedure Code, Sections 508, 521, 522, 622—*Act VIII of* 1859, *Section* 318—*Award made after time allowed by Court, invalid, when the time runs.*

An order of reference to arbitration was made on 21st January. Six weeks' time was allowed for the return of the award. No application was made for extension of time. The award having been returned on 8th May, the Court refused to give judgment in accordance with it under Section 522 of Code of Civil Procedure on the ground that it was not valid.

The plaintiffs now petitioned High Court under Section 622 of the Code of Civil Procedure:

Held, that the award was invalid and the Court had not failed to exercise jurisdiction within the meaning of Section 622 of the Code of Civil Procedure.

[**R.**, 13 B. 119 (122); 16 Ind. Cas. 861 (864) = 6 S L.R. 89; **Expl.**, 11 M. 85 (87); **Not appl.**, 7 Ind. Cas. 595 (598) = 4 S L R. 26; **D.**, 15 M. 384 (385).]

IN O.S. No. 10 of 1884 on the file of the Subordinate Judge at Cocanada an order of reference to arbitration was made on 21st January 1885 returnable in six weeks. The arbitrators' fees were not paid till 31st March, and they made their award on 8th May. The Subordinate Judge set it aside as invalid and refused to give judgment in accordance with it under Section 522 of the Code of Civil Procedure.

The plaintiffs presented a petition praying the High Court to revise the proceedings of the Subordinate Judge under Section 622 of the Code of Civil Procedure, on the ground that it was open to him to enlarge the time even after the return of the award and that he had declined jurisdiction in refusing to do so.

* Civil Revision Petition 344 of 1885.

Mr. *Grant*, for petitioners. 1886
Mr. *Norton*, for respondents. APRIL 12.
The Court (COLLINS, C.J., and PARKER, J.) delivered the following

APPEL-LATE CIVIL.

9 M. 475.

JUDGMENT.

The order of reference to arbitration under Section 508 of the Code of Civil Procedure was passed on January 21st, and [476] the arbitrators were requested to return their awards within six weeks. The full fees were not received till March 31st, and the award was made on May 8th. We must hold that the six weeks began to run from the date of the order, *viz.*, from January 21st.

As the fees were not at once paid, the proper course would have been for the parties to have applied or for the Court, on its own motion, to have enlarged the time allowed for the arbitration. Unfortunately this was not done, and under Section 521 of the Code of Civil Procedure, the award is invalid not having been made within the period allowed by the Court.

It was urged upon us that it was open to the Subordinate Judge to have enlarged the time even after the return of the award and that the Subordinate Judge virtually declined jurisdiction having ignored the prayer to that effect in the plaintiff's petition. It is on this ground that we are asked to exercise our power of revision under Section 622.

In England the power to enlarge after the expiry of the time allowed for an award rests upon an express Statute, and in India the old Code of Civil Procedure (Act VIII of 1859) enacted (Section 318) that an award should not be liable to be set aside only by reason of its not having been completed within the time allowed by the Court unless the delay was caused by the misconduct or corruption of the arbitrator or the arbitration had in the meanwhile been superseded by the Court. That section was not, however, re-enacted in the present Code, and we must therefore take it that the Legislature deliberately intended to enact that in all cases no award should be valid unless made within the time allowed by the Court.

The Subordinate Judge therefore did not refuse to exercise a jurisdiction vested in him by law, and we cannot interfere under Section 622 of the Code of Civil Procedure.

We must dismiss this petition, but, under the circumstances, without costs.

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9 M. 477.

[477] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

SUBBAYYA (*Plaintiff*), *Appellant v.* CHELLAMMA (*Representative of Defendant No.* 1), AND OTHERS, *Respondents.** [27th July, 1886.]

Hindu Law—Self-acquisition—Burden of proof.

Where waste land was taken up and cultivated by the father of an undivided Hindu family and the question was whether it was family property or self-acquired:

Held that the burden of proof lay on those who asserted that it was self-acquired.

Quære, whether under Hindu Law a father has power by a nuncupative will to dispose of self-acquired immoveable property to the complete disinherison of a son.

* Second Appeal 703 of 1885.

1886 JULY 27. — APPELLATE CIVIL. — 9 M. 477.

APPEAL against the decree of T. Ramasami Ayyangar, Subordinate Judge at Cocanada, in suit 188 of 1883.

Plaintiff, Varidhinidhi Subbaya, alleged that Gundabogulu Putramma (defendant No. 3), junior widow of Chowdhri, gave him a lease of certain land in June 1881; that Ammiraju (defendant No. 2), son of Chowdhri by his senior wife, prevented him from taking possession, claiming title; that in October 1881 he obtained a sale-deed of the land from defendant No. 2 who acquired the land on partition with defendant No. 1; that defendant No. 3, at the instigation of Surayya, defendant No. 1, the divided brother of defendant No. 2, thereupon sued him for rent and obtained a decree. Plaintiff claimed to have the lease of June 1881 cancelled and the sale-deed of October 1881 confirmed. Defendants Nos. 1 and 3 pleaded that defendant No. 2 had been adopted into another family and had no title.

The Munsif found that defendant No. 2 had not been given in adoption, that the land was the self-acquisition of Chowdhri, and that before his death he had made provision for his family by marrying defendant No. 2 into a family in which he was to be brought up as son and heir according to local custom (Menarikam) and by giving the property in suit to defendants Nos. 1 and 3.

[478] The suit was dismissed.

On appeal the Subordinate Judge found that defendants Nos. 1 and 3 had divided Chowdhri's property after his death in accordance with directions given by him shortly before death, and that the effect of Chowdhri's direction was to transfer the property at once to defendants 1 and 3.

Plaintiff appealed, on the following among other grounds :—

(1) because, if the land was self-acquisition, Chowdhri could not dispose of the whole estate without making provision for defendant No. 2;

(2) because there was no evidence to rebut the presumption that the land was family property;

(3) because Chowdhri had not transferred the land to defendants Nos. 1 and 3.

Mr. *Norton*, for appellant.

Mr. *Michell*, for respondent No. 3.

The Court (COLLINS, C.J., and PARKER, J.) delivered the following

JUDGMENT.

The plaint land appears to have been taken up by Chowdhri at the request of the tahsildar when it was waste, and had been abandoned by other cultivators. We cannot infer from that fact alone that it is necessarily to be regarded as self-acquired property. The ordinary presumption would be that Chowdhri acquired it for the benefit of his family and brought it under cultivation by the aid of family funds in the absence of evidence that he had self-acquired funds which he utilized for that purpose.

The District Munsif says that Chowdhri acquired the land without the use of any patrimony, and he might have said without the expenditure of any funds at all, since the land was taken up from the Revenue authorities when it was waste. The true test is whether it was brought under cultivation by family or self-acquired funds and the *onus probandi* lies upon those who allege the latter. The Subordinate Judge has clearly put the burden upon the wrong side.

1886 JULY 27. — APPELLATE CIVIL. — 9 M. 477.

We must ask the Subordinate Judge to re-try the 5th issue upon the evidence on record and upon any further evidence which the parties may adduce, and in the event of his again finding that the land was the self-acquired property of Chowdhri, he **[479]** will proceed to try the further issue whether according to Hindu Law a father has power by a nuncupative will to dispose of self-acquired immoveable property as he pleases and to the complete disinheriting of an undivided son.

We are clearly of opinion that the evidence as to what took place the day before Chowdhri died—if it is true—would establish a bequest to take effect after the death of the testator, and not a gift *inter vivos*.

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9 M. 479.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

PADSHA (*Defendant*), *Appellant v.* TIRUVEMBALA (*Plaintiff*), *Respondent.** [14th and 30th July, 1886.]

Rent Recovery Act (Madras Act VIII of 1865), *Sections* 39, 41, 43, 44—*Delivery of possession—Appeal—Limitation.*

A obtained a warrant ejecting B for arrears of rent under Section 41 of the Rent Recovery Act. B appealed within fifteen days, but A was put into possession on 13th May 1882, B's appeal came on for hearing and was dismissed on 30th June 1883. B instituted this suit to recover possession of the land on 28th July 1883:

Held, that B's suit was not time-barred under Section 44 of the Rent Recovery Act.

APPEAL from the decree of C.W.W. Martin, District Judge of Salem, reversing the decree of S. Manavalayya, District Munsif of Salem, in Suit No. 339 of 1883.

The plaintiff being a tenant of land in a certain jaghir failed to pay rent for fasli 1290 and the defendant obtained a warrant from the Collector (see Section 41 of the Rent Recovery Act), "authorizing him to enter on, and take possession of, the premises." Within fifteen days after service of the warrant, the plaintiff appealed to the Deputy Collector under Section 43 of the above Act, but the appeal did not come on for disposal for a year, and in the meanwhile, on 13th May 1882, the police put the defendant in possession of the premises.

On 30th June 1883 the appeal was dismissed; and on the **[480]** 28th July 1883 the plaintiff instituted the present suit to recover possession of the land. The District Munsif held that the plaintiff's claim was barred on the ground that he should have brought his action within one month from the date of his dispossession (see Section 44 of the Rent Recovery Act). The District Judge reversed this decision and also found that the plaintiff had a saleable interest in the land at the time of his ejectment.

Defendant appealed.

Mr. *Subramanyam*, for appellant.

Bhashyam Ayyangar, for respondent.

The Court (MUTTUSAMI AYYAR and BRANDT, JJ.) delivered the following

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* Second Appeal 936 of 1885.

1886
JULY 30.

APPELLATE CIVIL.

9 M. 479.

JUDGMENTS.

BRANDT, J.—The contention that the courts below were not warranted on the evidence before them in holding that the respondent had a saleable interest in the land cannot be supported.

The respondent in his plaint set out that the lands, of which he was dispossessed, were acquired by his father by purchase, and his title was not disputed by the appellant. Objection is taken to the finding of the District Judge on the issue, that he refers only to a decision in another suit, but the District Munsif in his judgment states that "the oral and documentary evidence adduced by the plaintiff in this suit proves" that the raiyats in the jaghir have a saleable interest in their lands; the District Judge says that "the Munsif's finding in the present case seems justified by the record;" and the depositions have not been printed to show that there was no evidence in support of this finding.

The only question then to be determined is whether the issue as to limitation has been erroneously decided by the District Judge.

Section 43 of Rent Act (Madras) provides that "the warrant shall be entrusted to some officer of police who shall serve it in the manner laid down in Section 39 of this Act. When no appeal shall be preferred to the Collector within fifteen days after service, or when an appeal has been preferred and decided against the defaulter, and when the amount named in the warrant is not discharged, the police officer shall place the person who has procured the warrant in possession," and Section 44 that "upon delivery of possession the tenancy existing between the defaulter and the landholder shall cease and determine, unless an action shall be brought in the proper Court of Civil Jurisdiction within one **[481]** month to reverse such delivery of possession and shall be prosecuted to a successful determination." It is admitted that within fifteen days after service of the warrant, the respondent did appeal to the Deputy Collector; the appeal was not, it is stated, disposed for a year or more; in the meanwhile the police had placed the person who procured the warrant in possession.

It is contended for the appellant that the words "upon delivery of possession" in Section 44 must be construed to refer to, and to include delivery of possession, however wrongfully given. For the respondent it is urged that those words must be construed with reference to the preceding section, and that delivery of possession as provided therein was intended by the Legislature; that until the tenant's appeal was disposed of the police had no authority to give possession; that an Act of the Legislature must be construed reasonably, but that it would involve an absurdity if the tenant were to be compelled to have resort to a regular suit for which there would be no necessity if his appeal to the Collector were allowed.

The peculiar sense in which the words "upon delivery of possession" are used must be determined by the context; and having regard to this there can be no reasonable doubt that in using the first four words in Section 44, the Legislature had in view the possession to be given under the preceding section; the act of the Collector in issuing the warrants under Section 41 is a ministerial act on his part, and the appeal provided in Section 44 was clearly intended to afford the tenant an opportunity of contesting in a summary manner the right of the landlord to take proceedings under Section 39. If the tenant be successful, there would be, as the intention unquestionably was, an end of the proceedings.

One part of an Act should so be construed by another that the whole may, if possible, stand; whereas, if the construction contended for by the appellant be adopted, the tenant would, so far as recovery of his land is concerned, be without remedy, unless he instituted in a Civil Court a suit which the Legislature, it may be assumed, evidently contemplated only in the event of his appeal being disallowed and possession given as required under Section 43.

MUTTUSAMI AYYAR, J.—I am of the same opinion. I desire to point out that, if the appellant's contention were to prevail, limitation would run against the tenant before he was in a position [482] to sue. The shorter period of limitation is prescribed in cases in which the tenants appeal against the warrant for ejectment, because dispossession under Section 43 is the result of an adverse decision against the tenant, and until there is an adverse decision to which the tenant's dispossession can be referred, the one year rule can have no application.

This second appeal fails and is dismissed with cost.

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9 M. 482 (P.C.) = 13 I.A. 147 = 4 Sar. P.C.J. 728 = 10 Ind.Jur. 425.

PRIVY COUNCIL.

PRESENT:

Lord Watson, Lord Hobhouse, Sir Barnes Peacock, and Sir Richard Couch.

[*On appeal from the High Court at Madras.*]

RAMALAKSHAMMA (*Defendant*) v. RAMANNA (*Plaintiff*).
[23rd June & 10th July, 1886.]

Limitation Act XV of 1877, *Schedule II, Article* 144—*Adverse possession—An outside person claiming an interest in an estate together with an undivided family—Inheritance to such owners.*

In a family of three undivided brothers, an estate was purchased by the eldest as manager, on whose application a fourth party, a sister's husband, was recorded in the revenue records as a co-proprietor with them. The latter, even if he by joining in the purchase had become entitled to an undivided fourth share in the estate, did not thereby become a member of the undivided family; and the members of it would not have had a right to succeed to his fourth share, which would have descended to his own heirs; the other three-fourths which he would not have inherited going by survivorship among the members of the family. A son of the eldest brother obtained, by the deaths of his father and uncles, sole possession of the whole estate:

Held, that he did not take the one-fourth share above mentioned by any right of inheritance, and that, in the absence of proof that his possession of it was by authority of the fourth recorded co-proprietor, his possession must be presumed to have been adverse to the latter and to any one claiming through him. It followed that a suit to obtain from those claiming through the son, who was now dead, the one fourth share, brought more than twelve years after possession taken by the son, by a purchase, relying on a title through the fourth co-proprietor, was barred by limitation under Article 144 of the second Schedule of Act XV of 1877.

[R., 12 Ind. Cas. 453 (455) = 6 P.R. 1912 = 218 P L.R. 1911.]

APPEAL from a decree (26th February 1884) of the High Court, reversing a decree (22nd December 1882) of the District Judge of Godavari.

[483] The suit, out of which this appeal arose, was brought against the Collector of the Godavari District as Agent to the Court of Wards and;

1886 JULY 10. — PRIVY COUNCIL. — 9 M. 482 (P.C.) = 13 I.A. 147 = 4 Sar. P C.J. 728 = 10 Ind. Jur. 425.

in that capacity, guardian of a minor widow, whose husband, Sarvarayya, deceased on 23rd July 1869, had in his life-time possessed the estate claimed.

This was one-fourth of the mutta Kesanakurru, in the Godavari District. The whole mutta was purchased in 1848 by Balasu Buchchi Krishnayya, who had two brothers then joint with him, Pattabhiramayya and Adinarayana, and a sister married to Anandarayya. In 1853 Krishnayya died, leaving one son, the above-mentioned Sarvarayya, and having made the will, dated 29th March 1853, which is set forth in their Lordships' judgment.

In his petition, dated 31st March 1853, forwarding his will to the Collector, Krishnayya stated that his brothers and Anandarayya had equal shares in the mutta, which he applied to have entered in their names, as well as that of his son, the management being in the hands of Pattabhiramayya. This was carried out. Both the surviving brothers having died—one in 1857 and the other in 1866—the management of the mutta devolved on Sarvarayya, who remained in possession till 1869, when he died without issue, leaving a widow under age. The mutta was then taken under charge of the Court of Wards.

Meantime, on the 26th May 1868, Anandarayya sold the one-fourth share to Kadavati Seshayya, who, on the 8th March 1880, transferred his right to a purchaser, the plaintiff in this suit, Addanki Ramanna. Neither the latter nor Seshayya obtained entry of their names as proprietors. Failing to obtain the one-fourth share, Ramanna brought the present suit on the 24th May 1880, claiming possession with mesne profits for three years.

The Court of Wards answered on behalf of the minor widow, denying that Anandarayya had ever had possession or had made a valid sale of the property.

On issues raising these questions, and whether the suit was not barred by limitation, the District Judge decided in favour of the defendant, the Court of Wards. He held that, under the circumstances, the burden of proof was on the plaintiff to show that Anandarayya had the share claimed. There was, however, nothing to show what proportion of the profits Anandarayya had ever received, or whether he had received any at all or had ever paid money for his share in the necessary expenses of the mutta. His [484] finding on the evidence was that Anandarayya was never in possession of the share, either actually or constructively, and had only had his name entered as a co-proprietor because he was a near relation. The District Judge concluded that, with regard to the failure to prove any kind of possession by, or on behalf of, Anandarayya down to 26th May 1868, and the absence of any possession delivered to his transferee on or after that date, the lapse of twelve years had barred the suit under Article 144 of the second Schedule of Act XV of 1877.

On appeal the High Court (TURNER, C.J., and MUTTUSAMI AYYAR, J.) reversed the decree of the District Court, giving judgment as follows :—

JUDGMENT.

"There is evidence to show that the one-fourth share was acquired by Anandarayya, and that his title was recognized by Krishnayya, the managing member of his family, who, by the will of 29th March 1853, directed that thereafter the estate should be managed by Pattabhiramayya. This direction was complied with, and the other owners recognized the title of Anandarayya in December 1853. Pattabhiramayya remained in possession up to his death in 1866, when possession was taken by his

nephew Sarvarayya of his own three shares as the surviving member of the joint family and of Anandarayya's undivided one-fourth share, presumably as heir to his uncle, the deceased manager. Until 6th August 1868, Sarvarayya did not set up a title hostile to Anandarayya. We are then of opinion that the suit is not barred by limitation. The seller, Anandarayya, died at the end of 1868, and the purchaser was deprived of the opportunity of examining him to ascertain in what manner, if any, he had enjoyed the share recorded in his name. We consider the better evidence indicates a *bona fide* intention on the part of Krishnayya and his brothers to admit the right of Anandarayya as a co-purchaser. If they had desired to make a gift to him, there is no reason why they should not have done so, for in 1848 the son of Krishnayya was not born; but however this may be, the survivors admitted his title and his possession.

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"For these reasons we find the plaintiff has made out his case; and reversing the decree of the Court of first instance, we decree the claim with costs and future interest at six per cent. from the date of this decree. The amount of mesne profits will be determined in execution of decree."

[485] Mr. *J. D. Mayne* and Mr. *A. Phillips* for the appellant contended that Anandarayya transferred no title to Seshayya, not having any; and that, independently of question of title, the suit was barred by limitation, as the possession of those through whom the appellant claimed had been adverse for twelve years and more before the suit was brought as against Anandarayya and those claiming under him. If the testamentary disposition made by Krishnayya in 1853 was taken as the origin of Anandarayya's title, then that title failed; because, already, in that year Sarvarayya, son of Krishnayya, was living, and the right of survivorship in the brothers of Krishnayya and in Sarvarayya could not be defeated by a will attempting to confer a title upon Anandarayya and depriving the joint family to that extent. Reference was made to *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1), in which it was held that the alienation of an undivided share could not take place by a father's will, as if by alienation in his lifetime. The bequest to Anandarayya, if relied on as a bequest, would be invalid as against Sarvarayya. On the other hand, if the will was not taken as such origin of title, it was for those who claimed through Anandarayya to show on what state of things and on what right of property in him they relied. This they had not shown. Nothing but evidence of the actual state of the facts would aid the plaintiff's case, for the presumption was against the husband of the sister having an interest in the estate of the undivided brothers, to whom he was no relation. The presumption was also against him in regard to the source of the purchase money, which, coming from Krishnayya, must be presumed to have belonged to the undivided family. To show the inferences that ought to be drawn in questions of ownership upon purchases in regard to the source of the purchase money and to presumptions of the Hindu law, reference was made to *Sreemanchunder Dey* v. *Gopaulchunder Chuckerbutty* (2), *Nawab Azimut Ali Khan* v. *Hurdwaree Mull* (3), and *Faez Buksh Chowdry* v. *Fukeeroodeen Mahomed Ahassun Chowdry* (4).

Again, the assignment by Seshayya was invalid. Lastly, in regard to limitation, the possession of Sarvarayya, after he had succeeded, on the death of his uncle, to the management of the estate, was not

(1) 5 B. 48 = 7 I. A. 181.
(2) 11 M.I.A. 28.
(3) 13 M.I.A. 395.
(4) 14 M.I.A. 234.

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taken on behalf of Anandarayya as to the one [486] fourth of the mutta, but was adverse to him, both before and after the date of the sale to Seshayya, an adverse possession for even two days before that date being sufficient to bring the case under Article 144, a period which had been much exceeded.

Mr. *R. V. Doyne* and Mr. *G. R. Johnstone*, for the respondent, argued that Anandarayya had a title to the one-fourth share upon the admission and recognition of the undivided family, his name having been entered in the Collectorate books at Krishnayya's request. The Court of Wards, though in a position to produce all the revenue records and papers relating to this estate, had not displaced the *prima facie* title made out. It could not be argued that Sarvarayya's possession was adverse, in regard to the one-fourth share only, to the recorded co-proprietor of it without showing that some assertion of right to it had been made. But far from this having taken place, Sarvarayya had taken possession of the whole mutta as heir to his uncle Pattabhirammayya, who, in the capacity of manager, had held the whole estate as well on behalf of Anandarayya as on behalf of the others entitled.

Counsel for the appellant were not called upon to reply.

JUDGMENT.

On a subsequent day, July 10th, their Lordships' judgment was delivered by

SIR BARNES PEACOCK:—This is an appeal from a decision of the High Court of Judicature at Madras, by which a decree of the District Court of Godavari in favour of the present appellant, the defendant in the suit, was reversed.

The suit was commenced on the 24th of May 1880. The plaintiff, now respondent, prayed that his right might be established to a fourth share in the mutta of Kesanakuru, in the District of Godavari, and that a fourth share might be divided and delivered over to him, with Rs. 3,000 on account of past profits for three years, at Rs. 1,000 a year, for his one-fourth share.

The suit was brought against the defendant, the Collector of the District of Godavari, as Agent to the Court of Wards and guardian of Ramalakshamma, a minor, who was the widow of Sarvarayya, deceased. The plaintiff claimed as a purchaser of the undivided fourth share. He alleged that one Anandarayya, who, as the joint proprietor of the mutta, had been entitled to a fourth share thereof, and had been in enjoyment of the same on the 26th of May 1868 by a registered sale deed, sold his right, title, and interest therein for Rs. 10,000 to Seshayya, who, on the 8th of [487] March 1880, sold the same to him, the plaintiff, for Rs. 5,000. It appears that the estate, of which the plaintiff claimed an undivided fourth share, was originally purchased some time about the year 1848, before the birth of Sarvarayya, the deceased husband of Ramalakshamma, by his father Krishnayya, in his own name; that at that time Krishnayya and his two brothers, Pattabhiramayya and Adinarayana, constituted a joint Hindu family governed by the Mitakshara law of inheritance. There was no direct evidence to show what funds were employed in the purchase of the estate. The presumption, therefore, in the absence of evidence to the contrary, would be that it was purchased with joint family funds, and that the estate so purchased became the joint estate of the family. However, on the 31st March in the year 1853, after the birth of Sarvarayya, Krishnayya his father presented to the District Collector of Godavari an arzi

accompanied by a will, dated the 29th March 1853, which he stated that he had executed to his younger brothers, &c.

The following is a copy of the will :—

"Will executed on the 29th March 1853 by me, Balasu Buchchi Krishnayya, proprietor of kasba Kapileswarapuram, &c., in favour of my son, Buchchi Sarvarayya, and the joint proprietors with me of Kapileswarapuram, *i.e.*, my two undivided brothers, Pattabiramayya garu and Adinarayanarayudu garu.

"The illness I have been suffering from for the last two months having at present grown serious, I think that I cannot survive it any longer, and as, after my death, my son, Buchchi Sarvarayya and both of you are the joint proprietors of our joint proprietary estate of kasba Kapileswarapuram, possessing equal rights, you three should jointly enjoy the said estate, and you Pattabhiramayya, who are capable of managing business, should manage the whole business from this day, until my son, who is now a minor, should enter into a partition of the estate with you on attaining his proper age. Further, as all of us possess equal rights to Kesanakurru mutta estate, which was purchased by means of our family funds and the funds of Kolupati Anandarayudu, the husband of our sister, and which now stands registered in my name alone, you four persons, *i.e.*, my two undivided brothers, my son Buchchi Sarvarayya, and Kolupati Anandarayudu, who is the husband of our sister, should jointly enjoy the produce of Kesanakurru mutta."

[488] This is the estate in dispute.

"You Pattabhiramayya should hold yourself also the management of the business of the said estate of Kesanakurru mutta from this day, and as your younger brother, Adinarayanarayudu, my wife, and our brother-in-law, Kolupati Anandarayudu, have all agreed to your taking the responsibility of managing the said Kesanakurru mutta, you should protect the whole family, holding the management of the Kesanakurru mutta yourself. If you should think of dividing the said two muttas among yourselves, Kapileswarapuram should be divided into three shares among my son Buchchi Sarvarayya and you both who have been joint proprietors with me, and Kesanakurru mutta into four shares among you three and Kolupati Anandarayudu, and each should get registered in his name his share and enjoy each his share. Until then you, Pattabhiramayya, should conduct the whole management of the two estates yourself, and until my son Buchchi Sarvarayya attains his proper age, you should protect him, his sister, and his wife, and celebrate the marriages, &c., of him and his sisters. Should it happen that you have to divide among yourselves each his share, before Buchchi Sarvarayya attains his proper age, you yourself should, until he attains his proper age, retain his share of the estate under you and manage it yourself, and hand over to him his estate on his attaining his proper age. Will executed of my full accord.

"(Signed) BUCHCHI KRISHNAYYA."

It is unnecessary in the view which their Lordships take of the case to determine what was the effect of the arzi and will of Krishnayya, or to consider the effect of the documentary and other evidence adduced in support of Anandarayya's title; for assuming that he had a title to an undivided fourth share in the estate, his right and the rights of those who claim under him appear to their Lordships to have been barred by limitation.

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It was proved by Seshayya that he married a granddaughter of Anandarayya, that he made advances of money to him from time to time to the extent of Rs 6,000, and that Anandarayya, being unable to discharge his debt, sold his share in discharge of the debt and for an additional sum of Rs. 4,000, which were paid to him by Seshayya; and that on the 8th of March 1880 Seshayya resold the share, together with past profits thereof, to the plaintiff [489] for Rs. 5,000. It was proved that Seshayya, and admitted that the plaintiff never had possession of any part of the estate, and never received any portion of the profits thereof. In order to show what little confidence Seshayya had in his title, it may be observed that in the bill of sále from him to the plaintiff he stipulated that the plaintiff should not recover from him any costs which he might incur on account of suits that he might bring for the recovery of proprietorship, and of the past profits, or the amount paid for the purchase in case his suit for recovery of the property should be dismissed.

The absence of possession is carried as far back as the 26th May 1868, the date of the sale to Seshayya, a period of twelve years, *minus* two days, prior to the 24th May 1880, the date of the commencement of the suit.

One of the issues raised in the suit was whether the plaintiff, or those under whom he claims, ever had possession of the property in the suit, and whether the suit was barred by limitation. The only question to be considered is whether during the two days prior to the 26th May 1868 Anandarayya had an actual or constructive possession of a one-fourth share, or whether the possession of Sarvarayya was not adverse to him during that period.

Adinarayana, the younger brother of Krishnayya, died in 1857, and Pattabhiramayya, the elder brother, who appears to have acted as manager in accordance with the will of Krishnayya, died in 1866 or 1867, and on his death, Sarvarayya, who had no authority to act as manager of Anandarayya's fourth share, assuming him to have had one, entered into possession of the whole estate.

It does not appear upon any credible evidence that Anandarayya ever received any portion of the rents and profits of the estate, a fact which must have been capable of proof had it existed.

Their Lordships cannot believe the evidence of the plaintiff's witnesses, of whom the fifth, *viz.*, Seshayya, the first purchaser of Anandarayya's fourth share, went to the extent of stating that Anandarayya managed the estate, and the first of whom stated that although the lease to his master was in the name of Pattabhiramayya, the rent was paid to Anandarayya and never to the other sharers. Their Lordships concur with the Subordinate Judge who heard the plaintiff's witnesses and saw their demeanour, and who stated that he was not satisfied with them. The High Court does not express an opinion at variance with the finding of the Sub-[490]ordinate Judge that Anandarayya was never in possession or enjoyment of the one-fourth share. It is improbable that if Seshayya believed that Anandarayya was in the management of the estate or in the receipt of a fourth share of the rents and profits up to the time of his purchase, he having purchased that share for Rs. 10,000, would have allowed Sarvarayya to retain the exclusive possession of the whole estate and of the rents and profits thereof for a period of nearly twelve years without any attempt to recover his share. He says as the estate had been in the management of the Court of Wards for twelve years, he remained quiet, thinking he would have to incur much expense if he should institute a suit. Again

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he states that as the estate was made over to the Court of Wards, he sold for Rs. 5,000 the share that he had bought for Rs. 10,000, not being able to file a suit. The High Court says: "The seller, Anandarayya, died at the end of 1868, and that the purchaser was deprived of the opportunity of examining him in what manner, if any, he had enjoyed the share recorded in his name." It must, however, be borne in mind that Anandarayya lived for eight or nine months, and Sarvarayya, for upwards of twelve months after the sale to Seshayya, during which period the latter might have brought a suit against Sarvarayya and called Anandarayya as a witness to prove that he had received his share of the profits down to the time of the sale to Seshayya, if such had been the fact. The Subordinate Judge alludes to the delay on the part of Seshayya. He stated that he was confirmed in the view that Anandarayya was never in possession, by the consideration that, had he really been in possession, his vendor would not have remained quiet for nearly twelve years. The High Court say that, until the 6th of August 1868, Sarvàrayya did not set up a title hostile to Anandarayya. But if Anandarayya never had possession of the one-fourth share from the time of Krishnayya's death in 1853, and Sarvarayya and his uncles, as a joint Hindu family, had the exclusive possession thereof without any claim on the part of Anandarayya, of which there is no proof, there seems to be no reason why Sarvarayya should set up any title hostile to Anandarayya. Their Lordships fail to see any reason why, if no claim was made, a hostile title should be set up. As soon, however, as Anandarayya presented his petition, on the 14th July 1868, more than fifteen years after the date of Krishnayya's will, to have Seshayya's name registered as the proprietor of the one-fourth [491] share in consequence of his purchase, Sarvarayya did, on the 6th August following, object to such registration, disputed Anandarayya's title, and asserted that he had never shared in the profits of the estate. The Collector, in consequence of such objection, refused to register the one-fourth share in Seshayya's name. Yet even then Seshayya took no proceedings to enforce his claim, and allowed Sarvarayya to retain possession of the whole estate up to the time of his death, on the 23rd July 1869, shortly after which date the whole estate was taken under the care of the Court of Wards for the infant widow of Sarvarayya, and so remained until the commencement of the suit. The High Court say that Pattabhiramayya remained in possession up to his death in 1866, when possession was taken by his nephew Sarvarayya of his own three shares as the surviving member of the joint family, and of Anandarayya's undivided fourth share, presumably as heir to his uncle, the deceased manager. This, however, is clearly an error. If, as represented by Krishnayya by his will of 1853, the estate was purchased by means of the family funds and the funds of Anandarayya, and Anandarayya was entitled to an undivided fourth share, Anandarayya was not entitled to such share as a member of the joint family, for, as the husband of a sister or daughter of Krishnayya, he would not become a member of the joint family, nor would his share be inheritable by the members of the joint family according to the Mitakshara. His share would be inheritable by his own heirs, and the other three-fourths would pass to the surviving members of the joint family by survivorship. It was impossible, therefore, for Sarvarayya to succeed to Anandarayya's fourth share during Anandarayya's lifetime by inheritance from his uncle, the deceased manager. It appears to their Lordships that it must be presumed that at least from the time when Sarvarayya took possession after his uncle's death the possession was

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adverse to Anandarayya, and, consequently that the suit was barred by limitation by Article 144, Schedule 2, Act XV of 1877. If Sarvarayya claimed to take the one-fourth share as heir to his uncle, the possession was clearly adverse to Anandarayya within the meaning of Article 144, and the suit would also be barred by limitation.

Upon the whole, their Lordships are of opinion that the decree of the Subordinate Judge was correct, and they will, therefore, humbly advise Her Majesty that the decree of the High Court be [492] reversed, that the decree of the First Court be affirmed, and that the respondent do pay the costs of the appellant in the High Court.

The respondent must also pay the costs of this appeal.

Solicitor for the appellant, *H. Treasure.*

Solicitors for the respondent, *T. Luxmore Wilson & Co.*

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9 M. 492.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

RAMASAMI AND ANOTHER (*Plaintiffs*) *Appellants v.* KADAR BIBI (*Defendnt No.* 1), *Respondent.** [14th and 23rd July, 1886.]

Contract Act, Section 264—*Partnership—Notice of dissolution—Sleeping partner.*

A, B and C traded together in partnership as B, C & Co., A being a sleeping partner. After the partnership was dissolved, B and C continued to trade together under the same name and incurred debts to the plaintiffs, who sued to recover the amounts from A, B and C. The plaintiffs had not dealt with the old partnership, nor received notice of its dissolution, and it was not alleged that they knew of A's previous connection with it:

Held, that the suits did not lie against A.

[R., 3 Ind. Cas. 445 (448) = 3 S.L.R. 140 ; 76 P.R. 1903.]

THESE were appeals against the decrees of J.W. Reid, District Judge of Coimbatore, modifying the decrees of P. Narayanasami Ayyar, District Munsif of Coimbatore, in original suits 325 and 490 of 1885.

The respondent (defendant No. 1) entered into partnership with defendants Nos. 2 and 3 on 21st June 1883 and traded with them as a sleeping partner. The names of defendants Nos. 2 and 3 alone appeared in the trade name of the Firm. The partnership was dissolved on 30th June 1884 on the retirement of the respondents; defendants Nos. 2 ond 3 however, constituted a new Firm and carried on the business under the old partnership name. The new Firm dealt with the plaintiffs (appellants) for skins and bark, and then suits were brought against defendants Nos. 1, 2 and 3 to recover money due on accounts stated. The plaintiffs had not dealt with the old partnership and had not received notice of its dissolution, and it was not averred that they knew of respondent's [493] previous connection with it. The Munsif passed decrees for the sums claimed against all three defendants.

Defendant No. 1 appealed against these decrees, and the District Judge modified them by ordering the suits as against defendant No. 1 to be dismissed.

Plaintiffs appealed to the High Court, on the ground, *inter alia*, that the lower Court was wrong in holding that in respect of a new customer no notice is necessary.

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* Second Appeals 948 and 977 of 1885.

Sundram Ayyar and *Krishna Ayyar*, for appellants.
Bhashyam Ayyangar and *Desikacharyar*, for respondent.
The Court (COLLINS, C.J., and PARKER, J.) delivered the following

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JUDGMENT.

Defendants 1-3 entered into partnership on 21st June 1883 to trade at Coimbatore under the name of "Padsha Rowten, Peer Muhammad Meracoyer and Co.," *i.e.*, the names of defendants 2 and 3 only appeared in the designation of the firm. The partnership was dissolved on 30th June 1884 by exhibit E, on which date defendant No. 1 retired, and defendants 2 and 3 continued to trade under the same designation as before. The two appellants are found by the District Judge to be "new customers" of the firm after the date of exhibit E: one of them lives at Annur, near Mettupalaiyam, in the Coimbatore District, and about 40 miles from Coimbatore; the other in Madras, over 300 miles from Coimbatore; and the question in these appeals is whether the defendant No. 1 can be held liable to their claims against the firm.

From the judgment of the District Court we do not understand that it was denied on the appeal that these appellants were "new customers" of the firm, and we must accept the finding upon the question of fact.

It was then urged that the Judge had misconstrued Section 264 of the Indian Contract Act and the judgment of Garth, C.J., in *Chundee Churn Dutt* v. *Eduljee Cowasjee Bijnee* (1), in holding that no notice of dissolution of partnership was necessary in respect of new customers.

Section 264 enacts that persons dealing with a firm will not be affected by a dissolution, of which no public notice has been given, unless they themselves had notice of such dissolution. In the present case the firm with which appellants opened dealings con-**[494]** sisted of defendants 2 and 3, and there has been no change in the Firm since the dealings were commenced. It would certainly, therefore, lie upon appellants to aver and prove that they commenced dealings with the Firm on the strength of their belief that defendant No. 1 was a partner. This they have not done, and the presumption would be against any such supposition, since the name of defendant No. 1 did not appear in the designation of the Firm.

It appears, moreover, from paragraph 3 of the judgment of the Lower Appellate Court, that defendant No. 1 was never at any time more than a dormant partner, since the Articles of Agreement (A) stipulated that defendants Nos. 2 and 3 should conduct the business, and defendant No. 3 was specially employed to do many acts for her and represent her in dealing with third parties — an arrangement only natural and such as we should expect in the case of a Muhammadan lady. The retirement of a dormant partner is an exception to the usual rule that a partner's agency ends by notice (see Lindley on Partnership, 4th edition, pages 405—408), and it was not averred that appellants knew defendant No. 1 to be a dormant partner, notwithstanding that her name did not appear in the designation of the Firm. An old customer might possibly be supposed to have known the fact, but there would be no such presumption in the case of a new customer, and there is no evidence that appellants ever heard of defendant No. 1 being a partner. Under these circumstances, we dismiss these second appeals with costs.

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(1) 8 C. 678.

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9 M. 495 = 10 Ind. Jur. 456 = 11 Ind. Jur. 139.

9 M. 495 = 10 Ind. Jur. 456 = 11 Ind. Jur. 139.

[495] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

RAMACHANDRA AND ANOTHER (*Plaintiffs*), *Appellants v.* KRISHNA (*Defendant*) *Respondent.** [28th July, and 3rd August, 1886.]

Registration Act (Act III of 1877), *Section* 50—*Conflict between an unregistered hypothecation bond and a subsequently registered conveyance—Notice—Decree on hypothecation bond.*

Land was hypothecated to plaintiff by an unregistered bond, dated 29th May 1878, and afterwards sold to the defendant by a registered conveyance, dated 29th June 1879, which recited the previous hypothecation. In a suit brought by the plaintiff to enforce his charge :

Held, that there was no conflict between the instruments, and the hypothecation bond was enforceable though unregistered.

[R., 16 M. 148 (165) (F.B.).]

THIS was an appeal against the decree of J. A. Davies, Acting District Judge of Tanjore, confirming the decree of V. Srinivasacharlu, District Munsif of Valangiman, in suit No. 164 of 1884.

The facts necessary for the purpose of this report appear from the judgment of the Court (COLLINS, C.J., and BRANDT, J.).

Bhashyam Ayyangar, for appellants.—The provisions of Section 50 of Act III of 1877 are not applicable. The conveyance to respondent conveying only the equity of redemption, no conflict arises between it and the unregistered hypothecation bond to appellants.

Rama Rau, for respondent.

JUDGMENT.

The appellants sued upon an unregistered instrument of hypothecation securing Rs. 75 principal executed in favour of their father by one Kamakshi Ammal in May 1878. In June 1879 Kamakshi Ammal executed a deed of conveyance, dealing with the land hypothecated, to the father of the appellants among other lands and conveying them to the respondent; this deed of conveyance was registered.

[496] The plaint contained a prayer for the principal and interest in accordance with the terms of the bond, "holding the plaint property liable," and asking that, if necessary, it be sold to realize the amount decreed.

The Court of First Instance found in favour of the appellants on the merits, and no appeal was preferred against that finding; but both Courts allowed the plea of the respondent, *viz.*, that the sale-deed passed to him by Kamakshi Ammal, being a registered instrument, must prevail against the appellants' unregistered instrument, and, for the purposes of this appeal, it may be taken that this was so decided in the authority of *Madar* v. *Subbarayalu* (1).

It is contended in appeal that that case and the present are not on all fours: that the provisions of Section 50 of the Registration Act apply only in cases in which a registered and unregistered document are antagonistic, not where legal effect can be given to one without infringement of

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* Second Appeal 1 of 1886.

(1) 6 M. 88.

the other *Sobhagchand Gulabchand* v. *Bhaichand* (1), which is the case here, it is said. And our attention is also called to *Ramaraja* v. *Arunachala* (2), in which the principle of the decision in the Bombay case, just above referred to, was approved, and in which it is said that "an unregistered mortgage is not itself unlawful, and a person who has bought, subject to it, cannot afterwards take advantage of the Registration Act to avoid it."

Madar's case is on all fours with the present case, in the following respects: there, an unregistered instrument creating an incumbrânce of prior date was set up in competition with a registered sale-deed of subsequent date, and it was found by the Lower Appellate Court that the purchaser and his vendors were well aware of the prior charge, and that the purchaser had retained a sum of Rs. 60 to pay it off.

The prior encumbrancer had obtained a decree upon his bond, but this fact is not material to our present decision, and on the question of notice, we are not prepared to reconsider the view of that doctrine taken by this Court in connexion with the Registration Act. But it does not appear that there was any reference to, or acknowledgment of, liability in respect of the prior encumbrance contained in the registered conveyance. In the present case, in the registered sale-deed, after recital of the sale, the consider-**[497]** ation is set forth, and as part of this the sum of Rs. 90 then due on account of the appellants' hypothecation claim is set out: this sum being described as reserved with or retained by the purchaser to be paid by him to the appellant, and it is contended in the present case that the equity of redemption alone was sold, or in other words that the estate was sold subject to the charge. On the other side it is urged that the sale was absolute, not conditional, and that the mere recital of the manner in which the consideration was made up cannot avoid the consequence of non-registration of the appellants' instrument as regards the claim against the land; that though it is possible the purchaser might be held to stand in the position of a trustee of the money, and an action for money had and received for the appellant's use might be maintainable, the recital of the existence of a prior charge does not debar the respondent from relying on the exception arising out of Section 50 of the Registration Act, does not amount to a covenant on the part of the purchaser to pay the charge, and cannot be held to create a liability in respect of the charge as affecting the land conveyed.

We concur in the proposition stated by the learned Judges in *Sobhagchand Gulabchand* v. *Bhaichand* (1), and in *Ramaraja* v. *Arunachala* (2) that the respondent's vendor coufd honestly sell subject to any equities arising out of prior charges created on the property sold, and that an unregistered mortgage is not itself invalid, and that a person who has bought subject to it cannot afterwards take advantage of the Registration Act to avoid it; and we do not see that there is any conflict between the decision in the latter case and that in *Madar's case.*

In the last-mentioned case the facts that the purchaser was aware of the prior incumbrance, and had retained a sum of money to pay off a prior charge were held to be of no avail to the incumbrancer holding an unregistered instrument, as against an absolute deed of sale registered, in which no mention was made of such incumbrance; but the retention of money by the purchaser to pay off the prior charge may have been treated by the Subordinate Judge and appears to have been referred to in argument only as evidence of notice. The question whether such

(1) 6 B. 193. (2) 7 M. 248.

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retention had the effect of passing the estate to the purchaser subject to [498] the prior charge does not appear to have been raised. We have to deal with a different case, *viz.*, one in which in the registered instrument of sale itself the estate is sold with notice to the purchaser of the charge, and the sum then due to the incumbrancer is left with the purchaser under an express or implied agreement on his part to pay it over to the incumbrancer.

The question then is whether, having regard to the recital of the prior charge, and of the retention of the money due, the purchaser should be held to have purchased the land subject to the prior charge. If he did, we should hold that the fact of appellants' instrument of mortgage being unregistered does not debar the appellants from relying on the recital in the respondent's registered sale-deed, or from availing themselves of the legal consequences of that recital, and does not enable the purchaser, who bought subject to that charge, to avail himself of the Registration Act to avoid it.

There is, it is true, in the defendant's conveyance, no covenant expressed on the respondent's part to pay the mortgage debt, but having regard to the ordinary manner in which conveyances are drawn in this country, we have no doubt that the vendor sold and the vendee purchased subject to the appellant's hypothecation lien. The vendor did not profess to sell, nor contract to convey, more than the estate which remained to him subject to that charge.

Nor can the purchaser succeed unless he puts in proof an instrument which itself discloses these facts.

There is then no conflict between the two documents, and we consider that the appellants are entitled to decree for the sum claimed, with interest and costs throughout and interest from date of institution of the suit, at 8 per cent. per annum till date of payment, to be realized by sale, if necessary, of the property, if the amount due be not paid within six months from the date of the decree of this Court.

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[499] PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Sir Barnes Peacock, and Sir Richard Couch.

[*On appeal from the High Court at Madras.*]

SURIYA RAU (*Plaintiff*) *v.* THE RAJA OF PITTAPUR AND ANOTHER (*Defendants*). [4th June, 1886.]

Mitakshara law of inheritance—A son's power to adopt—Impartible estate—Failure to prove alleged custom in a family against adoption—Invalid agreement between father and father's brother, in a joint family, contrary to rights of son already born.

Two brothers, undivided under the Mitakshara, the family estate being an impartible zamindari in the possession of one of them who had a son, contracted with each other that, in the event of an indefinite failure of male issue, in the line of either of them, the estate should descend in the line of the brother having aurasa, (self-begotten) issue, and should not be alienated from the line of the latter by adoption :

Held, that this contract did not bind the son not to adopt, or exclude from the inheritance a son adopted by him. Such a stipulation was contrary to the

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law declared in the *Tagore case* (1) and was ineffectual to prevent the son's exercising his right of adoption.

[R., 19 B. 428 (458); 31 C. 111 (117); 8 Ind. Cas. 897 (902)=4 S.L.R. 88.]

APPEAL from a decree (19th September 1881) of the High Court, affirming a decree (23rd August 1880) of the District Judge of Godavari.

This appeal arose out of a suit claiming the impartible zamindari of Pittapur, of which a former zamindar, Venkata Niladri Rau, died on the 25th of February 1828, leaving three sons. Of these, the eldest, Venkata Suriya Rau, succeeded his father as zamindar, and the others obtained maintenance. In 1845, Venkata Suriya Rau, and his surviving brother, Kumara Venkata Rau, the third brother Buchi Venkata Rau being then dead, made an agreement, in the form of kararnamas executed by the brothers in each other's favor, whereby it was declared that certain villages comprised in the zamindari were set apart for the maintenance of the younger brother. The agreement, which bore date 26th April 1845, contained the clause set forth in their Lordships' judgment, to the effect that the family property should, in the event of failure of **[500]** issue in the line of either of the brothers in possession of the zamindari, go over to the line of the other brother having aurasa issue, and "should not be alienated by making adoption and the like."

The present Raja, son of Venkata Suriya Rau, whom he succeeded in the possession of the impartible zamindari in 1850, adopted a son on the 28th September 1873, he having no issue of his body, though he was married. Against this Raja, as first defendants, and the son adopted by him, as second defendant, this suit was brought in 1879 by the present appellant.

The latter was the son of the Raja's paternal uncle, Kumara Venkata Rau, who was one of the parties to the kararnamas of 1845. The plaintiff sought to obtain a declaration that the adoption was invalid, alleging an old and uninterrupted custom to exist in this family that no adoption should be made obstructing the right of succession in the nearest male line; and that if any Raja for the time being had no aurasa issue or male heirs of his body, then the eldest and nearest male in the aurasa line of the original founder was to get the inheritance. This family custom had been confirmed by the kararnamas of 26th April 1845, on which the plaintiff also relied.

The defendants having denied the existence of the alleged custom, and the effect ascribed by the plaintiff to the kararnamas of 1845, the principal issues were whether the former could be proved, and whether the latter were valid as against the present Raja.

The District Judge found that the family was undivided, the zamindari being ancient and impartible and descending to the eldest son alone. The fact which he accepted that adoption had not taken place in fifteen generations of successive Rajas, of whom five had been childless, was insufficient, in his opinion, to establish a family custom acted upon through a long series of years, such as would displace the general law. Besides finding against the alleged customs, he was of opinion that, as a matter of Mitakshara law no head of a family could so bind his living co-parcener, by a contract entered into without the consent of the latter, as to deprive him of the right legally incident to his share in the estate, *viz.*, the right to adopt. He referred to *K. Venkatramanna* v. *K. Brammanna Sastrulu* (2), Mayne on Hindu Law and Usage **[501]** paras. 292, 293 and

(1) 9 B.L.R. 377, (403)=I.A. Sup. Vol. 1872—73, 47. (2) 4 M.H.C.R. 345.

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294. The case cited showed that where, upon the division of family property, the co-parceners agreed that the share of any one of them, or his heirs, dying without issue, should be divided among the other shareholders, and the son of one of the latter, contrary to the above agreement, sold the share, which he inherited from his father, who received it upon the division, the sale was held valid as his right of disposition could not be taken away in the above manner.

The suit was dismissed with costs, and an appeal against this decree was dismissed by the High Court (KINDERSLEY and MUTTUSAMI AYYAR, JJ.). They were of opinion that in the case of an impartible zamindari, belonging, as this did, to a joint Hindu family, each co-parcener had two distinct rights against the zamindar for the time being. The one was a right to be maintained, the other an interest in succeeding to the zamindari by survivorship. The grant made in this case of villages, for the maintenance of a junior branch of the family, did not, in the absence of an express contract to that effect, imply a renunciation of the right of succession by survivorship. The acceptance of maintenance by an undivided member of a joint Hindu family, before division, would not, in the case of impartible estate, any more than in the case of partible, bar his right of inheritance. So much as to the effect of the kararnamas. The decision, however, rested upon this, that no custom that the actual zamindar should not adopt had been proved to exist in this family. Although in five instances childless zamindars in this family had abstained from adopting, it did not appear that any one of them had done so because he was prohibited by the custom, of the family from so doing. And, if any such custom had existed, the attempt to preclude adoption by agreement need not have been made.

The judgment of the High Court, after stating the facts, was as follows :—

"We agree with the District Judge in finding that the parties are not divided. In every zamindari which belongs to a joint Hindu family, each co-parcener has two distinct rights as against the zamindar for the time being in connection with the estate. He has the right to be maintained, and he has the right to succeed to the zamindari by survivorship. A grant of villages in lieu of his claim and that of his descendants to a periodical payment for their maintenance is of the nature of a final arrangement for the [502] support of the junior branch of the family; and, in the absence of an express contract to that effect, it does not imply a renunciation of the right of succession by survivorship. The acceptance of maintenance by an undivided member of a joint Hindu family before division, will not bar his right to demand partition in the case of partible property, and when the estate is impartible, this right of enforcing is modified into a right of succession.

"But we rest our decision upon the determination of the second question, whether the adoption of the second defendant by the first defendant is invalid by reason of a custom in the family that the zamindar does not adopt.

"On this question we agree with the District Judge in finding that no custom binding on the defendant, that the actual zamindar should not adopt a son, has been proved. Such a custom would be so much at variance with the general Hindu law, with the religious feelings which impel a sonless Hindu to make an adoption and with those texts which encourage the practice of adoption, that it may be doubted whether, in a tribe of Hindu origin, such a custom would be enforced. But, in the

present case, it is sufficient to say that no such custom has been proved. It appears that among sixteen persons, who have in succession held the zamindari before the first defendant, five died without male issue, and might, but did not, adopt a son. But, of those five men, one died at the age of 27, another at 28, and two others at 48, the age of the remaining one being unknown. No argument can safely be drawn from the cases of those who died at the early age of 27 or 28; and even the others may not have abandoned all hope of begetting a son. It is impossible to say what reasons, if any, may have influenced the elder men to abstain from adopting a son. They may not have found a suitable boy for adoption. They may have doubted whether an adoption would be recognized by the ruling power; or they may have been indisposed, for some other reason, to adopt a son. But it does not appear that any zamindar abstained from adoption, because he was prohibited from making an adoption by the custom of the family; and, if any such custom had obtained in the family, and had been recognized as having the force of law, it would have been unnecessary for the plaintiff and his father to bind themselves by express agreement not to adopt. The answer filed by Suriya Rau, the father of first defendant, in Suit 23 of 1820, goes no further than this, that 'from the days of the founder [503] up to this time no member of our family, who was a Raja, adopted a son.' And in his answer to the appeal 2 of 1823 he says that 'nobody in this samasthanam who up to this time was Raja made an adoption.' In that suit, Niladri Rau was resisting the claim of one Buchi Tammayya to be his adopted son, and if at that time (1820) he could have pleaded that the adoption would have been void as prohibited by family custom, he would have said so. But he argued only that the adoption of a son by the Raja was unprecedented, and therefore improbable.

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"The agreement executed by the first defendant's father in favour of the plaintiff's father in 1845 provides that in case of the failure of naturally born sons in either line, the other line should take the immoveable property of both. 'But it should not be alienated (to strangers) by making an adoption or the like.' The word 'to strangers' are to be found only in the counterpart. It may here be observed that the first defendant's father had no power to bar his son by the agreement of 1845 from the exercise of his right to adopt a son in the event of his having no male issue. Similar expressions are to be found in the agreement executed in 1869 by the present first defendant in favour of his brother since deceased. So in the recital at the commencement of the letter addressed by the first defendant to the Governor in Council in 1871, it was recited that the zamindari had 'descended under the rule of primogeniture through a line of legitimate heirs uninterrupted by any adoption.' And in the proposed answer it was recited 'as it has never been customary in the family of the late Raja for the Raja, who reigns, to adopt children.'

"All these recitals appear to us merely to point to the undoubted fact that hitherto the actual zamindar had not made an adoption. In some instances the fact is used as an argument to show that in the particular instance an adoption by the zamindar would be improbable, but, in no case has it been stated that such adoption was prohibited by any rule observed in the family, or that such an adoption would be void. The oral evidence, which is not very reliable, points in the same direction. On the second question, therefore, we are of opinion that the plaintiff has not shown that the adoption of the second defendant by the first was invalid by reason of any custom in the family binding upon him."

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On this appeal, Mr. *J. D. Mayne* and Mr. *G. P. Johnstone* appeared for the appellant; Mr. *J. F. Leith*, Q.C., and Mr. *R. V.* [504] *Doyne* for the respondents. It was not attempted, for the appellant, to dispute the finding of both the Courts in India that the alleged family custom against adoption had not been proved. But the argument on behalf of the appellant related to the effect of the agreement of 1845, considered as a family arrangement. It was contended that the entire absence of any previous adoption in this family, and the strong tendency to avoid adoption shown by successive zamindars, should have been considered in connection with the fact of the agreement of 1845 having been entered into, the large proportion of the zamindari devoted to the maintenance of the younger brother, and the terms of the agreement. It having been shown to be in accordance with the feelings of the family that the agreement should be made, the question was whether the son's rights under the Mitakshara might not be considered as waived in support of what, in this family, was regarded as an expedient family arrangement, founded on good consideration. There had been a ratification of what the father had arranged. As to what constituted ratification, see *Trowell* v. *Shenton* (1).

Reference was also made to *Raja Venkata Rao* v. *Court of Wards* (2) and *Fanindra Deb Raikat* v. *Rajeswar Das* (3).

JUDGMENT.

Without counsel for the respondents being called upon, their Lordships' judgment, after Mr. *J. D. Mayne* and Mr. *G. P. Johnstone* had been heard, was delivered by

SIR BARNES PEACOCK.—This case has been very ably argued by the learned counsel for the appellant. He very properly did not contend that the custom not to adopt had been proved. This is a question of fact which was decided concurrently by both Courts below, and could not properly be raised now before this committee.

The case having now been thoroughly sifted, it appears that the only point to be decided is, what was the legal effect of the agreement of the 26th of April 1845 between Suriya Rau and his brother Kumara. At that time Gangadhara, the son of Suriya, was living. The estate was governed by the Mitakshara law. It is clear that Suriya, the father, could not, by the agreement of 1845, so bind the estate that an adopted son of his son Gangadhara should not take by descent. The agreement is contained in the 10th article, by which the two brothers stipulated as follows:—

"As to the immoveable property belonging to us both, the said [505] immoveable property shall, in case of the failure of 'aurasa' (self-begotten) male issue in either of these two lines, *i.e.*, either for yourself or in your line of aurasa sons, or in my line of aurasa sons, be put in possession of the other line, but it shall not be alienated by making adoption and the like." It is unnecessary for their Lordships to determine whether that agreement was or was not binding between the parties who made it. It is clear that the father of Gangadhara could not bind his son, who was then in existence, not to adopt, or legally stipulate that if he should adopt the son so adopted should not inherit. The words are: "In case of the failure of self-begotten male issue." Mr. Mayne was forced to admit that those words meant an indefinite failure of issue; and that an adopted son should not ever take by descent from his father. It

(1) L.R. 8 Ch. D. 318. (2) 2 M. 128=7 I.A. 38. (3) 11 C. 463=12 I.A. 72.

appears to their Lordships that that would be entirely altering the law of descent, and contrary to the principle laid down in the *Tagore case* (1). 1886 JUNE 4.

Their Lordships are therefore of opinion that the decision of the High Court was right, and that the agreement of 1845 did not operate to prevent the adopted son of Gangadhara from succeeding to this property. It has been very properly admitted by the learned counsel for the appellant that the similar agreement which was made by Gangadhara is not one of which the present plaintiff, who was no party to it, could take advantage. PRIVY COUNCIL.

Under these circumstances, their Lordships will humbly recommend Her Majesty to affirm the judgment of the High Court, and dismiss this appeal. The appellant must pay the costs of the appeal. 9 M. 499 (P.C.) = 13 I.A. 97 = 4 Sar. P.C.J. 725 = 10 Ind. Jur. 392.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondent, the Raja of Pittapur : *Frank Richardson & Sadler.*

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9 M. 506.

[506] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

AYYAVAYYAR (*Respondent*), *Appellant v.* SHASTRAM AYYAR (*Petitioner*), *Respondent.** [16th and 20th August, 1886.]

Civil Procedure Code, Sections 244, 583.

The Court has power to award to a successful appellant interest upon an amount found on appeal to have been improperly levied in execution of a decree.

[Appl., 11 M. 261 (262) ; R., 20 A. 430 (432).]

IN suit 14 of 1884 the Subordinate Judge of Tinnevelly decreed, *inter alia*, that defendant No. 3 should pay half the costs of the plaintiff. The plaintiff recovered Rs. 871-11-0 in execution. On appeal, the decree was reversed and defendant No. 3 levied this sum, with interest, from plaintiff. Upon this, plaintiff applied for a refund of the amount levied as interest (Rs. 56-12-3) and the Court (K. R. Krishna Menon) ordered a refund on the ground that there was no provision in the decree to levy interest. Against this order defendant No. 3 appealed.

Bhashyam Ayyangar, for appellant.

Parthasaradi Ayyangar, for respondent.

The Court (COLLINS, C. J., and PARKER, J.) delivered the following

JUDGMENT.

The question before us is, whether a Court can award interest on a sum ordered to be repaid by way of restitution under a decree passed in an appeal (Section 583, Code of Civil Procedure). We are referred to the decision in *Ram Sahai* v. *The Bank of Bengal* (2) in support of the contention that appellant is entitled to interest on the refund claimed. The appellant's pleader argues that the case is analogous to an order for the refund of profits in a similar case, and refers to *Lati Kooer* v. *Sobadra Kooer* (3).

On the other hand, the respondent's pleader urges that *Ram Sahai* v. *The Bank of Bengal* is inconsistent with the Full Bench [507] decision

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* Appeal against Order 75 of 1886.

(1) 9 B.L.R. 377 (403). (2) 8 A. 262. (3) 3 C. 720.

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of the same High Court in *Ram Ghulam* v. *Dwarka Rai* (1), in which it was held that a suit for mesne profits in such a case was not barred by Section 244, Code of Civil Procedure. That decision was followed in *Gannu Lal* v. *Ram Sahai* (2).

As regards the recovery of mesne profits under Section 583, the decisions of the Calcutta and Allahabad High Courts would appear to be conflicting. But in regard to the award of interest upon a sum of which the restitution is ordered under Section 583 of the Code of Civil Procedure, we are of opinion that the principles laid down by the Privy Council in *Rodger* v. *The Comptoir D'Escompte de Paris* (3) on appeal from the Supreme Court of Hong Kong should govern the case. In that appeal Lord Cairns, in giving the judgment of the Privy Council, pointed out that, if only the principal sum was restored to the petitioners without any interest, a very grave injury would be done. The petitioners would recover a sum taken away from them by mistake only after a considerable lapse of time, and without the ordinary fruits derived from the enjoyment of money. On the other hand, these fruits would have been enjoyed by a person who, by mistake or wrong, obtained possession of the money under a judgment, which had been reversed. Under those circumstances, the Privy Council held that a perfect judicial determination would not be arrived at unless the persons who had had their money improperly taken from them should have their money restored to them with interest for the time during which the money had been withheld.

After noticing the case of *Blake* v. *Mowatt* (4) in the House of Lords, in which money which had been ordered to be paid under a decree was ordered by the Court below to be restored together with interest on the capital sum, their Lordships proceeded to say that they "had reason to believe that the practice of the Courts in India, when there had been a reversal of the decree in the Privy Council and money had been ordered in India to be paid back in consequence of that reversal, was to order the payment of interest." Their Lordships therefore believed, so far as any precedents existed, they were in favour of a restitution of the money with interest, and considered that the practice was in accordance with right principle and justice.

[508] This decision was also followed by the High Court of Allahabad in *Jaswant Singh* v. *Dip Singh* (5), and was held not inconsistent with the Full Bench ruling in *Ram Ghulam* v. *Dwarka Rai* (1).

We are of opinion, therefore, that the Court has power to award appellant interest upon the amount improperly levied. We set aside the order of the Subordinate Judge, and allow appellant interest upon the sum levied at the rate of 6 per cent. per annum from the date of his payment of the sum to the Court Amin till the date of refund. The respondent must pay appellant's costs in this appeal.

(1) 7 A. 170. (2) 7 A. 197. (3) L. R. 3 P.C. 465.
(4) Not reported (See 21 Beav. 603). (5) 7 A. 432.

9 M. 508.

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APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Parker.

VENKATARAMAN AND OTHERS (*Petitioners and Appellants*) v. MAHALINGAYYAN (*Respondent*).* [30th July and 4th August, 1886.]

Civil Procedure Code, Sections 248, 295, 622—*Execution Proceedings—Rateable distribution—Application for further execution—Notice.*

A, and subsequently B, obtained decrees against X, in execution of which the same land was attached, and B obtained an order for rateable distribution. Neither decree was satisfied. A then applied for attachment of other property, and the sale was fixed for 28th September. On 25th September B filed a petition for further attachment under Sections 250, 274, and also a petition for rateable distribution under Section 295 of the Code of Civil Procedure. The District Judge rejected the application for execution as being too late, and then the application under Section 295, because no application for execution was pending.

Held, on appeal, that the petition for execution was wrongly rejected, but that the High Court could not, under Section 622 of the Code of Civil Procedure, revise the order rejecting the application under Section 295 for rateable distribution.

[Cited, 3 L.B.R. 275; R., 65 P.R. 1905.]

PETITION, under Section 622 of the Code of Civil Procedure, praying the High Court to revise the order made by J.A. Davies, Acting District Judge of Tanjore, on civil miscellaneous petition No. 757, and Appeal against the order passed by the same Court on civil miscellaneous petition 758 of 1885, between the same parties.

[509] The facts are stated in the judgment of the Court (COLLINS, C.J., and PARKER, J.).

Rama Rau, for petitioners and appellants.

Subramanya Ayyar, for respondent.

JUDGMENT.

A decree was passed against the respondent, Gopala Mahalingayyan, in original suit 2 of 1884, on the file of the District Court of Tanjore, in execution of which certain lands were attached, the sale of which was fixed for 1st December 1884.

The present petitioners had got a decree for money against respondent in the Subordinate Court of Tanjore (original suit 74 of 1882), in execution of which the same land was attached and the sale fixed for 17th November 1884.

By miscellaneous petition 640 of 1884, the petitioners applied on 15th November 1884 to the District Court for rateable distribution of the sum realized by the sale, and the petition was granted, but neither of the two decrees was fully satisfied.

The plaintiff in original suit 2 of 1884 again applied for the attachment of other properties.

In petition No. 757, the present petitioners applied for further execution in original suit 74 of 1882, but the Acting District Judge, on 25th September 1885, rejected the application on the ground that it was too late, since the lands of which the attachment was sought were to be sold on 28th September in execution of the decree in original suit 2 of 1884,

* Appeal against Order 7 of 1886 and C.R.P. 210 of 1886.

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and as notice had to go to the judgment-debtor, more than a year having elapsed since the date of the last application. They appeal against this order, urging that no notice under Section 248 of the Code of Civil Procedure was necessary, since they had made an application for execution on 15th November 1884, in civil miscellaneous petition 640, which order had been subsequently confirmed by the High Court on appeal.

Simultaneously with applying for further execution on 24th September 1885, the petitioners by civil miscellaneous petition 758 of 1885 asked for rateable distribution of the assets to be realized by the sale to take place on 28th September. The Acting District Judge disposed of this on the same day (26th September), having previously disposed of the application for execution, and rejected it as no execution petition was pending.

We have no doubt that the Judge was in error in dismissing the application for further execution. No notice under Section 248 of [510] the Code of Civil Procedure was necessary, and even if it had been, all that is required by Section 295 is that the petitioners should apply to the Court for rateable distribution before the assets have been realized, and this they did in the present case.

We have, however, further to consider whether this Court can, and should, interfere under Section 622 of the Code of Civil Procedure, since no application was pending, one having been rejected by mistake, when the Judge passed the order refusing rateable distribution. As, at the moment of the rejection of the application, no execution petition was pending, it can hardly in strictness be said that the Judge failed to exercise a jurisdiction vested in him by law, though he passed an order which he would not have done had he not been under a mistake in the first instance. It might be possible to hold that the petitioners were entitled to be placed in the same position as they would have been had the Judge not made a mistake, but they are not without their remedy, and as the assets have probably now been already distributed, we will refer them to the remedy indicated in the penultimate clauses of Section 295.

The Appeal against the order refusing execution must be allowed with costs, and the Civil Revision Petition 10 of 1886 is dismissed, but without costs.

10 M. 1.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

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NARAYANA AND OTHERS (*Defendants*), *Appellants v.* CHENGALAMMA AND ANOTHER (*Plaintiffs*), *Respondents.** [17th December, 1885, and 12th July, 1886.]

Hindu Law—Unsettled palayam held on service tenure—Commutation of service for quit-rent—Enfranchisement—Inam patta issued to Hindu widow by Government, acknowledging her absolute title to estate, not a grant of a new estate—Joinder of plaintiffs—Suit by daughter and daughter's son against widow to declare alienations invalid.

The palayam of C. was granted during the Muhammadan rule to a Hindu on service tenure, the condition being that the grantee should maintain a body of police for the service of the paramount power. This palayam was not brought under permanent settlement under the provisions of Regulation XXV of 1802. The last male holder died in 1860 leaving him surviving a widow K, and daughter C. In 1865 the Government discontinued the service and, in lieu thereof and of the reversionary interest of the Crown, imposed a quit-rent, and an inam patta was issued to K. by the inam Commissioner by which her title to the estate was acknowledged by the Government of Madras and the estate was confirmed to her as her absolute property subject to the quit-rent.

In 1882, C. and her minor son A. sued K. and others to whom K. had alienated portions of the estate for a declaration that they were the reversionary heirs of K. and that the alienations made by K. were good only during the lifetime of K.

The District Judge held that there being no collusion between C. and the defendants, A. was not entitled to join in the suit :

[2] *Held* that A. was entitled to join C. as co-plaintiff.

Held also that the effect of the inam patta was not to confer on K. any new estate but merely as between the Crown and the owners of the estate to release the reversionary right of the Crown.

[F., 13 Ind. Cas. 544 (546) ; 6 M.L.J. 117 (122) ; **Appr.**, 13 M. 195 (197) ; **R.**, 32 C. 62 (70)=9 C.W.N. 25; 21 M 47 (48) ; 26 M. 339 (358) ; 30 M. 534 (F.B.)=17 M.L. J. 101=2 M.L.T. 101 ; 13 C.P.L.R. 81 (91) ; **D.**, 23 M. 47 (48).]

IN suit No. 9 of 1882 in the District Court of Nellore, Tirvanthipuram Chengalamma and her minor son, Lakshmi Kumara Akkulu Nayudu (represented by his mother), sued Chitteti Kannamma, the mother of plaintiff No. 1, and 18 others for a declaration that plaintiffs were the reversionary heirs of defendant No. 1, and that alienations of portions of the palayapat called Chitteti palayam made by defendant No. 1 to the other defendants were not binding on the plaintiffs.

The District Judge held that plaintiff No. 2 could not join in the suit, but decreed the claim in full in favour of plaintiff No. 1.

Against this decree the following appeals were preferred :—

(1) No. 19 by defendants Nos. 3 and 4, Mummareddi Tulasamma and her minor son.

* Appeals Nos. 8, 9, 19 and 25 of 1885.

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(2) No. 25 by defendant No. 5, the Raja of Venkatagiri.

(3) No. 8 by defendant No. 6, Pennubolu Narayana Reddi.

(4) No. 9 by defendant No. 7, Nallappa Reddi Adilakshmamma.

Plaintiff No. 2 filed a memorandum of objections to the decree so far as it disallowed his claim to join as a plaintiff with his mother.

Ramachandra Rau Saheb, for appellants in Nos. 8 and 9.

Anandacharlu, for appellants in No. 19.

Rama Rau, for appellant in No. 25.

Bhashyam Ayyangar, for respondents.

The Court (COLLINS, C.J., and MUTTUSIAM AYYAR, J.) delivered the following

JUDGMENT.

The respondent Chengalamma is the daughter of Kannamma, defendant No. 1, and the mother of the minor, T. L. Akkulu Nayudu, and the several appellants are the alienees of hamlets and villages which are comprised in the Chitteti palayam of the District of Nellore. This palayam, it is stated in the plaint, was originally granted to Chengalamma's paternal ancestor during the Muhammadan rule on condition that he was to maintain a body of police for the service of the paramount power. The original grantee and his descendants have since continued to render the service and enjoy the estate. It is not, however, one of the palayams brought under permanent settlement with [3] reference to the provisions of Regulation XXV of 1802, and the tenure on which it was held was that of an unsettled palayam originally granted for police service. The last male holder was one Lakshmi Ragavappa Nayudu, who died on the 23rd August 1860, leaving him surviving his widow Kannamma, defendant No. 1, his only daughter, Chengalamma, the respondent, and his mother, Narayanamma. Upon his death, the estate devolved on his widow, Kannamma, who was heir at law, and whilst he was in possession, Government discontinued the police service in 1865 and charged on the palayam in perpetuity a quit-rent of Rs. 1,250 in commutation of that service and of the reversionary interest which the Crown claimed as the paramount power under the terms of the original grant. The title-deed C which was then issued by the inam Commissioner on behalf of the Governor in Council was issued in the name of Kannamma, and it purported to confirm the inam to her in freehold or as her absolute property, to be held or disposed of as she thought proper, subject only to the payment of the quit-rent which was charged upon it. It is also alleged in the plaint that Chengalamma was an infant of a year and a half old when her father died, and according to Act IX of 1875, she attained her majority on the 23rd August 1877. On the 1st January 1882, she instituted the suit from which these appeals arise in her own name and on behalf of her minor son to obtain a declaration that the alienations made by Kannamma in favour of the appellants were not binding upon her as reversionary heir. It is conceded, however, that the alienations are good during the lifetime of defendant No. 1 and to the extent of her estate as a Hindu widow. The respondents' case, then, was that the properties alienated were ancestral, that Kannamma took but a widow's estate therein, and that the alienations were in excess of that estate and in contravention of the provisions of the Hindu Law. On the other hand, the appellants contended that the alienations in which they are interested were made for value actually paid and for purposes recognized by the Hindu Law as binding on the reversioner. We may here observe that though

defendant No. 2, Chengalamma's husband, alleged at one time that the consideration mentioned in connection with some of the alienations was fictitious, and though Kannamma herself stated in her evidence that the gumastas in her service had deceived her, the contention that the consideration was fictitious in whole or in part is not [4] pressed on us in appeal in regard to the sales and mortgages now under consideration. The parties then proceeded to trial mainly upon the question whether those sales and mortgages were made in circumstances which rendered them valid against the reversioner. The Judge decided in favour of Chengalamma, but he observed in regard to her minor son that as he was not the next reversioner and as there was no collusion between her and the appellants, he was not entitled to join in the suit. From this decree four appeals have been preferred—No. 19 of 1885 by defendants Nos. 3 and 4 in regard to the sale of the village of Kesavaram in February 1876 under exhibit I A and the perpetual lease granted in July 1871 under document VII A with reference to 40 gorrus of land in the hamlet of Chittedu; No. 25, by the Raja of Venkatagiri, defendant No. 5, in regard to the sale of the village of Maddali in execution of the decree in Original Suit 3 of 1867 on the file of the District Munsif of Nellore; No. 8, by defendant No. 6 in regard to the sale of Vajjavaripalayam in October 1877 under exhibit C; and No. 9, by defendant No. 7 in regard to the mortgage of the village of Chittedu in March 1874 under exhibit I D and the perpetual leases granted in July 1871 and in November 1873 under exhibits III D and II D.

In connection with appeal 19 of 1885, objection has also been taken to the decree by Chengalamma on behalf of her minor son under Section 561 of the Code of Civil Procedure in so far as it negatives his right to join in the suit. Some of the objections raised against the decree and the evidence in regard to Kannamma's position in life, the income at her disposal, and the mode in which she managed the estate relate to all the appeals before us, and it is desirable to deal with them in one judgment.

It is contended in appeals 19 and 25 that the properties in dispute were Kannamma's self-acquisitions and that Chengalamma is not therefore at liberty to impeach their alienation. If this contention were to prevail, all the appeals should be allowed, and it is necessary to consider the grounds on which it rests though at some length it is not denied that the villages and hamlets sold and mortgaged are portions of the ancestral palayam, but it is asserted that the tenure of an unsettled palayam is such that there can be no proprietary estate in it, that on the death of each incumbent there is a lapse to the Crown, that if the palayam is still permitted to descend to the heir at law, such heir takes it not in [5] continuation of the antecedent title (for there was none), but as a fresh grant from the paramount power, and that the enfranchisement which changed the tenure into permanent and heritable property was an act of State or an event which occurred during Kannamma's incumbency as a grantee. A tenure like this came under the consideration of the Privy Council in *The Collector of Trichinopoly* v. *The Zamindar of Marungapuri and* (his predecessor's widow) *Lakkamani* (1). The *de facto* zamindar was the brother of the former palayagar and was recognized by Government as entitled to the palayam or appointed to it in preference to the widow. She alleged that the nominee of Government was an illegitimate brother of her husband, that the palayam

(1) 1 I. A. 282.

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was an ancestral and hereditary tenure, and that the succession to it was governed by the Hindu Law and not liable to be changed by the appointment made by Government. On behalf of the Crown the Collector pleaded among other matters that the estate was an unsettled palayam, that the right to nominate a successor to the former palayagar was vested in the Government, that in the exercise of his right, the Government granted the palayam to the late palayagar's brother, and that the grant being an act of State was not liable to be impugned in any Municipal Court. The matter in contest in that case was mainly the character of the tenure as heritable property though with this difference, *viz.*, that the contest was then between the Crown and the heir at law, and that there was an express appointment made by Government to divert the estate from the ordinary course of descent, whereas in the case before us, the Crown did not at all interfere with the ordinary course of succession and the contest is between a person claiming under a Hindu widow and her husband's reversioner.

After considering the history of the palayam tenures in this Presidency and the distinction between the palayams which were permanently settled under Regulation XXV of 1802 and those which were not brought under the permanent settlement, the Judicial Committee observed that a palayam might be hereditary though it was not permanently settled, and that the existence of a proprietary estate in such palayam and the tenure on which it is held are questions of fact which ought to be judicially determined in each case by legal evidence. There is thus no doubt that we [6] cannot support the contention that because the palayam now in dispute was an unsettled palayam when the late palayagar died, there was no heritable property in it. Again, it may well be that when the Crown does not step in and supersede the heir at law, the tenure is an ancestral estate as between that heir and the reversioner though not as between them and the Crown. In *Stree Rajah Yanumula Venkayama* v. *Stree Rajah Yanumula Boochia Vankondora* (1), the Privy Council considered what circumstances would support a plea of self-acquisition in regard to an estate originally granted by Government. They held that unless there was a confiscation of the antecedent estate and a fresh grant by a person competent to confer a legal title, the new occupant must be considered to take the estate, not as self-acquisition, but in continuation of the former title. Considerable stress was next laid on the words in the inam title-deed-C, "Confirmed to you in freehold or as your absolute property, &c." In construing those words, regard must be had to the other parts of the document and to the parties between whom they were intended to have operation. The document commences with the words, "On behalf of the Governor in Council of Madras, I acknowledge your title to the mokhasa village of Chittetivar palayam." What was then the title which was acknowledged as the basis of enfranchisement? Was it not Kannamma's title as the widow of the late palayagar or the descendant of the original grantee of an ancient palayam? If it was, is not the enfranchisement in the nature of a mere accretion to what was undoubtedly an ancestral and hereditary tenure? Nor is there reason to doubt that the words were intended to be operative only as between the Crown and the inamdar and not as between the latter and his heir. In *Cherukuri Venkanna* v. *Mantravathi Lakshmi Narayana Sastrulu* (2), it was decided that the enfranchisement of a personal inam was no bar to an enquiry into the title to that inam and that the title-deed

(1) 13 M.I.A. 333. (2) 2 M.H.C.R. 327.

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granted by the Inam Commissioner might be set aside by Civil Courts without prejudice to its effect as enfranchisement of the inam tenure. It was only provided by Section 2 of Madras Act IV of 1862 "that the title-deed issued by the Inam Commissioner shall be deemed sufficient proof of the enfranchisement of land previously held on inam tenure," while Section 1 abolished the special jurisdiction vested [7] in the Governor in Council by Section 2, Regulation IV of 1831, and revived the jurisdiction of the Civil Courts in regard to claims made to the inam. Although the palayam in this suit is described in document C as mokhasa and is as such in the nature of a service inam mentioned in Regulation VI of 1831, the legal effect of enfranchisement is the same as in the case of a personal inam. With reference to service inams, Madras Act IV of 1866, Sections 1 and 2, enacted similar provisions, with the proviso contained in Section 3, *viz.*, "No Court of Civil Judicature shall be competent to call into question decisions affecting any service inam which may have been already passed by Revenue officers acting under the provisions of Regulation VI of 1831 prior to the enfranchisement of such inam. There is then no foundation for the contention that the inam title-deed conferred a new title upon Kannamma or that the enfranchisement had a larger operation than as a release granted by the Crown in respect of its reversionary interest and of the obligation of rendering service. Again, reliance was placed on *Bada* v. *Hussu Bhai* (1). In that case the share which the plaintiff claimed had been transferred by the Collector prior to the enfranchisement to the office-bearer, defendant No. 1, under Regulation VI of 1831, and this Court held that the enfranchisement did not revive a title which had already become extinct. It was a decision with reference to the proviso contained in Section 3 of Madras Act IV of 1866 and there is no pretence in this case for saying that the Collector ever adjudicated in favor of Kannamma as against her daughter under Regulation VI of 1831. It is not clear whether the palayam in dispute was treated by Government as a service inam or as an unsettled palayam, but in either view of the case Kannamma acquired no new right of property under the inam title-deed. It has been repeatedly held with reference to ancient palayams and zamindaris brought under the permanent settlement that such settlement only changed a precarious tenure into permanent property and a varying assessment into a fixed demand and did not otherwise alter the incidents of the estates either in regard to their mode of descent or partibility as evidenced by family usage. With reference to the decision of the Privy Council in *the Marungapuri case*, it is suggested by the pleader for the defendants Nos. 3 and 4 that we should [8] now direct an inquiry as to whether or not the palayam in dispute was treated by Government prior to 1860 as a proprietary estate. We are unable to accede to this suggestion, for the question of self-acquisition did not at all arise on the pleading. Though there was a distinct averment in the plaint that the palayam was an ancestral estate, yet none of the appellants traversed it either in their written statements or at the first hearing. On the other hand, they justified the alienations and went to trial in regard to the question of justification. Though we may perhaps consider in appeal any question of law arising from facts which are either admitted or undisputed, we cannot allow without any satisfactory reason new questions of fact to be raised for the first time in appeal.

(1) 7 M. 236.

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Again, the petitions of appeal contain no ground of objection which specifically raises the question of self-acquisition, and it is extremely doubtful whether the contention is even open to the appellants under Section 542 of the Code of Civil Procedure. Further, the learned pleader for defendants Nos. 3 and 4 does not state on what specific facts he grounds his application for further enquiry and on what occasions the Crown interfered with the hereditary descent of the palayam, and it is difficult to resist the impression that the question is probably started for the first time at the hearing of the appeals as a matter of speculative reasoning. We have therefore no hesitation in overruling the contention that the palayam was Kannamma's self-acquisition as frivolous.

This being so, she succeeded to the palayam as her husband's heir and took in it but a Hindu widow's estate. In this view, the evidence which relates to her position in life, to the income at her disposal and to the mode in which she managed the estate is common to all the appeals.

(After disposing of the other questions in the appeals, the judgment proceeded as follows) :—

It only remains for us to dispose of the memorandum of objections. As observed by the Judge plaintiff No. 2 is not the next reversioner and the general rule undoubtedly is that no declaratory suit can be maintained when there is no existing interest to protect as contradistinguished from a mere possibility or contingency.

It was held, however, in the *Sivaganga case* (1) that, like the widow, the daughter takes under the Mitakshara Law but a **[9]** qualified heritage, and that, though for the time being she represents the inheritance, her succession is but a case of interposition between the last full male owner and his nearest male sapinda. The two plaintiffs in the suit before us would represent together full ownership, and in one sense, the position of plaintiff No. 2 is similar to that of a person who in terms of the English Law has a vested remainder subject to two pre-existing life estates. Adverting to such a case arising under a will left by the last male holder, the Privy Council observed in *Anant Bahadur Sing* v. *Thakurain Raghunath Koer* (2) that the remainderman was entitled to maintain a declaratory suit under the Specific Relief Act. We do not now consider it necessary to decide whether, in the absence of collusion between the plaintiff No. 1 and the alienees, the plaintiff No. 2 would be entitled to maintain a separate suit, and it is sufficient to say that we see no objection to his joining in this suit as a co-plaintiff.

Furthermore, none of the appellants seriously resists the claim of plaintiff No. 2 to intervene as a co-plaintiff.

On these grounds, we allow the memorandum of objections.

The result is, that Appeals 8, 9, 19 and 25 of 1885 are dismissed with costs and that the objections of plaintiff No. 2 are allowed, but, under the circumstances, without costs.

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(1) 3 M. 290 (331).

(2) 9 I.A. 41.

10 M. 9.

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APPELLATE CIVIL.

10 M. 9.

APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

NILAKANDAN (*Plaintiff*), *Appellant v.* MADHAVAN AND OTHERS (*Defendants*), *Respondents.** [5th April and 30th August 1886.]

Malabar Law—Brahmans—Nambudris—Mussads—Hindu Law, how far applicable—Liability of sons for father's debt in Hindu Law not applicable.

The principle of Hindu Law, which imposes a duty on a son to pay his father's debt, contracted for purposes neither illegal nor immoral, is not applicable to the Malabar Brahmans called Nambudris and Mussads.

[R., 15 M. 333 (335).]

IN suit No. 401 of 1883, on the file of the District Munsif of Ernad, [10] Nilakandan Nambudri sued Madhavan Mussad for specific performance of a contract to sell portion of his illam (family house).

The defendant admitted the claim and plaintiff got a decree.

The execution of that decree was resisted by the judgment-debtor's wife, Nangunili Manyamma, and the decree-holder's petition against her obstruction was registered as a suit under Section 311 of the Code of Civil Procedure, the minor sons of Madhavan being made defendants Nos. 1 and 2 along with their mother who was defendant No. 3.

The Munsif found that the debt (Rs. 68) for which Madhavan contracted to sell part of the family house was incurred for purposes binding on the defendants, and held that plaintiff was entitled to a decree. He decreed that defendant No. 3 should pay the debt and all costs of suit within a month, and that in case of default the portion of the house sued for should be surrendered to plaintiff.

On appeal the Subordinate Judge reversed this decree, holding that the decree in suit No. 401 of 1883 was not binding on the defendants and, if examinable, was not one which should have been passed.

The plaintiff having died, his representative, Vishnu Nambudri, appealed on the ground, *inter alia*, that the parties being Mussads were governed by Hindu Law and, therefore, defendants could not contest the decree against Madhavan, except on the ground that the debt which led to the decree was illegal or immoral.

Sankara Menon, for appellant.

Sankaran Nayar. for respondents.

The Court (BARNDT and PRAKER JJ.) delivered the following

JUDGMENT.

We consider it is necessary to ask for a finding, on such evidence as the parties may properly adduce, whether the family to which the respondents belong is governed by the ordinary Hindu Law or by the Marumakkatayam Law, or by a combination of the two systems of law, and if so, in what respects the law as affecting the liability of the defendants in this case by which they are customarily bound differs from the ordinary Hindu Law.

Findings to be returned within three months from date of the re-opening of the Lower Court, when ten days will be allowed for filing objections.

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* Second Appeal 784 of 1885.

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[11] Costs to abide the result.

In compliance with the above order, the Subordinate Judge submitted the following

Finding :—"I am directed to submit a finding, on such evidence as the parties may adduce, 'whether the family to which the respondents belong is governed by the ordinary Hindu Law or by the Marumakkatayam Law or by a combination of the two systems of law, and if so, in what respects the law as affecting the liability of the defendants in this case by which they are customarily bound differs from the ordinary Hindu Law.'

"No evidence has been adduced by either party in this case.

"The respondents (defendants) are Mussads, a class of Nambudris or Malabar Brahmans.

"Usages of the Nambudris differ on some important points from those of Brahmans in other provinces. The prominent variations are detailed in *Vishnu* v. *Krishnan* (1).

"Their customs in the management and assignment of property do not differ from the customs of the Nayars. Impartibility is the rule, and the eldest member is the manager. The eldest member in a Nambudri family, like the eldest member in a Nayar family, is called the karnavan, *Nambiatan Nambudri* v. *Nambiatan Nambudri* (2). The management does not descend from father to son, but invariably devolves on the senior male member however remotely connected, even though the deceased manager may have left adult sons competent to enter upon the management. The only difference between a Nambudri illam and a Nayar tarwad is, that in the former the offspring of the marriage and the married woman become members of the husband's illam, while the children of a Nayar woman become members of her own tarwad. The self-acquired property left undisposed of by a deceased junior male member does not descend to his son, but, following the custom of the Nayar tarwad, it lapses to the illam.

"It is worthy of remark that one of the earliest decisions of the High Court which established the rule that a decree obtained against the karnavan is not binding on the family unless members had notice under Section 30 of the Civil Procedure Code, or were parties to the suit, was passed in a case in which the parties were Nambudris, *Vasudeva* v. *Narayana* (3). Mr. Justice Kernan [12] observed in that suit: 'on his own statement he is a member of a Nambudri Brahman illam in Malabar. and *prima facie* he is governed by Malabar Law and not by the ordinary Hindu Law.'

"I am not aware of any decision, and the vakil of the plaintiff has not been able to refer me to any, in which it has been held that Nambudris are governed by the ordinary Hindu Law in respect of the management and alienation of their family property.

"There is nothing to show that the Nambudris who do not follow the Hindu Law in the management and alienation of their property are governed by the principle of the Hindu Law, imposing on the son the religious obligation of paying his father's debts, even though contracted without necessity, and by the logical extension of that principle laid down in *Girdharee Lall* v. *Kantoo Lall* (4) that the father is entitled to sell the family property in order to pay off such debts.

"The decision of the Privy Council cannot be carried beyond the circumstances upon which it was based. Under the Hindu Law, the father

(1) 7 M. 3 (15). (2) 2 M.H.C.R. 110. (3) 6 M. 121. (4) 14 B.L.R. 187.

has a share in family property which may be severed by partition and which descends on his death to his sons. The obligation of the sons to discharge the father's debts is incidental to the heritage. For discharge of debts other than debts incurred for immoral purposes, the interest of the son in the family property may be sold. But among Nambudris, neither the father nor the son has any definite share in family property which may be made available for the father's debt. The property is joint and indivisible and belongs to the whole family. The family in the present suit consists of the father, his two sons and their mother; and the three latter, according to the decision of the High Court in *Vasudeva* v. *Narayana* (1), are not bound by a decree against the former to which they were not parties.

"My finding is that the family to which defendants belong is governed by a combination of Hindu Law and Marumakkatayam Law, and that, in respect of the liability of the sons for a decree against the father, the law as affecting Mussads differs from the ordinary Hindu Law."

On the 30th August the Court delivered the following

JUDGMENT.

The finding being in favour of the respondents, and no objection having been taken, the appeal is dismissed with costs.

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10 M. 13=2 Weir 635.

[13] APPELLATE CRIMINAL.

Before Mr. Justice Brandt.

RANGAMMA *v.* MUHAMMAD ALI.* [15th September, 1886.]

Criminal Procedure Code, Section 488.

Where an application is made to a Magistrate to enforce an order for maintenance, passed under Section 488 of the Code of Criminal Procedure, such Magistrate is not bound to enforce the order if the defendant proves that the claim for maintenance has been released.

[R., 25 A. 165 (166)=22 A.W.N. (1902) 224.]

ON the 1st of December 1885 Muhammad Ali was ordered by C. Ramachandrayyar, a Presidency Magistrate, to pay Rs. 5 a month to Rangamma, for the maintenance of three illegitimate children.

On the 14th of July 1886 Muhammad Ali applied to the same Magistrate to cancel this order, on the ground that on the 16th January 1886 he had paid Rs. 60 to Rangamma and obtained a release from her by which she agreed to claim no more maintenance from him. The Magistrate held that the case did not fall under Section 489 of the Code of Criminal Procedure and that the proper course for Muhammad Ali was to plead the release if Rangamma moved the Court to enforce the order.

On the 26th July Rangamma complained to the Acting Chief Presidency Magistrate (W. M. Scharlieb) against Muhammad Ali for neglecting to pay Rs. 5 as ordered on the 1st December 1885.

The Magistrate ordered payment forthwith and costs.

Against this order Muhammad Ali presented a petition to the High Court.

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* Criminal Revision Case 437 of 1886.

(1) 6 M. 121.

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In forwarding the record, the Acting Chief Presidency Magistrate remarked that the proceedings held by him were the enforcement of a previous order, and that if Muhammad Ali felt aggrieved by the order for maintenance, he ought to have asked [14] the High Court to set it aside, or to have applied under Section 489, and that he had made no such application.

Dunhill, for Muhammad Ali.

The Court (BRANDT, J.) delivered the following

JUDGMENT.

The Code of Criminal Procedure contains no express provision for cancelling an order for maintenance in circumstances such as those here represented, but if it be true that the woman received a lump sum of money in satisfaction of all claims for maintenance for herself and the illegitimate children of herself and the petitioner, a Magistrate would clearly not only be justified in refusing to enforce the order for maintenance but would be wrong in enforcing it; of course I know nothing as to the truth or untruth of the petitioner's allegations. If the woman accepted the money said to have been paid in satisfaction of all claims, including a claim on account of the infant in arms, the youngest child, then the woman will have no right to an allowance for this child either; but if this is not so, and the rest of the arrangement is proved as alleged by the petitioner, the allowance should be reduced, as provided in Section 489, Criminal Procedure Code, so as to secure the maintenance of the infant child only.

The order of the Chief Magistrate is set aside, and he is directed to dispose of the petitioner's application in due course of law. The Chief Magistrate is in error in thinking that the petitioner did not apply to have the order originally granted reconsidered; such application was made to the Presidency Magistrate, Mr. Ramachandrayyar, and an order was passed by that Magistrate that it might be considered when and if the woman again applied to enforce the maintenance order.

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10 M. 15 (P.C.).

[15] PRIVY COUNCIL.

PRESENT:

Lord Watson, Lord Hobhouse, Sir Barnes Peacock, and Sir Richard Couch.

[*On appeal from the High Court of Madras.*]

VENKATADRI APPA RAU (*Plaintiff*) *v.* PEDA VENKAYAMMA AND OTHERS (*Defendants*). [7th July, 1886.]

Attempt to control the descent of property—Res judicata.

Two brothers having divided their family estate, each took a share consisting of villages which they held separately, agreeing in the instrument of partition that "the villages of the shares of both of us should in future descend only to the sons and grandsons, and so on of us both, but must not go to any others."

On the death of one brother leaving a widow and daughters, the widow obtained possession of the villages which formed her husband's share, and a suit brought against her by the other brother to recover them was dismissed on the ground that the divided shares descended according to law. The widow then transferred the villages to her elder daughter, whose right to the possession, as against the

brother, was declared in the present suit on the ground that, as between the widow and the brother, the question of the widow's title was *res judicata*.

1886 JULY 7. — PRIVY COUNCIL. — 10 M. 15 (P.C.).

APPEAL from a decree (26th February 1884) of the High Court, affirming a decree (16th March 1883) of the District Judge of Godavari.

About the year 1835, the brothers Simhadri and Venkatadri, Rajas belonging to the Nuzvid family, received from their elder brothers, the zamindars of Nidadavole and Nuzvid, respectively, a grant of certain villages in the Godavari district by way of permanent and heritable maintenance. On the 7th August 1846, the two brothers entered into an arrangement for the separate holding of these villages by them, each taking his separate share and agreeing in a samakhya or partition deed of that date to the following effect :—" As both of us are born of the same mother, the villages of the shares of both of us should in future descend only to the sons and grandsons, and so on, of us both, but must not go to any others." An entry in accordance with the above was made in the collectorate books and the separation was carried out.

Simhadri died in November 1861, Venkatadri surviving him, and left a widow, Sithaya, and two daughters; and the widow **[16]** obtained possession of the villages which had been allotted to her husband. These, by suit in 1863, Venkatadri sought to recover from her, alleging that he had been joint with his late brother, and that, by usage from time immemorial in the family, women did not inherit. This suit was dismissed, the Court holding that the deed of 1846 was an ordinary partition deed in its effect and that the alleged special custom was not proved. This decree was affirmed by the High Court.

By an instrument executed on the 24th April 1880, Sithaya transferred all the villages in her possession, as above stated, to her elder daughter, Peda Venkayamma, the first respondent, in consideration of her assuming the management thereof and discharging all the debts payable by her mother, including Rs. 20,000 stated in the document to be due to the elder daughter, whose sister, in the event of her death, was to succeed her, the issue of the younger daughter taking ultimately.

Venkatadri opposed the entry of this transfer in the collectorate books and Peda Venkayamma, accordingly, brought against him the present suit to obtain a declaration of her right to possession of the villages. He contended that the alienation by Sithaya was inoperative in consequence of the effect of the agreement of 1846 between himself and his deceased brother; also that it was contrary to the custom of the family that females should hold the family estate.

The District Judge held that effect should be given to the transfer made in 1880 by Sithaya. The questions whether or not the estate was still family estate, and whether or not the brothers were divided, and whether there was any agreement or custom of the family debarring females from inheriting, had been directly and substantially in issue in the suit decided in 1863. The questions raised had, in the Judge's opinion, been decided, and he decreed the suit in the plaintiff's favour.

On appeal to the High Court, this decree was affirmed by a Divisional Bench (MUTTUSAMI AYYAR and HUTCHINS, JJ.), whose judgment was as follows :—

" Only two points have been urged by the Advocate-General in support of this appeal—(1) that the question whether female heirs can come in is not *res judicata* ; and (2) that the suit for a declaration is not maintainable. Upon the latter point there cannot be any doubt. The declaration is necessary to enable the **[17]** plaintiff to go to the

1886 JULY 7. — PRIVY COUNCIL. — 10 M. 15 (P.C.).

Collector for consequential relief, and it has been rendered necessary by the appellant's own act in opposing the application which she formerly made to the Collector. Nor can the appeal be sustained upon the other ground. The same question was clearly decided in the former suit between this appellant and the widow, the defendant No. 1. The widow then represented the estate; and even if it were not so, her daughter, the present plaintiff, is at present claiming under her.

"We dismiss the appeal with costs."

On this appeal Mr. *J.D. Mayne*, appeared for the appellant.

Mr. *R.V. Doyne*, and Mr. *G.P. Johnstone*, for the respondents.

Mr. *J.D. Mayne*, for the appellant, after adverting to some other points bearing on the question how far the decision of 1863 was conclusive in regard to the present suit, suggested that the transfer of 1880 was open to the construction that it attempted to control the descent of the estate. This might be held to render it an invalid act on the part of a female, whose estate was but a limited one, the estate of a widow. This question, however, had not been raised below.

JUDGMENT.

Their Lordships, in the result, without calling upon counsel for the respondents, dismissed the appeal with costs.

Appeal dismissed.

Solicitor for the appellant : *R.T. Tasker.*

Solicitors for the respondent : *T.L. Wilson & Co.*

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10 M. 17=11 Ind. Jur. 18.

APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

VENKATRAMANNA (*Plaintiff*), *Appellant v.* VIRAMMA AND OTHERS (*Defendants*), *Respondents.** [6th and 8th September, 1886.]

Decree—Fraud—Collusion between parties—Defendant subsequently pleading his own fraud.

A obtained a decree against B, in execution of which he was put in possession of certain land by proclamation, the land being in the possession of tenants. A subsequently sued B and the tenants to recover possession of the same land. B pleaded [18] that the decree obtained by A was the result of collusion between himself and A in fraud of B's creditors :

Held, that it was not open to B to raise this plea.

[F., 11 B. 708 (713); 31 M. 485=18 M.L.J. 576=4 M.L.T. 331; R., 16 B. 722 (728); 21 B. 98 (101); 20 M. 326 (330); 20 M. 333 (337); 14 Bom.L.R. 115 (118); 4 Ind. Cas. 233 (234)=5 N.L.R. 146; Cons., 18 M. 378 (385).]

APPEAL from the decree of Mr. F. Graham, Acting District Judge of Cuddapah, reversing the decree of M. Jayaram Rau, District Munsif of Nandalur, in suit 313 of 1884.

Plaintiff, Ravoru Venkatramanna, sued Viramma, Bojjaya and Subbadu to recover certain land.

In suit 283 of 1869 plaintiff obtained a decree against Viramma, in execution of which he alleged the land was delivered to him in 1873.

Plaintiff also alleged that he had let this land to the father of Bojjaya and to Subbadu who refused to give up possession in 1881. Viramma

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* Second Appeal 418 of 1886.

pleaded that the decree in suit 283 of 1869 and the sale deed on which it was based were collusive, intended to protect the land against her creditors not to transfer it to plaintiff, and that the land had been in her possession throughout.

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She also alleged that she had let the land to the other defendants.

The Munsif found that it was not proved by Viramma that the sale deed or the former suit were collusive.

He found that the land had been in plaintiff's possession after the execution of the decree, but that it was not proved that defendants Nos. 2 and 3 were tenants of plaintiff.

The claim was decreed.

Defendants appealed.

The District Judge found that the former suit was collusive, that no valid delivery took place in execution thereof, and that defendant No. 1 had been in possession since the date of that suit.

The suit was dismissed.

Plaintiff appealed on the following grounds :—

I. As between the plaintiff and defendant No. 1 the process of delivery in execution of the decree in Original Suit No. 283 of 1869 transferred possession from the defendant to the plaintiff; and the defendant No. 1 and defendants Nos. 2 and 3 who claim under him are precluded from contending that there was only a symbolical delivery of possession and that such possession as defendant No. 1 had was not transferred to plaintiff.

[19] II. Whether the process of delivery purported to be under Section 223 or Section 224 of Act VIII of 1859 is immaterial as between the parties to the said suit and such delivery cannot affect the rights of third parties or the tenants if any having a right of occupancy.

III. That defendants Nos. 2 and 3 are estopped from denying the title and possession of the plaintiff on the dates of the rental agreement executed by defendant No. 3 and the father of defendant No. 2 in favour of the plaintiff whether or not rents were paid under those agreements.

IV. Defendant No. 1 who was defendant in Original Suit No. 283 of 1869 cannot be permitted to plead that the decree in the said suit was obtained by the plaintiff in collusion with her.

V. The decree in Original Suit No. 283 of 1869, dated 22nd April 1870, is in force, and even assuming that it can be set aside by a party alleging that it was obtained in collusion with him, the period of limitation of three years for setting aside such a decree has long ago expired.

Bhashyam Ayyangar, for appellant.

Anandacharlu, for respondents.

The Court (BRANDT and PARKER, JJ.) delivered the following judgments :—

JUDGMENTS.

BRANDT, J.—The Distrit Judge finds that there was such delivery of possession as the case admitted of, *viz.*, symbolical delivery by proclamation, the land being in the occupation of tenants; and such delivery is in the cricumstances as effectual to effect transfer of possession as physical

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delivery, and the suit is brought within twevle years from the date of such delivery.

It is admitted then that the decree of the Lower Appellate Court cannot be supported, except upon the ground that there was in fact no sale by defendant No. 1 to the appellant, and that the suit and decree in and by which the land was adjudged to the appellant can be, and should be treated as a nullity, the sale having been, as it is found by the Lower Appellate Court, a merely colourable transaction intended to screen the land from the pretended vendor's creditors. It is suggested that the rule observed in cases in which plaintiff and defendant are *in pari delicto*, should be observed in this case also, *viz.*, that the position [20] of the defendant is the better, and that the Court will not assist a plaintiff in such case. But the contention of the learned vakil for the plaintiff is correct, *viz.*, that where there is a decree which the defendant has taken no steps to have set aside on the ground of fraud or otherwise, the decree, although it was the result of fraud and collusion between the parties, will not be set aside, nor treated as a nullity when no injury to third parties will ensue. The subject is dealt with in *Ahmedbhoy Hubibhoy* v. *Cassumbhoy* (1), and, on the authorities therein cited, I consider rightly dealt with. I may add that there is also considerable force in the argument that as defendant No. 1 would not be in time with a suit to set aside the decree on the ground of fraud, so it is not open to her now to set up this plea ; but the case may be disposed of irrespective of this, and on the broad ground above stated I am of opinion that the decree of the Lower Appellate Court should be set aside, and that of the Court of First Instance restored, and the appellant should have costs of this appeal and in the Lower Appellate Court.

PARKER, J.—Although when a contract or deed is made for an illegal or immoral purpose a defendant against whom it is sought to be enforced may—not for his own sake but on grounds of general policy (per Lord Mansfield in *Holman* v. *Johnson*(2) and *Luckmidas Khimji* v. *Mulji Canji*(3) —show the turpitude of both himself and the plaintiff, it is otherwise when a decree has been obtained by the fraud and collusion of both the parties. In such case it is binding upon both, *Ahmedbhoy Hubibhoy* v. *Cassumbhoy* (1) and *Prudham* v. *Phillips* (4). It is not therefore open to defendant No. 1 to plead the collusion of herself and plaintiff in obtaining the decree in Suit No. 283 of 1869.

And, as between them the formal transfer of possession carried out by the Court is conclusive, it makes no difference whether the transfer was under Section 223 or 224 of the Code of Civil Procedure, *Juggabundhu Mukerjee* v. *Ram Chunder Bysack* (5) and *Lokessar Koer* v. *Purgun Roy* (6).

The suit is within twelve years of the transfer and cannot be barred.

[21] The decree of the Lower Appellate Court should be reversed and that of the District Munsif restored, and the respondent must bear the appellant's costs in this and in the Lower Appellate Court.

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(1) 6 B. 703. (2) 1 Cowper 343. (3) 5 B. 295.
(4) 2 Ambler 763. (5) 5 C. 584. (6) 7 C. 418.

10 M. 21=1 Weir 671.

1886 SEP. 28.

APPELLATE CRIMINAL.

10 M. 21= 1 Weir 671.

APPELLATE CRIMINAL.

Before Mr. Justice Parker.

GREGORY *v.* VADAKASI KANGANI.* [28th September, 1886.]

Act XIII of 1859—*Jurisdiction—Breach of contract to labour in foreign territory.*

V having received an advance of money from G, contracted to labour for him in foreign territory. Having broken the contract V was prosecuted under Act XIII of 1859, ordered to repay, and sentenced to imprisonment in default:

Held, that the order was illegal.

[R., 11 Cr. L.J. 380 (381)=6 Ind. Cas. 618=12 P.R. 1910 (Cr.)=185 P.L.R. 1910 (Cr.) =13 P.W R. 1910 (Cr.)]

CASE referred to the High Court by S. H. Wynne, Acting District Magistrate of Tinnevelly, in Calendar Case No. 10 of 1886 on the file of the Second-class Magistrate of Tenkasi.

The facts were stated as follows:—

"The magistrate has directed a man to pay up a sum under the †Contract Act XIII of 1859, and, in default, ordered him to be kept in rigorous imprisonment for one month, which sentence has been undergone.

"The contract was for work in Travancore territory. This is beyond the limits of British India, and the Act does not apply, though the contract was made in British territory (High Court Proceedings, 15th December 1876, No. 2940)."

Counsel were not instructed.

The Court (PARKER, J.) delivered the following

JUDGMENT.

The defendant was prosecuted under the Breach of Contract Act XIII of 1859, and was ordered to repay the money advanced. It is not stated whether the contract was made in British territory, but the work was to be performed in foreign territory.

The case is similar to that on which the High Court Proceedings of 15th December 1876, No 2940, were passed, in which case it was shown that the contract was made in British territory. It was then held that such an order was *ultra vires*.

The order of the Second-class Magistrate must be set aside.

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* Criminal Revision Case 307 of 1886.

[† It is Workmen's Breach of Contract Act.—ED.]

1886
AUG. 30.

APPELLATE CIVIL.

10 M. 22.

10 M. 22.

[22] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

NARAYANA NAMBI (*Decree-holder*), *Appellant v.* PAPPI BRAHMANI AND ANOTHER (*Judgment-debtor's Representatives*), *Respondents.**
[20th and 30th August, 1886.]

Limitation Act, Schedule II, Articles 178, 179—*Decree—Execution—Attachment set aside—Time occupied in suing to declare property liable to attachment not excluded from computation.*

An application for execution of a decree having been made in 1880, certain land was attached as being the property of the judgment-debtor (deceased). His children thereupon claimed the land and the attachment was raised. Upon this, the judgment-creditor sued to establish his right to sell the land in execution, and obtained a decree in 1882, which was confirmed on appeal in 1883. In 1885, the judgment-creditor again applied for attachment and sale of the same land;

Held that the application was barred by limitation—*Paras Ram* v. *Gardner*, I.L.R., 1 All., 355, dissented from.

[Overruled, 28 M. 50 (53) = 14 M.L.J. 410 (F.B.); R., 26 M. 780 (783); 7 Ind. Cas. 886 (888); 4 L.B.R. 83 = 14 Bur.L.R. 323; D., 21 M. 261 (263).]

APPEAL against an order of H. J. Stokes, Acting District Judge of South Malabar, reversing an order of the District Munsif of Chowgat in execution of the decree in Suit 132 of 1877.

In Suit No. 132 of 1877, the decree-holder, Thengil Narayana Nambi, applied for execution, on the 19th June 1880, by attachment of certain land, the property of the deceased judgment-debtor, Undadi Vasu Nambi. After attachment his daughter Pappi Brahmani and two others presented claim petitions, and the attachment was withdrawn. The decree-holder then instituted Suit No. 383 of 1882 on 10th July against the claimants, and on the 13th September the Court decreed that the property which had been attached was liable to be sold in satisfaction of the decree.

[23] On appeal, that decree was confirmed on the 16th June 1883.

On the 28th July 1881 suit No. 132 of 1877 was struck off the file.

On 6th July 1885, the decree-holder applied for execution of the decree in suit No. 132 of 1877 by attachment and sale of the property previously attached.

The Munsif granted the application, but the District Court reversed his order on appeal, dismissing the application as barred by limitation.

The decree-holder appealed to the High Court on the ground, *inter alia*, that limitation began to run from 16th June 1883 when suit No. 383 of 1882 was decided on appeal.

Anantan Nayar, for appellant.

Sankaran Nayar, for respondents.

The Court (COLLINS, C.J., and PARKER, J.) delivered the following

JUDGMENT.

The first application to execute the decree was made on 19th June 1880. An objection petition was put in on 9th February 1881 and allowed on 11th July 1881. On 10th July 1882 the decree-holder brought a suit to have it declared that the property was liable to his attachment, and got a decree in his favour on the 13th September 1882. On appeal,

* Appeal against Appellate Order 36 of 1885.

that decree was confirmed on 16th June 1883. The present application, which is to attach *the same property*, was put in on 6th July 1885.

1886 AUG. 30. — APPELLATE CIVIL. — 10 M. 22.

The District Munsif, following the Full Bench decision in *Paras Ram* v. *Gardner* (1), held that the application was not barred, since it was in effect an application to revive the previous application and was brought within three years of the date of the declaratory decree in plaintiff's favour.

On appeal, the District Judge held the application was barred, since the extension of time—if the decree-holder was entitled to any at all—could not exceed the time actually taken up in prosecuting the suit. He refused to follow the Allahabad High Court in reckoning a new period of three years from the date of the decree in the declaratory suit.

The decisions referred to by the District Munsif [*Ramsoonder Sandyal* v. *Gopessur Mostofee* (2), *Krishnaji* v. *Anandrav* (3)] which he refused to follow, do not really apply to such a case as this, since in the one case the second application was to attach *other* **[24]** lands than those at first attached, and in the second to *arrest* the judgment-debtor. They were, therefore, fresh applications and could not be regarded as reviving previous ones.

In *Virasami* v. *Athi* (4), the question was discussed. In that case the fresh application was also to arrest the debtor, and was therefore held to be barred, but the Court (Turner, C. J., and Brandt, J.) intimated that, could the subsequent application have been regarded as a continuance of the former proceedings suspended, by a step necessary to give effect to them, it would have followed *Paras Ram* v. *Gardner* (1).

This remark, however, is not authoritative, since the question did not arise in that appeal, and the cases *Krishna Chetty* v. *Rami Chetty* (5) and *Mahalakshmi Ammal* v. *Lakshmi Ammal* (6) were not brought to the notice of the Court. In appeal against appellate order No. 47 of 1883 (not reported) in which they were quoted, this Court has taken a different view.

These two rulings were given under the Limitation Act IX of 1871, Article 167; and in both of them the decree-holder applied a second time to attach *the same property*, which had been released on an objection petition and the liability of which to his decree had been established by a regular suit. In both these cases, it was held that the time must run from the date of the first application, and that the time during which the judgment-creditor was prosecuting another suit to remove obstacles to the execution of his decree could not be deducted. These cases are in conflict, therefore, with 1 All. 355, which was also a ruling under the Limitation Act of 1871. It will be observed that Pearson, J., dissented from the Full Bench ruling of the Allahabad Court and took the same view as Morgan, C.J., and Kindersley, J., in the Madras High Court.

Article 179 of the present Limitation Act follows Article 167 of Act IX of 1871, in that it makes the time run from the date of the decree, or from the date of the last application to execute; and though it might appear reasonable and equitable to exclude from the computation of the period of limitation the time during which the suit was pending, such a course is not authorized by the law.

[25] The Allahabad High Court in *Basant Lal* v. *Batul Bibi* (7) held that an application of this nature ought to be considered as one for the

(1) 1 A. 355. (2) 3 C. 716. (3) 7 B. 293. (4) 7 M. 595.
(5) 8 M.H.C.R. 99. (6) 8 M.H.C.R. 105. (7) 6 A. 23.

1886 AUG. 30. — APPELLATE CIVIL. — 10 M. 22.

revival of former proceedings after removal of the injunction, and that Article 178 of the Limitation Act 1877 (rather than Article 179) was applicable to it; but, with all respect, we cannot agree with the learned Judges in that conclusion. In the first place, the application in that case was to attach *other* property than that in respect of which the execution of the decree had been stayed; and, secondly, Article 178 only applies to applications for which no period of limitation is provided elsewhere in the schedule. But Article 179 clearly provides for *all* applications for the execution of decrees or orders, and hence Article 178 will not, in our judgment, apply.

The date of the last application in the present case was 19th June 1880, and the decree is therefore barred. We must dismiss the appeal with costs.

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10 M. 25 = 2 Weir 670.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Parker.

VERNEDE, *In re.** [23rd September, 1886.]

Criminal Procedure Code, Section 517—*Disposal of stolen property—Cow stolen—Disposal of calf, not in esse at time of theft, by Magistrate on conviction of thief.*

R's cow having been stolen, the thief after a lapse of a year and-a-half was convicted. Six months after the theft, V innocently purchased the cow, which while in his possession had a calf. The magistrate, under Section 517 of the Code of Criminal Procedure, ordered that the cow and calf should be delivered up by V to R.:

Held that, as the calf was not even in embryo at the date of the theft, the order to deliver up the calf was illegal.

CASE referred to the High Court by L. R. Burrows, District Magistrate of Nilgiris.

The case was stated as follows:—"About a year and-a-half before the 3rd of February 1886, a cow was stolen from one Rangasami and was sold by the thief to Mr. A. Stonehouse, second witness in calendar case No. 53 of 1886, on the file of the second class Magistrate of Coonoor. After that, it changed hands several [26] times and at last was purchased by Mr. Vernede for Rs. 20. While in Mr. Vernede's possession, which lasted about a year, it had a calf. In the calendar case above mentioned, one Michael was convicted of the theft of the cow, and the Magistrate passed an order that the cow and calf should be handed over to Rangasami, and that if the fine imposed on Michael should be recovered, Rs. 20 should be paid to Mr. Vernede as compensation. This latter order was quashed by the High Court in proceedings, dated 7th April 1886, Criminal Revision Case No. 180 of 1886.

"The cow and the calf appear to have been taken back to Pattikombi, in the Coimbatore District, by Mr. Vernede, who was most reluctant to part with them. The second-class Magistrate wrote to Mr. Vernede on 20th May 1886 that if he did not give up the cow and calf, he would report him to the District Magistrate for disobedience of his (Magistrate's) legal orders, adding "I should be sorry to go to this extreme and would therefore advise you to hand over the property without any delay."

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* Criminal Revision Case 431 of 1886.

1886 Sep. 23. — Appellate Criminal. — 10 M. 25 = 2 Weir 670.

"Mr. Vernede now states in his petition that the cow and calf were removed from his possession under protest on the 1st of June, and shows reasons for his prayer that the order of the second-class Magistrate may be cancelled and the cow and calf returned to him. I think the calf at all events should not have been taken away from Mr. Vernede. It could not have been in existence, not even in embryonic existence, at the time the theft was committed and is not therefore 'stolen property.'

"I think the second-class Magistrate's order should be modified by making it apply only to the cow."

The acting Public Prosecutor (Mr. *Powell*), appeared for the Crown.

The Court (KERNAN and PARKER, JJ.) delivered the following

JUDGMENT.

The calf was not any part of the stolen property. It was not in fact in embryonic existence when the theft took place. Therefore no order could be be legally made to deliver up the calf. So much of the order as relates to the calf is quashed. The rest of the order must stand.

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10 M. 27 (F.B.).

[27] APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Brandt and Mr. Justice Parker.

REFERENCE FROM THE BOARD OF REVENUE UNDER S. 46 OF THE INDIAN STAMP ACT, 1879.* [23rd September, 1886.]

Stamp Act, Schedule II, Clause 2 (a)—Agreement for or relating to the sale of goods.

By an agreement in writing the vendor agreed to sell and the purchaser to buy certain salt for a price to be paid at a future date. The salt was to be at purchaser's risk from the date of the execution of the agreement, and, if not removed within a certain time, to revert to and become the property of the vendor:

Held that this document was exempt from duty under Schedule II, Clause 2(*a*), of the Indian Stamp Act, 1879.

THIS was a case stated for the opinion of the High Court by the Board of Revenue under Section 46 of the Indian Stamp Act, 1879, on the 21st May 1886.

The proceedings which led to the reference were as follows:—

On the 8th May 1886, the Collector of Madras (R. W. Barlow) forwarded to the Board of Revenue, under Section 45 of the Stamp Act, a document presented to him for adjudication of stamp duty under Section 30 of the Act by Messrs. Arbuthnot and Co.

This document purported to be an agreement to sell salt, the price to be paid one month after the execution of the agreement, and the salt to be at the risk of the purchaser upon the execution of the document; if the salt was not removed on the date stipulated, it was agreed it should revert to and become the property of the vendor.

The Collector was of opinion that the document was a sale deed, and, as such, liable to stamp duty, while Messrs. Arbuthnot and Co. contended that it was exempt from duty as being simply an agreement for the sale of goods.

* Referred Case No. 2 of 1886.

1886 SEP. 23. — FULL BENCH. — 10 M. 27 (F.B.).

As the amount of stamp duty involved in the decision of this question was very large, the Board, while of opinion that the terms [28] of the exemption contained in Schedule II, 2 (*a*), covered the case, referred it for an authoritative ruling.

The Acting Government Pleader (Mr. *Powell*), for the Board of Revenue.

The Acting Advocate-General (Mr. *Shephard*), for Arbuthnot and Co.

It was contended by the Government Pleader that the document was really a sale of goods and therefore liable to duty (under Article 21 of Schedule I) though it purported to be an agreement to sell, because it transferred the property to the purchaser.

Counsel for the other side was not called on to argue.

JUDGMENT.*

The judgment of the Court (COLLINS, C.J., KERNAN, MUTTUSAMI AYYAR, BRANDT, and PARKER, JJ.) was delivered by

COLLINS, C. J.—We are of opinion that the exemption in Schedule II, 2 (*a*). in Act No. I of 1879, covers the case. The instrument is not liable to stamp duty.

Solicitors for Arbuthnot and Co.: *Barclay & Morgan.*

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10 M. 28 (F.B.).

ORIGINAL JURISDICTION—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Brandt, and Mr. Justice Parker.

SULLIVAN (*Petitioner*) *v.* NORTON (*Respondent*).*
[23rd August and 24th September, 1886.]

Privilege of Counsel.

An advocate in India cannot be proceeded against civilly or criminally for words uttered in his office as advocate.

[**F.**, 9 Cr.L J. 385=1 Ind. Cas. 799=19 M.L J. 217 (219)=6 M.L.T. 15; **R.**, 29 A. 685 (687); 19 B. 340 (347); 17 M. 87 (88)=3 M.L J. 94; 31 M. 400 (402)=18 M.L J. 353=4 M.L.T. 222=10 M.L.T. 489 (490); 2 Bom. L.R. 3 (6 and 15); 9 Bom.L.R. 1287 (1288); 9 Ind. Cas. 503 (510); 3 L.B.R. 265 (272); 11 M.L.T. 416 (417)=1912 M.W.N. 476; **D.**, 2 L.B.R. 130 (133).]

APPLICATION under Section 10 of the Letters Patent for the High Court at Madras.

The facts appear from the judgment of the Court (COLLINS, C.J., KERNAN, MUTTUSAMI AYYAR, BRANDT, and PARKER, JJ.).

[29] The Acting Advocate-General (Mr. *Shephard*) and Mr. *Branson*, for petitioner.

Respondent in person.

JUDGMENT.

COLLINS, C.J. (KERNAN, MUTTUSAMI AYYAR, and PARKER, JJ., concurring).—This is a petition of the Honorable Henry Edward Sullivan, Senior Member of Council and a Member of the Madras Civil Service, complaining of the conduct of Mr. Eardley Norton, Barrister-at-Law and an Advocate of the High Court of Judicature, Madras.

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* Civil Miscellaneous Petition 12 of 1886.

1886 SEP. 24. FULL BENCH. 10 M. 28 (F.B.).

The prayer of the petition is as follows:—

(1) That this Honorable Court will call upon the said Eardley Norton to explain under what circumstances he applied for and obtained a subpœna against your petitioner and to justify the statements made by him upon such application.

(2) That he may also be called upon to explain his conduct in making charges against your petitioner during the trial of the case of a grossly defamatory character in the absence of any evidence on the record to justify the same.

(3) That this Honorable Court will pass such orders on this petition and on the affidavit filed herewith as to your Lordships may seem fit and proper.

(4) That the said Eardley Norton may be ordered to pay the costs of and incident to this petition and the order to be made thereon.

Mr. Sullivan alleged in his affidavit accompanying the petition that he had been subpœnaed as a witness on behalf of the defence in the prosecution of the Queen-Empress of India against the zamindar of Bodinayakanur and others who were charged with abetment of dacoity and other offences under the Indian Penal Code; and that although he was in Court he was not called at the trial, but that Mr. Norton, who defended the zamindar, made charges of a grossly defamatory character against him not only during the course of the trial but also when making an application to the High Court for leave to summon certain witnesses, he (Mr. Sullivan) being one of those witnesses.

The words principally complained of were—

1st—Mr. Norton when making an application to the High Court for leave to summon witnessess, said—

[30] "The defence is that this is a concocted case and that Mr. Sullivan knew it to be so concocted and he kept the case up for ulterior purposes. Why should Mr. Sullivan try to ruin my client? He knows that if he is able to smash the zamindar of Bodinayakanur, he will have a strong case against Mr. Crole.

"That it is a concocted case and concocted to Mr. Sullivan's knowledge and for reasons of personal animosity."

And in his speech to the jury at the trial he said—

"He was not at all quite certain of calling witnesses, though, as at present advised, he believed he would call some. Independently of witnesses, he would take his stand upon the fact that no motive had been proved against his client for the commission of the offence with which he was charged. Nor had the prosecution even suggested the shadow of a motive why a person in the position of the zamindar of Bodinayakanur should behave himself in the manner alleged for the purpose of committing that which was a dacoity with the mere object of loot. If he were forced to call evidence, he would say that there had been a persecution, and that the motive that influenced the persons who had worked out the case against his client was simply the desire to reach, through his client, Mr. Crole, the then Collector of Madura: they were influenced by animosity and a spirit of revenge. There existed very bitter feeling on the part of some persons against Mr. Crole,

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whose conviction—moral conviction—was to be obtained through the physical conviction of the zamindar.

"The question for you, gentlemen, to decide is, should I have been committed to stand my trial here, had the case been opened in the Lower Court as it has been opened in this? And at the same time I am also entitled to say this, now that we have traced these documents to the police from Mr. Garstin, I am fairly entitled to ask you whether you think that it is likely that, under these circumstances, with all these facts before you, Mr. French is the true culprit upon whom the responsibility of the introduction of Mr. Crole's name rests, an introduction which my learned friend has characterized as a mistake. And if you agree with me that the responsibility rests, not with Mr. French, but with [31] a powerful, if nameless, *clique*, then ask yourselves, is this a prosecution instituted in the ends of public justice or to promote the ends of private malice?

"You may remember that I wished to recall Mr. Garstin to ask him whether he had not communicated this scandalous record to the Government, that the learned Chief Justice said that I must give names, that I replied to Mr. Grant Duff, to the Honorable Mr. Sullivan, to the Honorable Mr. Master and that his Lordship finally ruled the question irrelevant until and unless I could prove a conspiracy. I have already told you, gentlemen, that I cannot with the evidence at my disposal, establish that what the law would alone hold to be a conspiracy. But there is enough upon the record already to entitle me to ask you to believe that the present case is the outcome of personal vindictiveness against Mr. Crole, that it is not a prosecution, but a persecution.

"As I have begun so I will end. No motive is opened. No motive is alleged: you cannot convict upon so bald a statement as that advanced by the prosecution. Give me your verdict, gentlemen, and in giving it believe the theory for the defence that this is a case cast upon the waters to gratify the shameful ends of private malice."

The petition supported by affidavits was originally heard before Muttusami Ayyar and Brandt, JJ., and a rule was granted calling upon Mr. Norton under the provisions of Section 10 of the Letters Patent (amended) as an Advocate of the High Court to explain the matters urged against him contained in the affidavits.

Upon the rule coming on for argument, the Acting Advocate-General (Mr. *Shephard*) and Mr. *Branson* appeared for Mr. Sullivan in support of the rule, and Mr. Norton showed cause against it.

Mr. Norton contended that the order of the Court calling upon him to answer the matters contained in the affidavits was bad in law, as it was issued by a Divisional Bench consisting of only two Judges; that it should have been issued under the seal of the Court; and that it should have been heard by a Full Bench. He also contended that the order was issued without such *reasonable cause* as was contemplated by Section 10 of the Letters Patent.

He further submitted that, taking everything to be true as stated in Mr. Sullivan's affidavit, no reasonable cause has been [32] shown to enable the High Court to proceed under Section 10; and that

in all he said with regard to Mr. Sullivan he was acting under his instructions and was absolutely privileged (*Munster* v. *Lamb*) (1).

The Acting Advocate-General in supporting the rule contended that Mr. Norton had exceeded his privilege as an advocate. He admitted that in an ordinary case it would be sufficient for counsel to say that he was instructed, but in the present case Mr. Sullivan's position should be taken into account and that counsel must, before he makes such serious allegations, satisfy himself of the truth of the charges or at least take more than ordinary pains to satisfy himself that the charges are true. He contended that it was impossible for Mr. Norton to say that he was acting under instructions with respect to the matter complained of in his summing up his evidence to the jury. There was no evidence of any kind before the jury that Mr. Sullivan had been privy to the conspiracy alleged or had been guilty of misconduct of any kind and yet Mr. Norton had reiterated his charges against Mr. Sullivan, and although he did not mention Mr. Sullivan's name, yet he submitted to the jury that Mr. Sullivan was guilty of gross misconduct in connection with the trial.

The Acting Advocate-General referred us to the Evidence Act, Sections 149 and 150.

The Acting Advocate-General also contended that the rules of the English common law did not apply to advocates in this country in cases of defamation—Indian Penal Code, Section 499—and a person uttering defamatory words against another would be guilty of defamation unless he came within the 9th exception given by the Act: in fact the imputation must be made in good faith for the protection of the interest of the person making it or of any other person or for the public good; and that the privileges of an advocate in India, so far as liberty of speech is concerned, is not as great as it is by the common law of England.

I am of opinion that a Divisional Court consisting of two Judges has power to direct a rule to be issued calling on an advocate of the High Court to answer matters alleged against him under Section 10 of the Letters Patent (amended).

The first paragraph of the prayer of the petition was not argued before us. Mr. Sullivan has no right to ask this Court to inquire [33] why Mr. Norton obtained a subpœna against him. The High Court granted it for reasons that appeared to them sufficient.

The only point really involved in this case is, will the High Court take notice of defamatory words against an individual used by an advocate during the progress of the case.

The common law of England is that an advocate is not civilly or criminally responsible for anything he may say in his office as advocate.

The Courts in this country are undoubtedly bound to administer, within the original jurisdiction, *inter alia*, the common law as it prevailed in England in the year 1726 and which has not been subsequently altered by statutes especially extending to India or by the Acts of the Legislative Council of India.

Now there can be no doubt what the common law in England in relation to the privileges of advocates was and is. In *Brook* v. *Montague* (2) the Court of King's Bench held that a counsellor in law retained hath a privilege to enforce anything which is informed him by his client and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false.

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(1) 11 Q.B.D. 588=52 L. J. (Q.B.D.)

(2) Cro. Jac. 90.

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In *R.* v. *Skinner* (1) Lord Mansfield, C.J., said "Neither party, witness, counsel, jury, or judge can be put to answer, civilly or criminally, for words spoken in office."

In *Hodgson* v. *Scarlett* (2) it was held by Lord Ellenborough, C.J., that an action for defamation will not lie against a barrister for words spoken by him as counsel in a cause pertinent to the matters in issue.

In *Kennedy* v. *Brown* (3) Erle, C.J., says, "The Advocate is trusted with interests and privileges and powers, almost to an unlimited degree. His client must trust to him at times for fortune and character and life. The law trusts him with a privilege in respect of liberty of speech which is in practice bounded only by his own sense of duty, and he may have to speak upon subjects concerning the deepest interests of social life and the innermost feelings of the human soul, ... His words and acts ought to be guided by a sense of duty—that is to say, duty to his client—binding him to exert every faculty and privilege, and power in order that he may maintain that client's right, together [34] with duty to the Court and himself, binding him to guard against the abuse of the powers and privileges intrusted to him, by a constant recourse to his own sense of right."

In *Dawkins* v. *Lord Rokeby* (4), the Court of Exchequer Chamber presided over by Kelly, C.B., and consisting of nine judges, held that "the authorities are clear, uniform and conclusive, that no action of libel or slander lies, whether against judges, or witnesses, or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognised by law.

"The principle which pervades and governs the numberless decisions to that effect is established by the case of *Floyd* v. *Barker* (5), and many earlier authorities from 27 Edw. III, pl. 15; 9 Hen. IV, 60, pl. 9; and 9 Edw. IV, 3, pl. 10, down to the time of Lord Coke." See also *Revis* v. *Smith* (6), in which a number of authorities are cited.

In *Munster* v. *Lamb*, the Master of the Rolls says, referring to *Dawkins* v. *Rokeby* and other cases, "if it is right and wise that such a privilege shall be extended to a Judge, . . . and if the privilege is equally given to a witness, ... how can it be considered that it is not equally, I would say more, beneficial to the public that a counsel and an advocate should come to the performance of his duty with an equally free and unfettered mind? If any one needs to be free of all fear in the performance of his arduous duty an advocate is that person. His is a position of difficulty: he does not speak of that which he knows, but he has to argue and to support a thesis which it is for him to contend for; he has to do this in such a way as not to degrade himself; but he has to do it under difficulties which are often pressing. If in this position of difficulty he had to consider whether everything which he uttered were false or true, relevant or irrelevant, he could not possibly perform his duty with advantage to his client; and the protection which he needs and the privilege which must be acceded to him is needed and accorded above all for the benefit and advantage of the public."

From the cases I have quoted it is abundantly clear that an advocate speaking in a Court of Justice in England is not liable either civilly or criminally for defamatory words spoken in his [35] office if

(1) Lofft. 55. (2) 1 B. and A. 232. (3) 32 L.J.C.P. (N.S.) 137.
(4) L R. 8 Q B. 255. (5) 12 Co. Rep. 23.
(6) 18 C.B. 126=25 L.J. (C.P.) 195.

they are pertinent to the inquiry. But it is said by the Acting Advocate-General that the principles of the common law thus laid down are not applicable to this country, and that the privileges as to the liberty of speech of an advocate in his office as advocate in this country are materially abridged, and that an advocate is liable, if he uses defamatory language against an individual, to be prosecuted for defamation unless he can bring himself within the 9th exception of Section 499 of the Indian Penal Code; and Section 150 of the Evidence Act (Act I of 1872) is also referred to as supporting this contention. That section however refers to questions put in cross-examination by any barrister, pleader, vakil or attorney of the class referred to in Section 148 and gives the court the power, if such Court is of opinion that such question was asked without reasonable grounds to report the circumstances to the High Court, but it limits the scope of the section to questions asked under the circumstances mentioned in Section 148.

It is also said that Mr. Norton should have considered the position of Mr. Sullivan as a Member of Council before he carried out his instructions and made the allegations complained of against Mr. Sullivan.

I cannot agree with the Acting Advocate-General. I think that the advocates in this country have and should have the same privileges in respect of liberty of speech (bearing always in mind the remarks of Erle, C.J., in *Kennedy* v. *Brown*) they have so long enjoyed in England; and that in this country it would be beyond measure embarrassing to the advocate and disastrous to the interests of the client, if the advocate was exposed to the liability of a criminal or civil charge for defamation for words uttered in court. To quote again the words of the Master of the Rolls in *Munster* v. *Lamb*, "If any one needs to be free of all fear in the performance of his arduous duty an advocate is that person." I see no reason to fear that the privilege will be abused, but if it should unfortunately turn out that I am mistaken, measures can at once be taken to prevent the abuse of the privilege, should the powers the High Court possesses under Section 10 of the Letters Patent (amended) prove insufficient. I hold therefore that an advocate in this country cannot be proceeded against either civilly or criminally for words uttered in his office as advocate.

I disagree with the learned Acting Advocate-General that an advocate is bound to consider the position in life of the person **[36]** whose conduct he is condemning. His words and acts ought only to be guided by a sense of duty—duty to his client—and by a constant recourse to his own sense of right to guard against the abuse of the powers and privileges intrusted to him.

Mr. Sullivan complains that Mr. Norton acted recklessly, unprofessionally and unscrupulously and without that due care and caution (see Section 52, Indian Penal Code, definition of good faith) which as an Advocate of the High Court he was bound to take. Mr. Norton's reply is, "I acted under my instructions: all I said and did was within the four corners of those instructions: *and my duty to my client* compelled me to say what I said."

There is no allegation in the petition that Mr. Norton was actuated by malice against Mr. Sullivan, and it cannot be said that the defamatory matter complained of (if true) was not relevant to the inquiry. I am of opinion that no reasonable cause has been shown to empower the High Court to take proceedings under Section 10 of the Letters Patent (amended), and I think therefore that this petition should be dismissed.

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BRANDT, J.—As stated in the few words delivered at the hearing in dismissing the application, we were all agreed that Mr. Norton was protected in what he said by the privilege of counsel, but that this was a proper case for inquiry under the 10th Section of the Letters Patent (amended).

We were all further agreed as to the contention that a rule could not legally be made by a Divisional Bench of the Court calling on Mr. Norton under that provision of law to answer and explain in respect of the matters alleged against him being untenable.

I entirely concur with the learned Chief Justice and my learned colleagues that there were not grounds for calling upon Mr. Norton for any explanation in respect of any thing said or done by him in proceedings prior to trial or during the course of the trial in which his client was concerned prior to the conclusion of the evidence taken therein.

As regards counsel's speech to the jury on the whole case, I was and remain of opinion that in the case of an issue to be tried as to whether by inuendo or implication the Hon. Mr. Sullivan was indicated in the several passages of that speech there would have been sufficient evidence to lay before a jury with a view to their giving a verdict. As however on mature considera-**[37]** tion I could not undertake to say that question should be answered beyond doubt in the affirmative, the further question whether, if it were beyond all resonable doubt that the imputations were directed at that gentleman, there would be reasonable cause for exercising the powers conferred upon this Court by the Letters Patent does not call for decision.

Mr. Norton did not disclaim an intention on his part to imply that he reiterated and emphasised the allegations which under instructions he had made prior to and during the preceding part of the trial against the Hon. Mr. Sullivan, and it certainly is not going too far to say that the jury might, whether rightly or wrongly, understand that those observations were directed at that gentleman.

As we are agreed that there are not grounds on which Mr. Norton should be censured even, I abstain from saying anything further than it is in my opinion a question whether his client's interests might not have been equally well protected without suggesting that the conspiracy, if there was one, was the result of personal feelings of enmity on the part of individuals indicated with more or less precision.

As to the law on the subject the English cases are sufficiently stated by the learned Chief Justice. There are among them authorities which I can accept without hesitation as sufficient for the disposal of the matter before us, without expressing any opinion as to whether we should be bound to go to the extreme length to which the case of *Munster* v. *Lamb* has carried the law as now expounded in England.

As regards the arguments of the learned Acting Advocate-General, first that the courts in this country are not bound absolutely to follow the English precedents, or to adopt them as conclusively applicable to all libel or slander suits, *Abdul Hakim* v. *Tej Chandar Mukarji* (1), but that regard may and should be had to the provisions of law, if any, *in pari materia*, specially applicable to this country, and secondly that some consideration should have been had for the position and presumably high character of the petitioner in this case, I am by no means prepared to express entire dissent from the several propositions propounded in the case cited ; and as

(1) 3 A. 815.

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to the second, I consider it sufficient to say that the legal [38] maxim quoted in Court that "all men are equal in the eye of the law" though it undoubtedly is true, absolutely true in one sense, is after all but a maxim, and such maxims are from the nature of the case capable of misleading and of being misapplied unless applied with reservation and nice discremination; and this particular maxim is in my opinion by no means of itself conclusive in respect of the proposition put forward by the learned Advocate-General.

I would refer to one instance only in which the maxim is not and cannot be adhered to to the letter an instance of everyday occurrence: when there is a question as to the probable truth or untruth of a particular statement, and a statement in one sense has been made by a person of hitherto high accredited probity and truth, and of position such as presumably to place him above temptation to speak untruly, and a contradictory statement on the other side by one whose character is not above suspicion and whose circumstances might lay him open to temptation, a Judge who on these grounds accepted the statement of the former in preference to that of the latter would not, I presume, be obnoxious to a charge of having violated the legal maxim above enunciated.

Again, having regard to probabilities, experience shows that there is at least equal truth in the proposition *nemo repente fuit turpissimus*: men of good character do not as a rule at one bound become absolutely depraved. To the extent that under instructions counsel might suggest the possibility of such a change, I am willing to accept the applicability of the maxim, but not further, in this particular case.

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APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

THE SECRETARY OF STATE FOR INDIA *v.* THE MUNICIPAL COMMISSIONERS OF THE CITY OF MADRAS.*

[21st April and 7th September, 1886.]

City of Madras Municipal Act, Section 123—Tax on buildings—Hospital built by Government—Standard of hypothetical rent.

Under Section 123 of the City of Madras Municipal Act, the gross annual rent at which a building might reasonably be expected to let from month to month or from [39] year to year is for the purpose of assessment to house-tax under the Act, to be deemed to be the annual value of such building. The Lying-in Hospital at Madras, built and supported by Government, having been assessed by the President of the Municipality as on a rental of Rs. 1,000 a month the Magistrates on appeal reduced the assessment, finding, that Rs. 7,920 per annum would be a reasonable rent, having regard to the letting value of the buildings in the neighbourhood, but, at the request of the Municipality, referred the following questions to the High Court:

Whether (as contended by Government) the property in question should be valued and assessed on the rent which, on the property being offered in the open market without reserve, a person desirous of securing it would have to pay; or

Whether (as contended by the Municipality, it should be valued and assessed on the highest reserve rent which an owner of the property offering it in the open market would reasonably demand, and below which sum he would not be willing to let.

Held, that the standard value was what the hypothetical tenant requiring the building for use as a hospital would be willing to pay rather than rent a less

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* Referred Cases 2 and 3 of 1886.

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suitable building and adapt it to his requirements at his own expense, and that in this sense the contention of the Municipality was correct.

CASE stated and referred to the High Court under Section 193 of the City of Madras Municipal Act.

The facts are set out in the judgment of the Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.).

The Acting Advocate-General (Mr. *Shephard*), for the Secretary of State.

Mr. *Wedderburn*, for the Municipality.

The following authorities were referred to in argument :—

Rosher's Parochial Assessments Act, pp. 83, 86, 87, 91, 99, 100, 101, 106, 122, 133; *The Queen* v. *London and North-Western Railway Co.* (1); *Mersey Docks* v. *Liverpool* (2); *Brown on Rating*, pp. 26, 27, 30.

It was contended by the Acting Advocate-General that if a lease of the Lying-in Hospital were put up to auction, Government could secure it for a sum just in excess of that which would be offered by persons who might require the building for ordinary purposes. *i.e.*, purposes other than that for which the building was specially built and adapted, and that such sum was the amount at which the building should be assessed.

For the Municipality it was urged that as in the hypothetical market there was one person who required the building for a special purpose and no other suitable building, the hypothetical **[40]** landlord might reasonably demand and could obtain a higher rent than would be offered if the auction were without reserve.

JUDGMENT.

This is a case referred to this Court for decision under Section 193 of Madras Act I of 1884. The buildings which compose the Lying-in Hospital in the town of Madras were valued at Rs. 12,000 per annum, and the Superintendent's residence at Rs. 1,248 per annum, for the purpose of calculating the tax due upon them under Section 119. The Government preferred an appeal against this valuation to the President of the Municipality under Section 190, on the ground that it was not in accordance with the provisions of Section 123. The President, however, confirmed the valuation.

Again the Government appealed from his decision to the Magistrates under Section 192. Mr. Chisholm, the Government Architect, originally valued all the buildings, including the Superintendent's residence at Rs. 10,488 per annum. He stated in his evidence before the Magistrates that, if the special character of the buildings alone were considered, Rs. 1,000 per mensem would be a fair rent for Government to pay for the Hospital, including the Superintendent's residence and Apothecary's quarters, which, he said, would fetch Rs. 190 a month, and that, ordinarily, a fair rental for Government in such circumstances to pay would be Rs. 833 a month. It was contended for the Municipality that though the Government might have much difficulty in obtaining tenants for the buildings if they were to let them, yet the present value of the buildings to the hypothetical tenant was the true test of rateable value, and that the consideration of what the Government might get, if they rented the buildings to others who might not require them for use as a hospital, was immaterial.

(1) L.R. 9 Q B. 134. (2) L.R. 9 Q.B. 96.

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The Lying-in Hospital must, for the purpose of this reference, be taken to be a building occupied by the owner himself. Admitting the principle that the value to the owner, whether he occupies the building himself or lets it to a tenant, is to be measured by the amount of rent per annum it would be worth to a hypothetical tenant on the terms laid down by the Act as the standard, the Magistrates came to the conclusion that such amount could be pretty accurately calculated only by considering the letting value of other buildings in the same locality, that is, by considering the demand for the Lying-in Hospital in the open market. In this view, and also taking into consideration the value of the premises **[41]** to the present tenant, the Magistrates reduced the rateable value (excluding the Superintendent's residence and the Apothecary's quarters as to which the parties were not at issue) to Rs. 660 per mensem, or Rs. 7,920 per annum. But, at the request of the respondent's solicitor, they referred for our decision the following question:—

Whether the property in question should be valued and assessed on the rent which, on the property being offered in the open market without reserve, a person desirous of securing it would have to pay; or, whether it should be valued and assessed on the highest reserve rent which an owner of the property offering it in the open market would reasonably demand and below which sum he would not be willing to let.

Our decision must depend on the provisions of Section 123 of Madras Act I of 1884, which provides that "the gross annual rent at which a building or land might reasonably be expected to let from month to month or from year to year shall for the purposes of assessment under this Act be deemed to be the annual value of such buildings or land" The letting value from year to year is the standard prescribed also in the Parochial Assessments Act (6 and 7 Will. IV, cap. 96), and the words used in it are that the rates are to be made upon an "estimate of the net annual value of the several hereditaments rated thereunto, that is to say, of the rent at which the same might reasonably be expected to let from year to year," &c. The intention of the Legislature in referring to a tenancy from month to month or from year to year was evidently to establish in regard to all buildings a uniform rule for assessing the value of the occupation. The standard of value is certainly, as observed by the Magistrates, the value of the property to the owner, which is to be measured, whether he occupies the property himself or lets it to a tenant, by the amount of rent per annum it would be worth to a hypothetical tenant on the terms laid down by the Legislature. Having regard to the course of decisions under the English Statute, there are several matters which ought to be kept in view in fixing the rateable value. The standard value is the rent which the building would be worth to a hypothetical tenant on the terms laid down by the Statute. The terms on which any particular property is in fact let are therefore immaterial, and the tenancy from month to month or year to year is prescribed as the standard by which all buildings should be valued in order that their assessments **[42]** might be equal. Again, the standard value is the value which the building possesses at the time the assessment is made. Hence the value of the property in the past or future is immaterial. The present value is not the value of any exceptional year but the value which under present circumstances the building would be worth to let in an average year or taking one year with another. Neither exceptional repairs nor exceptional profits made in a particular year are to be considered. In letting a building from year to year, the rent would ordinarily be regulated by

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two matters as observed by Blackburn, J., in *The Queen* v. *London and North Western Railway Co.* (1) on the one hand by the benefit which the tenant could be likely to derive from the occupation, because he would not give more; on the other hand, by the nature of the property, such as local situation, or the number of persons there are who could supply him with an equally eligible building and be willing to let it to him; for, while he would not be willing to give more than he expects to gain by the occupation, he would not give even that if he could get a similar building at a lower price. Further, in rating property, it must generally be assumed that the hypothetical tenant would be in the same position and use the building in the same way as the party, rated, for, the object is to ascertain its intrinsic value to the owner in its present condition. In *The Queen* v. *The School Board for London* (2) it was contended, *inter alia*, for the respondent, before a Divisional Court of Queen's Bench, that the rent which the School Board might be supposed to be willing to give for the school premises if the Board were in the market anxious to rent premises suitable for use as school, was a fair test of rateable value. On the other hand, it was urged for the appellant —1st, that the School Board owning the premises should not be supposed to be in the market anxious to rent premises, but should be excluded from the number of hypothetical tenants who might be supposed to be willing to rent the school premises, and 2ndly, that the only true indication of rateable value was the rent for which the premises could in their present condition be let to a hypothetical tenant from year to year, supposing they were not used for Board Schools but were applied to any other use or purpose for which they could be made available by a tenant. The respondent's contention was allowed and the appellant's objections were overruled. Cave, J., **[43]** said: "when you want to find what a hypothetical tenant will give, you must not take a man who does not want the permises for the use for which they are built, but wants to use them for some other purpose, unless you can first show that they cannot be let for the purpose for which they are built. If they cannot be let for the use for which they are built, then, no doubt, you may go and see what you can do with them for some other purpose and the best subsidiary purpose you could put them to. But, as long as they can be let for the purpose for which they are built, it seems to be idle to say "well if this man were not occupying them, they could not be let to anybody else."

The Court of appeal confirmed the decision (the case is not yet reported). Lord Esher, M.R., observed: "In this case there was no tenant as the Board were owners and occupiers. All possible tenants must be looked at. In estimating the rent, no tenant was excluded and the actual occupier might be included, and the owner, if he was occupier, as to whom it might be considered what rent he might be reasonably expected to pay. The School Board might be tenants, and therefore the rent they would be willing to pay might be considered."

Lord Justice Brown says: "the test of rateable value was the rent for which the premises might reasonably be expected to let to a tenant. In estimating that, in the present case, the rent for which the premises might be reasonably expected to let to the Board themselves may be considered, for how could the only body likely to require the premises be excluded from the estimate, that is, why should the only body likely to require or use the premises be excluded from the estimate of rent payable?"

(1) L.R. 9 Q.B. 134.

(2) 55 L.J. Q.B.D. 53.

Having these principles in view, we are of opinion that the Lying-in Hospital should not be valued at the rent which it would fetch if it were offered in the open market without reserve. Admittedly there is but one building in Madras specially eligible for use as a Lying-in Hospital, and it is occupied by the owner. If the owner, the only person likely to require the premises, were excluded from the market, then the hypothetical tenant would take advantage of the absence of demand for it and pay no more than those who require it for use other than as a hospital would choose to pay. No prudent landlord, who is aware of the fact that only one person requires the building for use as a hospital, would offer it in the open market without reserve.

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[44] Nor can any reserve rent which the landlord may arbitrarily demand be taken to represent the standard value. If such demand is far in excess of the special convenience or benefit which the hypothetical tenant can expect to derive from the occupation, the tenant would prefer to rent less suitable buildings and adapt them to his requirements, though at some expense, or to forego the special convenience if it is not indispensable.

The standard value is then what a tenant requiring the building for use as a hospital would consider it reasonable to pay from year to year rather than resort to renting a less suitable building and adopting it to his requirements at his expense. In this sense, the standard value is the higher reserve rent which the owner of the property offering it in the open market would reasonably demand and below which sum he would not be willing to let.

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10 M. 44.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

KRISHNA AND ANOTHER (*Defendants Nos.* 2 *and* 3), *Appellants in Appeal No.* 127, THE COLLECTOR OF SALEM (*Defendant No.* 1), *Appellant in Appeal No.* 130 *v.* MEKAMPERUMA AND OTHERS (*Plaintiffs*), *Respondents.** [13th and 15th April, 1886.]

Regulation X of 1831, *Sections* 1, 2, 3—*Regulation V of* 1804, *Section* 14 (4), *Section* 20 - *Sale for arrears of revenue of mitta held by tenants in common during minority of some of the owners—Minority no bar to sale—Civil Procedure Code, Section* 32.

A mitta held by tenants in common was sold for arrears of revenue at a time when the owners of a moiety thereof were minors.

In a suit brought by the mother of these minors on their behalf against the Collector to set aside the sale, the District Court held that Regulation X of 1831, Section 2, absolutely debarred the Collector from selling the estate of the minors during their minority and set aside the sale so far as their interests were concerned :

Held, on appeal, that, the minors not being sole proprietors, their estate was not one of which the Court of Wards could assume the management and, therefore, Section 2 of Regulation X of 1831, did not affect the sale.

[45] In the above-mentioned suit the plaintiffs impleaded also the other previous owners of whom one was the purchaser at the sale. Two others in their written statement pleaded that the purchase had been made in fraud of their rights, and claimed to be still entitled to their shares in the mitta on the ground that the purchaser must be held to have purchased for their benefit (Indian

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* Appeals 127 and 130 of 1885.

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Trusts Act, 1882, Section 90). They further claimed that should the sale be set aside so far as the plaintiffs' interests were concerned, the sale of their interests also should be held to be null and void.

Before the suit came on for hearing the District Judge *suo motu* ordered that these two defendants should be made plaintiffs in the suit under Section 32 of the Code of Civil Procedure.

At the date when this order was made, the claim of these defendants, had they sued to set aside the sale in their own interest, was barred by limitation: *Held* that the order was illegal.

[**R.**, 34 B. 91 = 11 Bom.L.R. 1102 (1105) = 4 Ind.Cas. 249 ; 35 C. 1065 = 8 C.L.J. 286 = 13 C.W.N. 186 = 4 Ind.Cas. 369 (370) = 5 M.L.T. 91 (92) ; **D.**, 17 M. 12 (13) = 3 M.L.J. 176.]

APPEALS from the decree of C. W. W. Martin, District Judge of Salem, in suit No. 9 of 1884.

The facts appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and PARKER, J.).

Bhashyam Ayyangar and *Kalianaramayyar*, for appellants.

The Acting Advocate-General (Mr. *Shephard*) and *Ramasami Ayyangar*, for respondents.

JUDGMENT.

The plaintiffs' father, Mekaperuma Udayan was the owner of half the Senthamangalam mitta. He died in 1876, and the plaintiffs, Mekaperuma and Ramaswami, were then registered as the owners of his moiety. The other sharers were Krishna Chetti, defendant No. 2, who owned $\frac{1}{12}$ (which he purchased in 1880); Solamuttu, Karuppa and Varada Udayan, defendants Nos. 4—6, who jointly owned another $\frac{1}{12}$; Vela Gounden, defendant No. 7, who owned $\frac{1}{4}$; and Malayandi Pillai, defendant No. 8, who owned the remaining $\frac{1}{12}$.

On the death of plaintiffs' father, one Varadaperuma Udayan was appointed their guardian by the District Court under Section 20, of Regulation V of 1804. The kists due to Government were allowed to fall into arrears for faslis 1290 and 1291, in consequence of which the whole mitta was attached, and was sold on 9th March 1882 by revenue auction. It was purchased by plaintiffs' guardian, Varadaperuma Udayan, for Rs. 65,000 on behalf of plaintiffs, but as he did not pay the balance of the purchase-money, the sale was ultimately cancelled.

The plaintiffs' guardian died on 1st December 1882 and shortly afterwards a fresh attachment of the mitta was made for arrears which had accrued subsequent to the first attachment. At the **[46]** date of this attachment no new guardian had been appointed by the Court for the minor plaintiffs under Section 20 of Regulation V of 1804. The Collector did write to the Judge on 2nd March 1883, suggesting that a fresh appointment should be made (Exhibit IX); but this letter appears to have been despatched subsequent to the attachment which was made in January. From the endorsement made by the District Judge upon this letter (dated 16th July 1883), it would appear that he proposed to consult the Collector as to the fitness of Subbraya Udayan (plaintiffs' brother-in-law) to be appointed guardian, but there is nothing to show whether any further steps were taken. At any rate when the mitta was brought to sale a second time on 14th September 1883, no fresh guardian had been appointed by the Court.

At that sale the mitta was knocked down to defendant No. 2 for Rs. 1,50,800. Plaintiffs' mother and Subbaraya Udayan above-mentioned attended the sale and bid for plaintiffs, but their last bid was Rs. 50 less

than that of defendant No. 2. It would appear that they had in hand at that time some Rs. 15,000, which was nearly double the amount of the arrears of kist due on the mitta but plaintiffs' mother and defendant No. 2 would appear to have been equally desirous that the mitta should be sold, each hoping to become the successful purchaser of the whole estate.

The plaintiffs' mother, Sellammal (the unsuccessful bidder), now sues on their behalf to set aside the sale, on the ground that the whole proceedings were illegal and not binding on the plaintiffs. The plaint was filed on 12th March 1884, and alleged, among other things, that the Collector (defendant No. 1) was bound to have attached the moveable property of the registered holders in the first instance; that the demand notice was not served upon any properly constituted guardian to the minor plaintiffs, nor was it legally served; that the sale of the whole of this valuable mitta for so small an arrear was unnecessary and illegal, and that the minors' interests were not liable to be sold at all. The plaint impleaded the Collector as defendant No. 1 and the other joint owners (before the sale) as defendants Nos. 2—8.

Defendant No. 2 and his undivided nephew, Ramasami Chetti, defendant No. 3, upheld the validity of the sale.

Defendants Nos. 4 and 7 put in written statements, in which they alleged that they were still entitled as co-owners to their respective shares, and that the defendant No. 2, having purchased in **[47]** fraud of their rights, must be held to hold the estate for their benefit as co-owners (Section 90, Indian Trusts Act II of 1882). They contended, however, that should the plaintiffs succeed in the suit, the sale of the interest of themselves also should be held null and void.

The other defendants were *ex parte*. It will be seen from this that defendants Nos. 4 and 7 claimed to be still entitled to their shares on grounds utterly inconsistent, and whether the sale itself was valid or invalid as regards the plaintiffs. They did not ask to be made plaintiffs and throw in their lot with plaintiffs to set aside the sale, but they asked for the benefit of the decree should plaintiffs succeed, and, if plaintiffs failed, they claimed a relief on a totally different cause of action on which they had never sued.

The only issue framed was the general one, whether the sale was valid and binding on plaintiffs and defendants Nos. 4 and 7. Some time after this issue was settled, and before the suit came on for hearing, the District Judge *suo motu* ordered that defendants Nos. 4 and 7 should be made plaintiffs in the suit instead of defendants, and directed them to pay stamp duty upon the relief which they apparently wished to obtain should they be considered as not being in the same interest with plaintiffs. Defendant No. 4 was willing to pay the stamp duty, but defendant No. 7 was not, and ultimately the Judge ordered them to be entered plaintiffs Nos. 3 and 4 under Section 32 of the Code of Civil Procedure without the payment of any stamp duty.

At the trial the District Judge held that the provisions of Regulation X of 1831 absolutely debarred the Collector from selling the plaintiffs' estate during their minority, and therefore set aside the sale as far as their share was concerned. He held, however, that it was valid as regards the shares of the other co-owners so far as the Collector was concerned, but that it was not binding on plaintiffs Nos. 3 and 4 as regards the relations between them and defendant No. 2. The decree after setting aside the sale of plaintiff's share directed defendant No. 2 to execute reconveyances to plaintiffs Nos. 3 and 4.

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Against this decree defendants Nos. 2 and 3 in Appeal Suit No. 127 and the defendant No. 1 (the Collector) in Appeal Suit No. 130 have appealed. In the former appeal we are constrained to hold that the procedure of the District Judge in transforming defendants Nos. 4 and 7 into plaintiffs Nos. 3 and 4 was, under [48] the circumstances, irregular. It does not appear that either of them desired to become a plaintiff, nor could they in this suit have been granted relief on the same cause of action as that set forth by plaintiffs Nos. 1 and 2. Their position as plaintiffs could only date from 14th March 1885, which was the date of the Judge's order. On that date a suit by them to set aside a sale for arrears of Government Revenue would have been barred (Article 12-C, Schedule II of the limitation Act); while a suit based on Section 90 of the Trusts Act would set fourth a totally different cause of action in which plaintiffs Nos. 1 and 2 were not interested, and which was altogether foreign to their claim. Defendants Nos. 2 and 3 can, under Section 591 of the Code of Civil Procedure, dispute the validity of the order passed on 14th March 1885, and we must set aside the order passed under Section 32 and restore plaintiffs Nos. 3 and 4 to their original positions on the record.

The sole ground on which the District Judge has allowed the claim of plaintiffs 1 and 2 is the legal one that Regulation X of 1831 debars the Collector from selling for arrears of revenue the estates of minors which are not subject to the Court of Wards. Defendant No. 1 and the auction-purchasers (defendants Nos. 2 and 3) appeal against this decision, and it is contended that the prohibition enacted in Regulation X of 1831 only applies to estates which have been, or which legally might have been, taken under the charge of the Court of Wards.

If the minor plaintiffs were the sole proprietors of the Senthamangalam mitta, there could be no doubt that their estate was one of which it was competent to the Court of Wards to assume the management. Had such management been assumed, it could not be sold for arrears of revenue (Section 14, Clause 4, Regulation V of 1804); nor could it be so sold even if the Court of Wards had not chosen to assume the management—(Section 2, Regulation X of 1831).

But the minor plaintiffs are not the sole proprietors, but are joint proprietors with others, who are not incapacitated from the management of their inheritance. Their case is therefore governed by Section 20, Regulation V of 1804; and the duty of appointing a guardian for them devolves not upon the Court of Wards, but upon the Zila (now the District) Court.

The law imposes upon the Collector the duty of reporting the case to the District Court, but having done that, the Collector [49] would appear to be *functus officio*. It was held in *Subramanyan, in re* (1) that a District Court had no jurisdiction, under Section 20, Regulation V of 1804, to appoint a guardian to the estate of a minor when the estate pays revenue to Government. In that case the minor was the sole proprietor. The converse of the proposition would appear also to be true, that where the law imposes upon the District Judge, as in the case of a minor co-owner under Section 20, the duty of appointing a guardian, the right of the Court of Wards to appoint a guardian is *ipso facto* excluded. The words of Section 20 are imperative as to the procedure to be followed.

(1) 6 M. 187.

The estate of the plaintiffs is not therefore one of which the Court of Wards could assume the management, and we have to consider whether the Government is debarred from selling it for arrears of revenue under Regulation X of 1831.

The preamble (Section 1) of that Regulation shows that the enactment was passed for two distinct purposes—(1) to remove doubts as to the liability of the estate of a minor, not taken under the management of the Court of Wards, to be sold for arrears of revenue; (2) to extend, for the protection of minors and other incapacitated persons, the provisions of Section 20, Regulation V of 1804, to property of every description not subject to the Court of Wards.

Section 2 is the enacting section for the first of these purposes and Section 3 for the second.

It is quite clear that Section 14, Clause 4, Regulation V of 1804, had previously forbidden the sale of minors' estates which had been taken under the Court of Wards, and the second clause of Section 2, Regulation X of 1831, shows that it was with reference to such estates (which might have, but had not, been taken under the Court of Wards) that the doubts had arisen which are set forth in the preamble. The estate of the minor plaintiffs is not such an estate. The 3rd Section of Regulation X of 1831 deals with the second object set forth in the preamble and extends the powers of the Zila Courts to appoint guardians to cases in which incapacitated persons are possessed of property of every description not subject to the jurisdiction of the Court of Wards, *i.e.*, that does not pay revenue to Government. Section 20, Regulation V of 1804, had limited the Zila Judges' power to act to **[50]** cases in which the estate was held by joint possessors and subject to an undivided assessment of the public revenue, but it was then extended to the heirs of single as well as of joint possessors of all kinds of estates, provided only they were not subject to the jurisdiction of the Court of Wards.

It appears to us that the District Judge has confused together the two separate purposes for which Regulation X of 1831 was passed. It is intelligible that the Government should legislate so as to forbid the sale of the property of minors whose estates were under the management and control of their own officers, but to forbid the sale of property not subject to such control and guarantee would be to place the State, alone of all legal creditors, in a position of inability to exact its dues. It is no doubt true as urged by the Acting Advocate-General that the words "The property of a minor not under the charge of the Court of Wards" in Section 2, Clause 1 of Regulation X, are wide enough of themselves to include estates of every description, but the term "such estates" in the 2nd clause of the same section makes it clear that the Legislature only intended to refer to estates of which the Court of Wards might have originally assumed the management. We must therefore set aside the decree of the District Judge in plaintiffs' favour, which is based upon this preliminary point. There are however other points arising in the suit, on which plaintiffs have based their claim, and these must now be remitted for the consideration of the Court of First Instance. The points raised are several and cannot conveniently be met by an issue so general in its terms as that on which the suit has been tried. We observe that, under Clauses 5 and 6 of the sanad-i-milkeut istimrar, under which this mitta is held, the personal property of the holder is liable in the first instance to attachment for arrears of revenue, and under Section 6, Act II of 1864, the procedure against the defaulters should be in accordance with the terms of this

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sanad. The plaintiffs complain that this has not been done, and they further complain that Section 44 of the same Act would prevent the sale of the whole of so valuable a mitta for a comparatively small arrear.

Another point raised is that the demand notices were not served upon any one legally competent to represent the minors, and it is argued that the plaintiffs' mother, though their natural and personal guardian under Hindu Law, could not take for such purposes the position of a person duly appointed by the Court **[51]** under Section 20, Regulation V of 1804. Further objections are raised as to the publication and conduct of the sale.

We merely indicate these as some of the points which will require the attention of the Judge in framing fresh issues. The appeals of the Collector (No. 130) and of defendants Nos. 2 and 3 (No. 127) must be allowed and the decree of the Lower Court reversed. The names of plaintiffs Nos. 3 and 4 must be restored to their original positions in the suit, which must be retried on the merits after framing fresh issues. The respondents must pay the costs of these appeals, but the costs in the Lower Court will abide and follow the result.

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10 M. 51.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

JIVRAJI (*Judgment-debtor*), *Petitioner v.* PRAGJI (*Decree-holder*), *Respondent.** [24th September, 1886.]

Civil Procedure Code, Sections 206, 622—*Error of law—Application to bring decree into conformity with judgment—Limitation Act not applicable.*

Applications to the Court under Section 206 of the Code of Civil Procedure are not governed by the Limitation Act.

A Small Cause Court rejected an application made under S. 206 of the Code of Civil Procedure to bring a decree into conformity with the judgment, on the ground that a former application had been dismissed for default and the petitioner was bound to apply within one month from the date of dismissal and was now too late. On an application to the High Court under Section 622 of the Code to set aside this order:

Held that the High Court could not interfere.

[**F.**, 21 C. 259 (261); **R.**, 39 C. 265 (274) = 14 C.L.J. 481 = 12 Ind. Cas. 151 (154); 11 M. 220 (229) (**F.B.**) = 12 Ind. Jur. 49; 11 O.C. 208 (211).]

APPLICATION under Section 622 of the Code of Civil Procedure to set aside an order of the Subordinate Judge of North Malabar, made in Small Cause Suit 722 of 1885.

Khimji Jivraji Shett, defendant No. 1 in the suit, applied under Section 206 of the Code of Civil Procedure to have the decree amended and brought into conformity with the judgment by reducing the amount of the decree from Rs. 446-7-3 to Rs. 239-7-0.

[52] The Judge rejected the application, on the ground that two former applications for the same purpose made to the Judge who passed the decree had been dismissed for default and that petitioner should have, and had not, applied within one month from the date of the dismissal of the first application.

* Civil Revision Petition 29 of 1886.

Srinivasa Rau, for petitioner. **1886**

The second application was not dismissed for default, nor does the Limitation Act apply (Referred Case 18 of 1885). **SEP. 24.**

Mr. *Wedderburn*, for Purushotam Dass Pragji Shett, respondent. **APPELLATE CIVIL.**

This Court has no jurisdiction to entertain this application. The error of the Judge, if any, was an error of law, *viz.*, that the application was barred by limitation—*Amir Hassan Khan* v. *Sheo Baksh Singh* (1). If the second application was not dismissed, the proper course was to proceed with it, and, in that case, this application was properly rejected. **10 M. 51.**

The Court (COLLINS, C.J., and PARKER, J.) delivered the following

JUDGMENT.

Though the Subordinate Judge states that both the previous applications were dismissed for default, there is nothing on the record or the diary to show that the application of 5th December 1883 was ever disposed of, or when it was disposed of. If it had not been disposed of, the Subordinate Judge should have taken it up again and heard the application.

If that application was dismissed for default, there is nothing to prevent the Subordinate Judge hearing another application to amend the decree. It has been held in referred case No. 18 of 1885 (not reported) that it is a ministerial function to bring the decree in accordance with the judgment, and that there is no period of limitation—see also *Vithal Janardan* v. *Vithojirav Putaljirav* (2). This, however, is an error in law which will justify an application for review, but not one under Section 622 of the Code of Civil Procedure.

We therefore dismiss this petition with costs.

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10 M. 53 = 11 Ind. Jur. 19.

[53] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

SEVU (*Plaintiff*), *Appellant v.* MUTTUSAMI AND ANOTHER (*Defendants*), *Respondents.** [8th and 11th September, 1886.]

Civil Procedure Code, Sections 318, 335—*Suit to recover possession of property sold in execution of decree.*

S. attached certain land and a house in execution of a decree against R. M. put in a claim under Section 278 of the Code of Civil Procedure, alleging that he was in possession as purchaser from R. The claim was rejected. No suit was brought by M. to contest this order. S. purchased the said land and house in execution, and obtained a sale certificate. In 1884 S. sued M. to recover possession of the land and house alleging that in execution proceedings in 1882 he had been put into possession of the land, but not of the house, which was found locked up by the Court amin, and that M. prevented him from enjoying both the land and house M. pleaded that S. had never been put into possession, and again set up his title as purchaser from R. and possession under such title.

The Munsif found that S. had been put into formal or constructive possession of the land, but not of the house, and decreed the claim.

On appeal the District Judge held that S. was bound to proceed according to the provisions of Section 335 of the Code of Civil Procedure to recover possession, and could not bring a separate suit :

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* Second Appeal No. 72 of 1886.

(1) 11 C. 6. (2) 6 B. 586.

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Held that, whether there had been legal delivery or not, the suit was not barred.

[Appl , 24 C. 715 (719) ; D , 9 M L.J. 131.]

APPEAL from the decree of J. A. Davies, Acting District Judge of Tanjore, reversing the decree of T. Rangacharyar, District Munsif of Tiruvalur, in Suit No. 183 of 1884.

The facts and arguments appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C J., and BRANDT, J.).

Mr. *Wedderburn*, for appellant.

Bhashyam Ayyangar, for respondents.

JUDGMENT.

The plaintiff, appellant, purchased the plaint properties in execution of a decree against one Ramasami Pillai. The respondents (Muttusami Pillai and Dorasami Ayyangar) raised objection to the lands, &c., being attached, setting up a claim on [54] their own account. Their objections were disallowed in execution proceedings, and they filed no suit to set aside the order made against them ; and it is admitted that they cannot raise any objection on the merits to the appellant's claim to the lands or to his obtaining possession of them.

In 1882, the appellant obtained a sale certificate, and he also obtained delivery, not actual delivery under Section 318, Civil Procedure Code, but symbolical delivery, presumably given under Section 319. The District Munsif passed a decree in plaintiff's favour, but in appeal that decree was reversed, the plaintiff's claim being disallowed on the grounds, apparently taken for the first time in argument in appeal, that the plaintiff accepted symbolical delivery only when he was entitled to and might have had actual delivery ; that express provision for summary remedy in the case of obstructions offered to an auction-purchaser in obtaining possession is provided in the Code of Civil Procedure, and that the plaintiff is therefore precluded from bringing a separate suit for possession ; and reference is made to *Lolit Coomar Bhose* v. *Ishan Chunder Chuckerbutty* (1). It is further observed by the District Judge that even if resisted the plaintiff could still obtain redress under Section 335, Civil Procedure Code.

It is contended in appeal that the decision of the Lower Appellate Court is wrong in law, that there is no express provision in the Code of Civil Procedure in bar of a suit like the present, and that it therefore lies on the respondents to show affirmatively that such a suit is not maintainable ; and with reference to the case mentioned by the District Judge, it is pointed out that this case is not reported in the authorized Law Reports, and that there are other subsequent decisions by the same Court, *Krishna Lall Dutt* v. *Radha Krishna Surkhel* (2), and *Shama Charan Chatterji* v. *Madhub Chandra Mookerji* (3), to the contrary.

For the respondents it is urged that the decision in *Lolit Coomar Bhose's* case only follows another in *Kristo Gobind Kur* v. *Gunga Pershad Surmah* (4), and that it is correct in principle, and may be distinguished from the other cases above cited.

Section 244, Civil Procedure Code, has no bearing on the present case, as the respondents were no parties to the suit in which the [55] decree was passed, in execution of which the appellant purchased the plaint lands.

(1) 10 C.L.R. 258. (2) 10 C. 402. (3) 11 C. 93. (4) 25 W.R. 372.

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Section 13 has no application, as there has not been any previous suit between the parties to this suit in respect of the plaint lands.

The case of *Lolit Coomar Bhose* v. *Ishan Chunder Chuckerbutty* differs from the present case, in that there was no application made for delivery in execution. The case in the Weekly Reports above referred to and followed in *Lolit Coomar Bhose's* case is on all fours with this, assuming it to be correctly held therein that the symbolical delivery here given is in fact no delivery at all. But the correctness of this latter decision was questioned by Garth, C.J., in *Lolit Coomar Bhose's* case; and in *Shama Charan Chatterji* v. *Madhub Chandra Mookerji* (in which the question was whether a plaintiff, who obtains a decree for possession against a defendant and in execution obtains formal, *i.e.*, symbolical delivery, has a fresh starting point as regards limitation, and also a fresh cause of action) reference is made to the case of *Seru Mohun Bania* (1) as authority for the proposition that an auction-purchaser is not confined to the remedies provided by Sections 318 and 319 of the Code, but may sue without proceeding under those sections, or if the possession obtained under them be infructuous, the decision in *Kristo Gobind's* case being thereby overruled, at all events as regards an auction purchaser.

We have to observe that *Seru Mohun Bania's* case is not precisely the same as that now before us, seeing that the auction purchaser had failed to obtain any sort of delivery whatever by reason of alleged errors in boundaries and of opposition by the defendants on this score; in other respects it is an authority in favour of the appellant.

We are then certainly not met with any unquestioned authority for the decision of the Lower Appellate Court in this case, and we are of opinion that the appellant's suit is maintainable.

The appellant certainly might have had delivery under Section 318, the respondents being actually and physically ejected from the land if necessary.

Delivery under Section 319 could properly be made only in the case of there being tenants or other persons entitled to occupy the [56] land in occupation: it is not alleged there were any tenants on it, and the respondents were not entitled to occupy it. Either then there was a delivery of some sort, or there was legally no delivery at all. If there was no delivery at all, then certainly the appellant is in our opinion not debarred from maintaining the suit. If there was delivery—whatever the nature of that delivery may have been—the respondents either remained in possession or occupation, having no right thereto, or they re-entered and their re-entry was wrongful and a trespass.

There are in our opinion no grounds for holding that a suit like the present is barred by reason of the Civil Procedure Code containing special provisions for putting an auction-purchaser in possession in execution proceedings.

Section 244 specifies the cases in which questions arising in execution of decrees shall be decided in execution and not by separate suit, and this is not one of those questions.

This disposes of the argument that the appellant, having been resisted by persons not claiming in good faith, has his remedy under Section 335 of the Civil Procedure Code. He might, perhaps, apply to the Court under that section: on the other hand, the Court might hold that having given delivery before, on which occasion no resistance or obstruction was offered,

(1) 9 C. 602.

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it is *functus officio* and has nothing more to do in execution with the conduct of the purchaser and those opposing him; and, as is pointed out by the learned counsel for the appellant, if the latter did apply and obtain an order in his favour under that section, the respondents, as parties against whom the order was made, might perhaps claim to institute a suit to establish their right.

However this may be, unless the suit is clearly not maintainable by reason of some express provision of processual law, it cannot be held to be barred: we have not been referred to any such provision.

The decree of the Lower Appellate Court should be reversed, that of the Court of First Instance being restored, and the appellant should have costs in the Lower Appellate Court and in this Court.

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10 M. 57.

[57] APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

LAKSHMI (*Appellant*) *v.* KUTTUNNI (*Respondent*).*
[24th and 29th September, 1886.]

Civil Procedure Code, Section 311—"*Decree-holder*" *not restricted to decree-holder who has attached, but includes one entitled to rateable distribution under Section* 295.

Where one decree-holder had attached certain land and another decree-holder against the same debtor had entitled himself to rateable distribution of the assets under Section 295 of the Code of Civil Procedure:

Held that the latter was entitled to apply under Section 311 of the Code to set aside the sale on the ground of material irregularity.

[**Diss.**, 4 C.W N. 542 (544); **F.**, 3 M.L.T. 249 (250); **Appr.**, 15 A. 318 (320); **R.**, 16 B. 91; (101): 20 C. 673 (675); 29 C 548 (554); 21 M. 51 (52); 23 M. 478; 24 M. 311 (315); 28 M. 380 (385) = 15 M.L J. 202; 17 Ind. Cas. 920 (924) = 23 M.L.J. 585 (587).]

APPEAL against an order of J. A. De Rozario, District Munsif of Kutnad, under Section 588 (16) of the Code of Civil Procedure.

The facts appear sufficiently for the purpose of this report from the judgment of the Court (KERNAN and BRANDT, JJ.).

Gopalan Nayar, for appellant.

Anantan Nayar, for respondent.

JUDGMENT.

KERNAN, J.—In suit No. 537 of 1884 the plaintiff therein got a decree, applied for execution and sale of Palisseri and other lands held by the defendant. The land was attached. One P. V. Kuttunni proved a claim, by way of mortgage, before the Munsif against the lands for Rs. 300. Owing to an error in the Munsif's Court, the proclamation issued by the Court stated that the property was to be sold subject to the mortgage debt of Rs. 430, whereas the admitted amount was only Rs. 300. At a sale by auction on the 14th of December 1885 under that proclamation, the mortgagee, P. V. Kuttunni, was the highest bidder for the sum of Rs. 125.

Before the sale took place, Lakshmi Amma Anakkara Vadaketh, the appellant, had obtained three Small Cause decrees in suits Nos. 343

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* Appeal against Order 78 of 1886.

and 312 of 1882 and No. 390 of 1884 for Rs. 300, and had applied before the sale to the Court of the same District Munsif for execution against the defendant of those decrees by sale [58] of the same land and did not get satisfaction. On the 18th December 1885 the appellant applied to the Munsif to set aside the sale by reason of the irregularity of the statement that the land was sold subject to Rs. 430 instead of Rs. 300, and alleged that if the property had been sold subject only to the proper amount of the incumbrances, both the petitioner in No. 537 and appellant would have been paid in full. The Munsif by order of the 9th January 1886 recorded the mistake and his opinion that the irregularity vitiated the sale. But he held that appellant had no right to apply under Section 311 for cancellation of the sale, on the ground, as it appears, that she was not a "decree-holder" within the meaning of Section 311, and that the decree-holder within the meaning of that section is the decree-holder at whose instance the lands were first attached.

I think however that, upon the construction of the provisions of the Code, the expression "decree-holder" in Section 311 is not limited to the decree-holder at whose instance the lands were first attached. If such limited construction is the only correct one, then the right of the other decree-holder who applied for execution would, in certain given events, be prejudiced. For instance, if the first decree-holder dies, and if no representative of his applied under Section 311, or if that decree-holder did not, as in this case, choose to point out to the Court the irregularity and apply for a re-sale, then, if no other decree-holder could apply, the irregularity and consequent loss would be incapable of remedy. The excess amount of the mortgage stated is small in this case, still that sum of Rs. 130 and the Rs. 125, the purchase money, would be sufficient, it is alleged, to pay the petitioner and the previous decree-holder. But suppose a case occurred when the excess amount was large, the loss would be serious. If the sale now stands, the purchaser (the mortgagee) will get the land for Rs. 130 less than he contracted to pay, and will retain that sum which ought to be distributed under Section 295.

The definition of "decree-holder" in Section 2 of the Code applies certainly in terms to the case of the present appellant, and although in ordinary circumstances, probably the first attaching decree-holder would be the most proper decree-holder to apply under Section 295 for re-sale if he was willing to do so: but that is no valid reason for holding that an application by any other decree-holder is not provided for by Section 311. It was suggested that if *any* [59] decree-holder could apply, all or any number of decree-holders might apply. But in such case, the Judge to whom the application should be made could either refuse to hear the application of any other decree-holder, if the first decree-holder was willing to proceed; or if he was not willing to proceed, then the Judge could appoint any of the other decree-holders to apply under Section 295, as he should think fit.

The rights of all the decree-holders under Section 295 are the same, and the same proceeding must be taken by the subsequent decree-holders to apply to the Court for execution as the first decree-holder took.

From the date that the Court grants the order to execute the decree under Section 245, all proceedings to attachment and sale are directed by the Code to be taken by the *Court*, and the first attaching creditor has no more to do with the attachment and the sale than the subsequent decree-holders. The first attaching decree-holder could not stay the sale even if he was paid *in full* after the other decree-holders had applied to the Court

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for execution. It was certainly open to the appellant to have informed the Munsif before the sale that proclamation was wrong, if the appellant was in fact aware of the error before the sale. But apparently the decree-holders were not aware of the error until the sale, or if they were aware of the error, neither applied to have the error corrected. I do not, however, think the omission to do so affects the question.

For the above reasons, I think that the power of any decree-holder to apply under Section 311 is essential to the rights of all decree-holders. I also think that upon the ground on which the Munsif put his order, it is wrong. I would therefore reverse it and instruct the Munsif that he is at liberty to entertain the application of the appellant and act on the facts, if he thinks it is a proper case to set aside the sale. Costs to be provided for in the revised order.

BRANDT, J.—It is admitted that the appellant has a right to appeal in this case if she is "the decree-holder" or "a decree-holder" within the terms of Section 311, Civil Procedure Code, and not otherwise.

She is a person holding three decrees for money against the judgment-debtor in execution of a decree against whom another judgment-creditor (the plaintiff in Original Suit No. 537 of 1884) **[60]** attached and eventually brought to sale certain immoveable property; and prior to realisation of the "assets," *i.e.*, the purchase money paid for the property sold, the appellant had applied to the Court which ordered the sale for execution of his decree against the same judgment-debtor.

The property sold was subject to an encumbrance; inquiry was held by the Court as to this, and the Court allowed the claim of the encumbrancer to the extent of Rs. 300; but, by a mistake in the execution department, it would seem the property was advertised for sale as subject to an encumbrance of Rs. 430.

The encumbrancer himself purchased the property. The appellant applied to the Court which executed the decree to set aside the sale on the grounds that if the amount of the charge on the land had been correctly stated, the property would have sold for a higher price, for a price sufficient to satisfy the appellant's claims in full, and that the mistake constituted a material irregularity, by reason of which the appellant had sustained substantial loss.

The District Munsif held that there was such an irregularity as would vitiate the sale, but that, as the appellant is not the holder of the decree in executing which the property was attached and sold, she has no *locus standi* under Section 311 of the Code.

If we are to hold that the District Munsif is wrong in this respect, we must hold that the words "the decree-holder" in that section include "any decree-holder" who has made an application under Section 295.

The Code deals with the sale and delivery of property in sections commencing with 286. There are, first, general rules, Sections 286 to 295 inclusive; then Sections 296 to 303 deal with sale of moveable, and Section 304 *et seq.* with the sale of immoveable, property. In these sections the holder of a decree is referred to first in Section 293 as "the judgment-creditor;" in Section 294, it is provided that "no holder of a decree" shall purchase without the leave of the Court, and prescribes what shall be done in case of a decree-holder who purchases with such permission; up to Section 320 (beyond which we need not go for present purposes) the only section which contains a reference to the decree-holder is Section 311; and the only persons at whose instance a sale of immoveable property under the chapter can be set aside are "the decree-holder," any

person whose immoveable property has been sold at such sale, and the auction-purchaser. 1886 SEP. 29.

[61] It appears to me then that, according to the ordinary rules of construction, the words "the decree-holder" should apply to the decree-holder at whose instance the property has been brought to sale. On the other hand, it is contended that even if the words cannot be read as "any decree-holder,"—and this certainly cannot be, for it could not be contended that a decree-holder who had taken no steps whatever in execution could come under Section 311—they do include any decree-holder who has taken action under Section 295. Section 295 is very curiously worded. The "assets" therein specified are not "assets" until the property had been sold and the proceeds realized; and there cannot strictly speaking be any application "to the Court by which such assets are held, prior to realization" thereof, for there are, according to the terms used, no assets until the purchase money is in the hands of the Court. Some reasonable construction must however be placed on the wording. APPELLATE CIVIL. 10 M. 57.

The section requires that application be made "for execution" by those holding decrees and desirous of coming to share rateably; it appears to have been generally assumed, and I do not say wrongly, that there is a sufficient application for execution if such decree-holders simply ask to share rateably in the net proceeds when realized.

It is said that great hardship may be inflicted on such decree-holders if they have no means of having sales set aside on good and sufficient grounds.

If the balance of convenience clearly is in favor of the more extended construction to be put on the words "the decree-holder" in Section 311, and such construction is not evidently not allowable, such extended construction should be given. I think that no inference either way can be drawn from the definition of "a decree-holder" in Section 2 of the Code; appellant certainly is a decree-holder within the meaning of the term as used in the Code; the only question is as above stated.

Under Section 271 of Act VIII of 1859, the first attaching creditor, even though he proceeded no further and a subsequently attaching creditor brought the property to sale, had priority; Section 295 of the present Code was intended to prevent this and to provide for rateable distribution, after deduction of the costs of the proceedings necessary for and anterior to sale, and of the sale; and the holders of decrees for money only come in last, so that the [62] preferential claims of decree-holders having superior rights and of the creditor, at whose cost the sale is carried out, are provided for.

These are difficulties which occur to me from the peculiar wording of Section 295 which I have above indicated; but on the whole, I am not prepared to dissent from my learned colleague in the conclusion arrived at by him, *viz.*, that it is open to us to hold petitioner to be entitled to call the sale in question under Section 311.

I, therefore, concur in the proposed order—*Girdhari Singh* v. *Hurdeo Narain Singh* (1) being authority that a material error in describing the encumbrances on the property sold may be a material irregularity in publishing and conducting the sale.

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(1) 3 I.A. 230.

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APPELLATE CIVIL.

10 M. 62.

10 M. 62.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Muttusami Ayyar.

YELLAYA (*Plaintiff*), *Appellant v.* VIRAYA (*Defendant No.* 2), *Respondent.** [19th July and 29th September, 1886.]

Revenue Recovery Act, Section 59—Limitation—Sale of land subject to mortgage—Suit by mortgagor.

Land which was subject to a mortgage having been sold for arrears of revenue under Act II of 1864 (Madras), the mortgagee's assignee sued to enforce the terms of the bond by sale of the land more than six months after the date of the sale of the land :

Held that the suit was barred by Section 59 of the said Act.

[R., 12 M. 168 (172).]

APPEAL from the decree of Venkata Rangayyar, Acting Subordinate Judge at Ellore (Godavari) confirming the decree of K. Venkatachalam, District Munsif of Ellore, in suit 759 of 1882.

The facts necessary for the purpose of this report are set out in the judgment of the Court.

Subba Rau, for appellant.

Respondent did not appear.

JUDGMENT.

The appellant Nidadavolu Yellaya is the assignee of the mortgage bond A which was executed by defendant No. 1 **[63]** to defendant No. 4 on the 29th June 1879. By that document the mortgage debt was secured on 68½ cents of inam land now in suit. The revenue payable to Government on some jiraiti land owned by the mortgagor, defendant No. 1, for fasli 1290 fell into arrear. It was considered that if that piece of land was put up to sale, no one might purchase it and the arrear might not be recovered. The land in suit was therefore attached and sold to defendant No. 2, the respondent, under Act II of 1864. The revenue sale took place on the 24th November 1881. When the land was under attachment, the original mortgagee, defendant No. 4, brought to the notice of the tahsildar the existence of the mortgage, but he was informed that if he paid the arrear, the attachment would be raised. As he failed to do so, the land was sold, and Umidi Viraya (defendant No. 2), the respondent, became purchaser. On the 10th August 1882, the appellant accepted the assignment of the bond A and brought this suit on the ground that what actually passed by the revenue sale was only the right of redemption which the mortgagor had at the date of the sale.

The District Munsif passed a personal decree in favor of the appellant as against the mortgagor, and also directed payment to the former of the surplus sale proceeds in the hands of the Collector of the District (defendant No. 3), but he exonerated the property in suit from all liability for the debt.

On appeal, the Subordinate Judge confirmed the decree of the District Munsif on the ground that the suit, which was instituted after the expiration of six months from the date of the sale, was barred by Section 59 of Act II of 1864, and that under Section 42 of the same enactment,

* Second Appeal 896 of 1885.

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the property in the land sold passed to the purchaser free of prior encumbrances.

It is urged in second appeal that both the grounds relied on by the Lower Appellate Court are not good in law. It cannot be denied that what was really intended to be sold and what was sold in fact was, not the mortgagor's right of redemption, but the entire property under mortgage. It would become necessary to determine whether more than the right of redemption was liable to be sold only in case the suit is not barred by Section 59. This Section provides that "nothing contained in this Act shall be held to prevent parties aggrieved by any proceedings under this Act, except as hereinbefore provided, from applying for redress; provided that Civil Courts shall not take cognizance of any suit [64] instituted by such parties for any such cause of action unless such suit shall be instituted within six months from the time at which the cause of action arose." In the case before us the sale of a larger interest than what was liable to be sold is, according to the appellant, the grievance for which he seeks redress; and the claim, therefore, that the sale was illegal so far as it purported to convey more than the right of redemption appears to us to fall under that section. It may be that the appellant does not seek to annul the sale *in toto*; but its cancelment *pro tanto*, so far as the interest conveyed is in excess of the right of redemption, is also a remedy for an injury caused by a proceeding under the Act. We are of opinion that the suit was properly held to be barred by limitation and dismiss this second appeal.

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10 M. 64 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Brandt, and Mr. Justice Parker.

REFERENCE FROM THE BOARD OF REVENUE UNDER SECTION 46 OF THE INDIAN STAMP ACT, 1879.*
[3rd September, 1886.]

Stamp Act, Schedule II, Article 15 *(a)—Receipt—Endorsement of payment on mortgage deed.*

An endorsement on a mortgage, acknowledging the receipt of the sum thereby secured is exempt from stamp duty under Schedule II, Article 15 (*a*) of the Indian Stamp Act, 1879.

REFERENCE to the High Court by the Board of Revenue under Section 46 of the Indian Stamp Act, 1879.

On the 1st April 1886 the Collector of Tanjore (J. B. Pennington) made the following reference to the Board of Revenue:—

"The Sub-Registrar of Tirukattupalli has impounded an instrument which purports to be a receipt endorsed on a deed of mortgage without possession, whereby the mortgagee acknowledges the receipt of the principal of the original instrument *plus* the interest due on it.

[65] "Now, under Article 15 (*a*), Schedule II of Act I of 1879, this receipt would appear to be exempted from the payment of any duty; but the Sub-Registrar considers that this provision of the Act has been narrowed

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* Referred Case No. 3 of 1886.

1886 SEP. 3. — FULL BENCH. — 10 M. 64 (F.B.).

in its scope by the terms of the resolution of the Board, in their Proceedings, dated 19th December 1883, No. 3852, paragraph 3. He makes a distinction between receipts endorsed on simple bonds and receipts endorsed on mortgage-deeds whether simple or usufructuary, and considers that these latter receipts should be duly stamped with one-anna stamp; but I do not know whether this is the opinion of the Board, or, judging from the words 'custody of any specified property,' whether they only distinguish between usufructuary mortgages and mortgages creating only an encumbrance on property without involving its custody or possession. And before drawing the distinctions referred to in paragraph 2, I would submit that the terms of Article 15 (*a*), Schedule II, of the Act, are so plain that I do not understand how any reservation in the class of exempted receipts can be made. The wording of Article 15 (*a*), Schedule II of the Act, *viz.*, 'receipts endorsed on or contained in any *instrument* duly stamped' seems wide enough to cover any kind of document.

"I request therefore that the Board will be good enough to inform me whether any distinction was contemplated in their Proceedings, dated 19th December 1883, and, if so, to instruct me as to what classes of receipts are exempt from stamp duty and what not."

The resolution of the Board, dated 27th May 1886, was as follows:—

"The position taken by the Board in their Proceedings of 19th December 1883, No. 3852, was that receipts endorsed on deeds, *which involved the custody of specified property*, amounted to and, therefore, were releases.

"As at present constituted, they doubt whether they were justified in so deciding, or whether, as in Board's Proceedings, dated 27th October 1879, No. 3028, they should, before holding a receipt to be a release, have demanded the additional words of actual relinquishment.

"The present deed, as a case in point, they resolve therefore to refer to the High Court for decision; its *wording* is the receipt of money, its effect the release of land; is it to be exempted as the former, or stamped as the latter?"

[66] The Acting Government-Pleader (Mr. *Powell*), for the Board of Revenue.

JUDGMENT.

The judgment of the Full Bench (COLLINS, C. J., KERNAN, MUTTUSAMI AYYAR, BRANDT, and PARKER, JJ.) was delivered by

COLLINS, C.J.—We are of opinion that the endorsement on the mortgage bond is exempted from stamp duty under Schedule II, Article 15, of the Stamp Act of 1879, it being a receipt within the terms of the exemption.

1886 SEP. 25. APPELLATE CIVIL. 10 M. 66.

10 M. 66.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

KURUPAM ZAMINDAR (*Plaintiff*), *Appellant v.* SADASIVA (*Defendant*), *Respondent.** [24th and 25th September, 1886.]

Limitation Act, Schedule II, Articles, 178, 179 (3) – *Civil Procedure Code, Section* 583—*Application for refund of moneys levied under decree reversed on appeal—Review rejected – Time not excluded from computation.*

Where a review of judgment has been applied for, and, after notice to the other side, refused, the period during which such application was pending cannot be excluded in computing the period of limitation for execution of the decree under Article 179 (3) of Schedule II of the Indian Limitation Act.

Semble—An application for refund of moneys levied in execution of a decree subsequently reversed on appeal is not governed by Article 179 but by Article 178 of Schedule II of the Limitation Act.

[F., 28 C. 113 (115) ; R., 20 M. 448 (449).]

APPEAL against an order of J. Kelsall, District Judge of Vizagapatam, in execution proceedings in Suit 11 of 1878.

The facts necessary for the purpose of this report appear from the judgment of the Court (COLLINS, C.J. and PARKER, J.)

Subba Rau, for appellant.

Mr. Powell, for respondent.

JUDGMENT.

In this case Sri Raja Vyricherla Suryanarayana Razu Bahadur, zamindar of Kurupam, had sued defendant, Kuchibhotla Sadasiva Parabrahman, for mesne profits, and had got a decree, which was subsequently reversed by the High Court [67] in Appeal Suit 71 of 1881 on September 26th, 1881. Pending the appeal the zamindar had collected in execution Rs. 7,100 from defendant.

The zamindar petitioned the High Court to review the appeal decree, but after notice to defendant the review was refused on October 2nd, 1882.

The present application under Section 583 of the Code of Civil Procedure, for recovery of the Rs. 7,100 levied in execution, was presented on August 6th, 1885, and the appellant contends that it is barred except as to Rs. 70, the costs of the review proceedings.

If the application be regarded as falling under Article 179, Schedule II of the Limitation Act, the period of limitation will run from the date of the High Court decree (September 26th, 1881), since Clause 3 only applies to cases in which there has been a review of judgment, and in this case the review was refused.

We are disposed however to think that the application is governed by Article 178, since it is not one for execution of a decree or order, but to enforce a benefit by way of restitution under a decree passed in appeal. Such execution is governed by the rules prescribed in the Code for the execution of decrees, and limitation will run from the date when the right to apply accrues. This was on September 26th, 1881, and the pendency of an application for review by the other side did not debar defendants from applying for the refund. The application is therefore

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* Appeal against Order 56 of 1886.

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barred in either case, except with regard to Rs. 70, the costs of the review proceedings.

The order of the District Court must be modified accordingly, and the respondent must bear appellant's costs in this appeal. It is not necessary now to consider the claim for interest, but we do not think the Judge should have awarded a higher rate than 6 per cent. per annum.

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10 M. 68.

[68] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

ABDUL RAHIMAN (*Respondent*), *Petitioner v.* KUTTI AHMED (*Petitioner*), *Respondent.** [1st October, 1886.]

Act XIX of 1841, *Section* 3—*Civil Procedure Code, Section* 622.

Where a District Court purporting to act under Section 4 of Act XIX of 1841 directed an inventory of the estate of a deceased person to be taken without conforming to the requirements of Section 3 of that Act, the High Court set aside the order under Section 622 of the Code of Civil Procedure as made without jurisdiction.

[R., 34 C. 929 (934) = 12 C.W.N. 65 ; 17 Ind. Cas. 429 (431) = 23 M.L.J. 537 (538) = 12 M.L.T. 497 (498) ; 2 N.L.R. 72 (76).]

APPLICATION under Section 622 of the Code of Civil Procedure to set aside an order made by J. W. Best, District Judge of South Canara, on a petition presented under Act XIX of 1841.

On an application made under Act XIX of 1841 by the next friend of Kutti Ahmed, a minor, alleging that he was entitled to the estate of Kunhamed, deceased, his grand-uncle, and praying that an inventory of the estate left by the deceased might be taken, Abdul Rahiman opposed, claiming to be entitled to the said estate under an agreement executed by the deceased which he produced in Court. This agreement was impugned by the minor's mother's sister, Biyatumma, a party to it, who was examined by the Court. The District Judge under these circumstances held that the case was a proper one for the taking of an inventory of the moveables and made an order to that effect.

To set aside this order Abdul Rahiman made the present application.

The Acting Advocate-General (Mr. *Shephard*) and *Gopala Rau*, for petitioner.

Mr. *Subramanyam* and *Narayana Rau*, for respondent.

JUDGMENT.

In our opinion the District Judge has acted without jurisdiction in making the order to which exception is taken. He has not set forth the facts necessary to show jurisdic- [69] tion, having regard to the requirements of Section 3 of Act XIX of 1841. On the contrary, after citing the parties and having them before him, he has himself recorded that they may properly be left to their remedy by means of a regular suit, so far as the dispute between them is concerned.

In these circumstances, his jurisdiction under Act XIX of 1841 ceased. The order for taking an inventory had not been made prior to

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* Civil Revision Petition 119 of 1886.

the time when he decided that the parties should be referred to a regular suit, and the Judge had no jurisdiction then to make an order for such inventory to be taken. He directs that the inventory is only to be taken in certain circumstances and under certain conditions; but the Act does not contemplate such an order being made subject to conditions. The order appears to us to be made without jurisdiction and must be set aside on that ground. The respondent must pay the petitioner's costs in this Court.

1886 OCT. 1.

APPELLATE CIVIL.

10 M. 68.

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10 M. 69.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Parker.

TELLIS (*Plaintiff*), *Appellant* v. SALDANHA AND OTHERS (*Defendants*), *Respondents*.* [20th August and 8th October, 1886.]

Indian Succession Act, 1865, *effect of, on estates of Native Christians previously following Hindu law.*

A and J, brothers, Native Christians, descendants of Brahmans, were living in co-parcenary and owned certain land on the date when the Indian Succession Act, 1865, came into force. In 1872, no partition having been made, A died :

Held that J did not take the whole estate on the death of A by survivorship.

[F., 12 Ind.Cas. 704 (707) = (1911) 2 M.W.N. 467 (471); 11 M.L.T. 232 (239) = (1912) M.W.N. 386 (392) = 14 Ind.Cas. 480; Rel., 12 C.L.J. 459 = 15 C.W.N. 158 (161) = 8 Ind.Cas. 41 (43); R., 31 C. 11 (18) (P.C.) = 5 Bom. L.R. 845 = 7 C.W.N. 895 = 30 I.A. 249 = 13 M.L.J. 381; 32 M. 191 (197) = 1 Ind. Cas. 408 (411) = 19 M.L.J. 94 (99) = 5 M.L.T. 49 (51); 16 C.L.J. 311 (314) = 17 C.W.N. 102 (105) = 17 Ind. Cas. 257 (2599); 4 O.C. 89 (92); P.L.R. 1900 p. 269.]

APPEAL from the decree of C. Venkoba Rau, Subordinate Judge at Mangalore (South Canara), modifying the decree of A. Venkataramana Pai, District Munsif of Mangalore, in suit 286 of 1883.

The facts of the case, so far as they are necessary for the purpose of this report, are set out in the judgment of the Court (COLLINS, C.J. and PARKER, J.).

[70] The Acting Advocate-General (Mr. *Shephard*) and *K. Narayana Rau*, for appellant.

Bhashyam Ayyangar and *Strinivasa Rau*, for respondents.

JUDGMENT.

The first question raised in this second appeal is a very important one. The question is whether the Hindu rule of survivorship obtains in the families of Native Christians, who were living in undivided co-parcenership at the time of the passing of the Succession Act and who have not since effected a partition.

The plaintiff, Jose Tellis, and Augustine Tellis, the late husband of defendant No. 1, were Native Roman Catholic Christians and were living in co-parcenership as to their ancestral lands when the Indian Succession Act came into force in 1866. Their father had died previous to 1866. Augustine Tellis died in 1872, leaving a widow, defendant No. 1, and a daughter, Anna Tellis, defendant No. 2. The plaintiff's contention is that, by the rule of survivorship, he became sole owner of the ancestral property

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* Second Appeal 1053 of 1885.

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on the death of his brother in 1872 to the exclusion of defendants Nos. 1 and 2.

Both the Courts below have disallowed the plaintiff's claim. The District Munsif held, on the authority of *Ponnusami Nadan* v. *Dorasami Ayyan* (1), that the succession to the property of Augustine Tellis—including his share in the ancestral estate—was governed by the Succession Act. He referred to a case decided by the same Judges reported in 8, Indian Jurist, page 30, which appeared to him inconsistent with the former ruling, but considered himself bound to follow the ruling in the authorized reports.

On appeal, the Subordinate Judge, though not considering the Jurist case inconsistent, also followed *Ponnusami Nadan* v. *Dorasami Ayyan*.

The learned Acting Advocate-General, on second appeal, argues that both these cases are really in favor of the plaintiff's contention. He points out that in the latter case the plaintiff's father died after the Succession Act came into operation and urges that plaintiff may, at his birth, have acquired an interest to which the rule of survivorship gives effect, and of which the subsequent enactment of the Succession Act will not deprive him. It was urged that the Jurist case was on all fours with the present, since in that case also the father had died subsequent to the passing of **[71]** the Succession Act; and with regard to joint family property there was properly speaking no succession, but the rule of survivorship applied. The succession Act, it was said, applied only to property which was inheritable.

Against this Mr. *Bashyam Ayyangar* urges that the term "joint tenants," as applied to Hindu co-parceners with respect to their ancestral property, is misleading, since among them the joint tenancy with rights of survivorship is by operation of law and not by consent of the parties. He argues that, under the law of the Mitakshara, the chance of an increased share on partition accruing by the rule of survivorship is merely a contingent or possible right, and not a vested right; that if it were a vested right it might be attached and sold by a creditor, but it is not attachable (Section 266, cl. (*k*) of the Code of Civil Procedure, ; that the cases to which the Succession Act does not apply are cases in which the parties are Hindus by religion—*Joseph Vathiar's case* (2); and hence that it is impossible, where the Succession Act is in force, to give to a Christian a contingent right which could only accrue to him were he a Hindu by religion and governed by Hindu law.

In reply the Acting Advocate-General argues that when two persons have come into such a relation that the rule of survivorship applies there can be no question of inheritance, and that whatever would be the case under the Bengal law, the plaintiff's claim by survivorship is good under the law of the Mitakshara. (Mayne, Section 242).

The passage relied on by the plaintiff in *Ponnusami Nadan* v. *Dorasami Ayyan* does not appear to us to carry the proposition further than this—that where a Native Christian, whose family had up to 1866 observed the Hindu law of succession, had by such law acquired at his birth an interest in ancestral property, the subsequent enactment of the Succession Act would not divest him of such interest. It would still be open, therefore, to a son to sue his father and brother for a partition and separation of such share in the ancestral family estate. But it does not follow from this that until a partition was made all the rules of Hindu

(1) 2 M. 209. (2) 7 M.H.C.R. 121.

law would remain applicable after the passing of the Succession Act. It will be hardly contended that a managing member could bind the shares of the others, or that it would not be open to each member to give [72] or bequeath his share to a stranger, and yet such alienation would be opposed to, and inoperative under, Hindu law, though valid under the Succession Act.

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In the Jurist case the present point did not arise. That was a suit brought by one of three brothers (Roman Catholic Christians), whose family had adhered to the Hindu law of succession up to 1866 and had not afterwards effected any partition. The father died in 1869 and the ancestral property continued to be managed by the second son as joint family property. On a suit brought by one of the brothers for partition, it was held that the Indian Succession Act did not apply, since on the father's death the estate which had been held by him and his three sons jointly continued to be held by the survivors, and that as there was no separate estate, no letters of administration were required. It was also held that the plaintiff's share was one-third, not one-fourth.

In that case no widow or daughter appeared to put in any claim under the Succession Act, and the three brothers had of course under either law equal rights in the father's share. As the only property in suit was property which the members of the family had practically agreed among themselves to treat as if it were joint family property under Hindu law, it would naturally follow that the plaintiff was entitled to one-third, and the question now in issue did not arise.

We are of opinion that coparcenership and the right of survivorship are incidents peculiar to Hindu law, which law, as far as it affected Native Christians, was repealed by the Succession Act. The Succession Act did not however take away any vested rights, and Augustine Tellis had a vested interest on 1st January 1866. That interest continued to vest in him till his death in 1872, when a case of intestacy arose which was governed by the Succession Act and not a case of coparcenary and survivorship governed by Hindu law. The right of survivorship pre-supposes that the rule of Hindu law is the rule of decision at the date of the coparcener's death, but the effect of the Succession Act was to convert vested coparcenary rights into individual rights and to subject such rights in cases of intestacy to the rules of succession provided by that Act. We are of opinion that the decision of the Courts below was right.

The next point is whether defendants Nos. 1 and 2 are liable to account to plaintiff for half rent for land No. 2 for three years or six. The Subordinate Judge ruled that the claim was governed [73] by Article 61 (apparently a clerical error for 62) of Schedule II of the Limitation Act, and it is argued for the plaintiff that the case is similar to *Gooroo Das Pyne* v. *Ram Narain Sahoo* (1).

Per contra Johuri Mahton v. *Thakoor Nath Lukee* (2) and *Kundun Lal* v. *Bansi Dhar* (3) were referred to. The Calcutta case does not apply. The Allahabad case was one in which one of two heirs (each entitled to a moiety of deceased's estate) received the whole of a certain sum of money in a banker's hands. It was held that Article 62 there governed the case.

The present case is that defendants Nos. 1 and 2, who were jointly entitled with plaintiff to the whole of rent for land No. 2, are called upon to give up to plaintiff his moiety. We think Article 62 will govern the case.

(1) 11 I.A. 59. (2) 5 C. 830. (3) 3 A. 170.

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Lastly, it is urged that the Subordinate Judge improperly refused to enforce the clause for forfeiture against defendants Nos. 3 and 4. It is found that plaintiff refused to accept from these defendants a moiety of the rent, which was really all he was entitled to, and in any case it would be extremely unjust to enforce such a clause under present circumstances against tenants who have been holding on a mulgaini lease since 1841. The case is similar to *Narayana* v. *Narayana* (1), and we think the penalty is one which should be relieved against.

The second appeal, therefore, fails and we dismiss it with costs.

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10 M. 73 (P.C.) = 13 I.A. 155 = 4 Sar. P.C.J. 755.

PRIVY COUNCIL.

PRESENT :

Lord Watson, Lord Hobhouse, Sir Barnes Peacock, and Sir Richard Couch.

APPA RAO, *In re.* [17th July, 1886.]

Re-hearing—Infancy of party at the time of the hearing of appeal—"Res noviter" not itself a ground for a re-hearing.

There may be exceptional circumstances which will warrant the Judicial Committee in allowing, even after an order of Her Majesty in Council has issued upon their report, a re-hearing at the instance of one of the parties. But this is an indulgence with a view mainly to doing justice when by some accident, without any blame, the party has not been heard, and an order has been made, inadvertently, as if he had been heard.

[74] In one of two appeals in suits relating to the same estate, judgment was given by the Judicial Committee after a hearing on the merits. In the other, judgment was given to the same effect as in the first, it being conceded between the parties that the questions in both suits were the same. After both judgments had been reported to Her Majesty, and confirmed by her orders in Council, a petition for a re-hearing was presented.

Held, that, even assuming that a case of *res noviter* had been made out (which was not, however, the fact), the orders were final, and the petition must be rejected.

[R., 14 M. 439 (440) (P.C).]

PETITION for the re-hearing of two appeals in which orders of Her Majesty in Council (15th December 1879 and 3rd May 1882) had issued.

The question decided in the two suits in which the above orders were made, related to the partibility of the new zamindari of Nuzvid, in the Kondapalli Circar, granted by sanad on the 8th December 1802. After the death of Raja Shobhanadri, the son of the grantee, in 1868, leaving six sons, his third son Narasimha brought the first of the two suits against the eldest son Narayya, joining the other four as defendants, for a declaration of his share in the zamindari. In 1874, while this suit was pending, Narayya died, and the Court of Wards, on behalf of his minor son Gopala, the present petitioner, maintained the defence that the zamindari was, as it had been decided to be by the High Court, impartible. This was not upheld by the Judicial Committee, it being held by their Lordships, on 13th December 1879, that as the original zamindari of Nuzvid had been declared forfeited, and the new zamindari consisting of six parganas, part of the old, had been granted without any provision for its descent otherwise than according to the

(1) 6 M. 327.

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prevailing law, it descended according to the ordinary rules of inheritance, and was not impartible; *Raja Venkata Rao* v. *Court of Wards* (1). The second of the two suits was instituted in 1873 by three of the brothers for their shares in the same zamindari. This was pending in 1879, when the above decision was given; the defendants, one of whom was the present petitioner, no longer contested the question of partibility; and judgment went against him in this suit also on 15th March 1882; *Appa Rao* v. *The Court of Wards* (2).

Both judgments having been followed in due course by orders of Her Majesty in Council, the petitioner now alleged that, [75] having been an infant at the hearing of the above appeals in 1879 and 1882, he attained full age on 4th December 1882. Also, that he had discovered that there were official papers at Madras, showing that the old zamindari of Nuzvid, never having been declared by the Government to have been forfeited, was held by it only with a view to certain re-imbursements being made out of the revenue; and, further, that previously to the sanad of the 8th December 1802 having been granted, the Government had already ordered that the zamindari should be restored to the family. The reports of Revenue officers in charge of Nuzvid at the time, and other documents were specified.

Mr. *H. M. Bompas*, Q. C. (with whom as Mr. *Nanda Lal Ghose*), in support of the petition relied mainly on (1) the minority of the petitioner at the time of the hearings in 1879 and 1882, and inability to defend his interests himself, coupled with (2) the discovery of fresh evidence, which had it been forthcoming would, it was contended, have altered materially the case presented. Reference was made to the English rules of equity in regard to suits against infants, they being allowed on coming of age to answer afresh as defendants, and to give fresh evidence in support, although the guardian might have appeared and answered: *Kelsall* v. *Kelsall* (3). The Indian High Courts admitted reviews on an infant party attaining majority; *Dabee Dutt Shahoo* v. *Subodra Bibee* (4). Again, the Civil Procedure of the Indian Courts had always allowed reviews on the discovery of fresh evidence, and the Code now in force, Act XIV of 1882, provided for this in Section 623. The petitioner, accordingly, might have obtained a review in the High Court, had the decision been against him, and had the question come up in India. The Judicial Committee, however, could re-hear the appeals. Re-hearings were within its discretion, and had been allowed even after orders in Council had confirmed the committee's reports: see *Rojundro Narain Rai* v. *Bijai Govind Singh* (5), the precedents cited in the argument of Sir J. D. Coleridge in *Hebbert* v. *Purchas* (6), and "*The Singapore*" (7), in which last the authorities were all collected in the argument. Reference was also made to Macpherson's Practice of the Judicial [76] Committee, p. 165, where the case of *Raja Deeda Hossein* v. *Ranee Zahuran Nissa* was stated.

The Judicial Committee having power to re-hear the appeals, the fresh evidence would affect the result, and would negative the premise of fact on which the judgment of 1879 had proceeded. That was that the Nuzvid zamindari, as granted in 1802, could not be identified with any estate, or title, existing prior to the issue of the sanad of 1802, which put Nuzvid on the same footing with ordinary estates. So far from this being the fact, the fresh evidence would show that the Government had virtually restored

(1) 2 M. 128 = 7 I. A. 38.
(2) 5 M. 237 = 9 I.A. 125.
(3) 2 Myl. & Keen 409.
(4) 25 W.R. 449.
(5) 2 M.I.A. 181.
(6) L.R. 3 P.C. 664.
(7) L.R. 1 P.C. 378 (386, 387).

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the zemindari before the sanad was granted, and the order of the Government, not the sanad, constituted the actual grant of the estate. This was the main point to which the fresh evidence had reference; and by it the supposed disconnection between the old and new Nuzvid would be found not to exist. This want of connection between the new and the old zamindaris formed the main distinction which had been taken between the Nuzvid case and that of the Sivaganga zamindari; see the judgment in *Muttuvadaghanada Tevar* v. *Dora Singha Tevar* (1), *viz.*, that in the latter case the istimrar zamindar received his estate back on no other terms than the old terms. The evidence would show this distinction to be unfounded, and it would appear that Nuzvid was impartible as Sivaganga had been held to be; the latter being, also, but a portion of the larger impartible zamindari of Ramnad, as the new Nuzvid was of the old.

In regard to whether the Judicial Committee should consider the evidence itself, or send the case back to the Indian Courts, to take the evidence, and deal with it, reference was made to *Meer Mahomed Hossein* v. *Forbes* (2), *Muttusawmy* v. *Vencataswara* (3), *Juveer Bhaee* v. *Vuruj Bhaee* (4).

JUDGMENT.

Their Lordships' judgment was delivered by

LORD WATSON.—Their Lordships are of opinion that this petition must be refused.

The petitioner asks a re-hearing of the judgment of this Board in these two appeals which was finally approved by Her Majesty in Council in the year 1883. The ground upon which he makes the application is, that he has discovered certain new matter which [77] would, if it had been produced in these appeals, have materially affected the judgment of the Board. After hearing a very full explanation from counsel at the bar, it appears to their Lordships to be exceedingly doubtful whether the documentary evidence, which is said to be new, could have had any bearing or any effect upon the decision of the Board. But it is hardly necessary to consider that point, because some of the documents which are alleged to be new are printed at length in the record formerly before this Board; and that which is now represented by the petitioner to be the most important of them all is a recommendation of the Special Commissioner, approved of by the Governor in Council on December 3rd, 1802. That document is fully and correctly described in the record, so that its existence was known to the parties. In short, it is certain that most of the documents were well known to the parties, and were actually produced, and that, with reasonable care and diligence, all of them might have been recovered and made evidence, by the ordinary methods of procedure.

Their Lordships are unwilling to dispose of this application on these grounds alone. They are willing to assume, for the purposes of this petition, that a relevant case of *res noviter* is set forth in it,—new matter which would, if it had been submitted to the consideration of this Board, possibly have led to a different decision from that which was formerly arrived at. But in considering the petitioner's motion for a re-hearing, the following facts must be kept in view. It is not alleged that there was any informality in the conduct of these suits from their inception to their close. Both parties appeared before the Committee; they were fully heard upon the merits of the appeals, the petitioner being at that time

(1) 3 M. 290 (304 305) = 8 I.A. 99. (2) 2 I.A. 1.
(3) 12 M.I.A. 203. (4) 3 M.I.A. 324.

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represented by the Court of Wards. It is not said that there was any error in framing the judgment of this Board, or that it did not fully and accurately express what the Board intended to decide. Then it was reported to Her Majesty, and was confirmed by regular orders in Council, dated the 3rd May 1882, and the 19th July 1883. No authority has been cited to their Lordships which can warrant them in granting a re-hearing under such circumstances as these. It is quite true that there may be exceptional circumstances which will warrant this Board, even after their advice has been accepted upon by Her Majesty in Council, in allowing a case to be re-heard at the instance of one of the parties. The cases [78] in which that may be competently done are explained by Lord Brougham in the case of *Rajunder Narain Rae* v. *Bijai Govind Singh* (1). His Lordship properly describes this privilege, when allowed, not as a right, but as an indulgence. At page 220 of the second volume of Moore's Indian Appeals, his Lordship says: "It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of the last resort, where, by some accident, without any blame, the party has not been heard, and an order has been inadvertently made as if the party had been heard." Even before report, whilst the decision of the Board is not yet *res judicata*, great caution has been observed in permitting the re-hearing of appeals. In the last case to which we were referred, that of *Hebbert* v. *Purchas*, in Moore's Reports, volume 7, N.S., where a litigant alleged, before report and approval, that he had been disabled by want of means from appearing and maintaining his case, the Lord Chancellor said:—"Having carefully weighed the arguments, and considering the great public mischief which would arise on any doubt being thrown, on the finality of the decisions of the Judicial Committee, their Lordships are of opinion that expediency requires that the prayer of the petitions should not be acceded to, and that they should be refused." There is a salutary maxim which ought to be observed by all Courts of last resort—*Interest reipublicæ ut sit finis litium.* Its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this.

Petition rejected.

Solicitors for the petitioner: *Scott & Spalding.*

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10 M. 79.

[79] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

SRI DEVI (*Defendant No.* 10), *Appellant v.* KELU ERADI AND OTHERS (*Plaintiffs*), *Respondents.** [15th July and 18th October, 1886.]

Malabar Law—Decree against karnavan and senior anandravan not binding on junior members—Civil Procedure Code, Section 13, *Explanation* 5, *Section 30.*

A decree having been obtained against the karnavan and senior anandravan of a Malabar tarwad whereby the tarwad was dispossessed of certain land, the junior members of the tarwad who had not been impleaded in the suit sued to recover the land:

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* Second Appeal 982 of 1885.

(1) 2 M.I.A. 181.

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Held, that the plaintiffs were entitled to recover upon proof that the decree in the former suit was not substantially correct, and that they were not bound to prove *mala fides* on the part of their karnavan in defending the former suit as condition precedent to recovery.

[F., 17 M. 214 (215); R., 10 M. 223 (225); 15 M. 6 (9); 20 M. 129 (136) (F.B.).]

APPEAL from the decree of H. J. Stokes, Acting District Judge of South Malabar, reversing the decree of J. A. D'Rozario, Acting District Munsif of Angadipuram, in suit 514 of 1883.

Suit by Kelu Eradi and seven others, junior members of the Patharikat Arikkare tarwad, against (1) their karnavan Unni, (2) their senior anandravan Manissa, (3) Sri Devi, Valia Thamburatti of the Puthia Kovilagam, and six others, to recover seven parcels of land.

In 1880, the predecessor of defendant No. 3 obtained a decree for the possession of this land in a suit to which defendants 1 and 2 were parties, and Krishnan, Cheria Thamburan of the Puthia Kovilagam (defendant No. 4), purchased this decree and obtained possession of the land.

Defendants 5—9 were tenants of defendant No. 4.

Defendant No. 3 having died, her representative was impleaded as defendant No. 10.

The Munsif dismissed the suit. Plaintiffs appealed.

The District Judge decreed the claim. Defendant No. 10 appealed.

The facts necessary for the purpose of this report appear from the judgment of the Court (MUTTUSAMI AYYAR and BRANDT, JJ.).

[80] *Gopalan Nayar*, for appellant.

The Acting Advocate-General (Mr. *Shephard*), for the respondents.

JUDGMENT.

The lands in suit originally belonged to the tarwad now consisting of the plaintiffs (respondents) and defendants Nos. 1 and 2, the karnavan and senior anandravan of the tarwad.

It is the case for the appellant that the jenm right was in 1839 sold to her predecessor in title the then Thamburatti of the Puthia Kovilagam; that at the time of this sale they were held on an outstanding kanam by one Unnian; and having been demised back on kanam by the Kovilagam to defendant No. 1 as karnavan of his tarwad, the latter in 1858 sued the tenants in occupation to eject them, on which occasion defendant No. 1 in his plaint sued as holding on a kanam demise, from the Puthia Kovilagam. This was in original suit 680 of 1858. The Kovilagam in original suit 172 of 1879, sued the present defendants Nos. 1 and 2 and others, tenants

The defendants in that suit denied the alleged sale of the jenm right to the properties then and now in suit; and the present defendant No. 2 pleaded that the admission of his karnavan (present defendant No. 1) in the suit in 1858 was false and fraudulent; and the junior members of the tarwad now sue to establish their jenm right.

In the suit in 1879 the appellant's jenm title was held proved, though the finding was that a document which was produced to prove it was not genuine; the admission of defendant No. 1 in 1858 coupled with other facts was, however, considered sufficient to entitle the Kovilagam to a decree; in execution of which the tarwad was dispossessed.

In the present suit the District Munsif held that the admission of defendant No. 1 in 1858 was made in good faith, and is binding on the tarwad. A document, purporting to be the jenm deed of 1839, was produced in this case, and the District Munsif thought it certainly was not a

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genuine document, but the introduction of a fabricated document was held not sufficient to prove that the admission of defendant No. 1 in 1858 was the result of fraud and collusion between the defendant No. 1 and the Kovilagam against the rest of the tarwad.

The District Judge held that the other members of the tarwad [81] are not bound, nor even affected, by the admission of their karnavan in 1858; and that that admission was false, there having been no sale of the jenm right to the Kovilagam in 1839, and that it was made by defendant No. 1 in fraud of his tarwad to oblige the representative of the Kovilagam whose kariasthan (agent or manager) he was, and at a time when he was not managing the affairs of the tarwad, nor living with the family. As showing that the Kovilagam did not acquire the jenm title in 1839, the Judge says the plaintiff in the suit of 1879 did not know on what grounds or on what documents to base the alleged title; and this alone (he says) is sufficient to show the alleged deed of sale to be a forgery. Decree was accordingly passed in favour of the respondents.

It is contended in appeal that it lay upon the respondents to prove affirmatively that the admission of defendant No. 1 in 1858 was made fraudulently; that a claim to set aside an admission as fraudulently made is barred by time; that it is not alleged that there was any fraud on the part of defendant No. 2 in the matter of original suit No. 172 of 1879, to which he was a party; that on the contrary, defendant No. 2 and the other defendants in that suit then pleaded that the admission of defendant No. 1 in 1858 was fraudulent, and the suit was fully contested in this respect; and that where a suit has been so defended, the tarwad should not be permitted to have the same issue tried over again on an allegation of fraud in respect of admission made by the karnavan in 1858, even if such suit be not barred by time.

For the respondents, it is contended that the District Judge finds fraud on the part of the karnavan established; and, as to the senior anandravan being a party, that this cannot estop the other members from suing, as the anandravan could not represent the tarwad.

We shall later on refer in more detail to the Full Bench case: *Ittiachan* v. *Velappan* (1).

It was sought in the present appeal to distinguish the cases disposed of by the Full Bench from the present, as relating only to property attached or sold in execution of a decree; but we must not overlook the fact that regard was had in the cases then under consideration to the laxity of procedure which for many years [82] prevailed in Malabar, and to the extent to which concession might be made in such cases.

The substantial question then is, whether the defendants Nos. 1 and 2 sufficiently represented the respondents' tarwad in original suit 172 of 1879, and whether the decision therein bars the present suit. The issue whether the jenm title was in the appellants' Kovilagam or in the respondents' tarwad was also a material issue in the former suit, and the responents' karnavan and senior anandravan were party defendants. The former decision would clearly be a bar if the respondents could be taken to have been parties to that suit, unless they showed that those who were actually parties did not defend the title of the tarwad *bona fide*. Whether this can be taken to be so in this case is the real question which we have now to consider.

(1) 8 M. 484.

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The decision in *V. Narayanan Nambudri* v. *V. Narayanan Nambudri* (1) is a clear authority for the position that Explanation V of Section 13 of the Code of Civil Procedure is not limited to the case of a suit in which the provisions of Section 30 were complied with, and we should follow it if subsequent decisions did not throw doubt upon it. In that case it was also found as a fact that the plaintiff in the second suit assisted the karnavan in defending the first suit.

This decision was not followed in *Kombi* v. *Lakshmi* (2). It was there held that the decree against a person who happened to be the karnavan of a tarwad is not necessarily binding on the tarwad in the absence of fraud, and that if it is sought to bind the tarwad, the procedure laid down in Section 30 must be followed. In that case, a sale in execution of a decree against one who was a karnavan was set aside at the instance of the other members of the tarwad.

The decision in *Gopalan v. Valia Tamburatti* (3) proceeded on the ground that a perpetual lease granted to a tarwad was forfeited by the denial of the landlord's title by the karnavan of the tarwad, and that, unless the karnavan was shown to have acted in fraud of the tarwad, in denying the title, the leasehold interest which was forfeited in law could not be restored at the suit of an anandravan. Alluding to Section 30 of the Code of Civil Procedure, the Court then observed that it might be doubted how far the [83] practice would be now upheld whereby the karnavan was recognized as representing the tarwad and entitled to sue or defend suits as such representative, without the association of the other members of the tarwad, who were nevertheless held bound by decrees passed in such suits unless they showed *mala fides* in their representative.

In this state of decisions, the legal effect of the procedure which had prevailed in Malabar was considered by the Full Bench in *Ittiachan* v. *Velappan* (4). The grounds of decision unanimously adopted by the Court were (I) when the karnavan of a tarwad was not impleaded as such in a suit, and there was nothing on the face of the proceedings to show that it was intended to implead him in his representative character, tarwad property could not be attached and sold in execution of a decree, even though it was proved that the decree was obtained for a debt binding on the tarwad, and (II) that, although the property of a tarwad might be attached and sold in execution of a decree when the karnavan was sued as representative of the tarwad, members of the tarwad who were not parties to the proceedings and had not been represented in the manner prescribed by the Code of Civil Procedure were not estopped from showing that the debt for which the decree was passed was not binding on the tarwad. The principles on which the grounds of decision were formulated are (I) that a decree can only operate *inter partes*; (II) that if it is desired to extend its operation to those who are not parties to the suit, or who do not claim under them, the procedure prescribed by Section 30 should be followed; and (III) that a concession can legally be made in view of the irregular practice in Malabar only to the extent indicated by the ruling of Privy Council in *Bissessur Lall Sahoo* v. *Maharaja Lachmessur Singh* (5). In that case the Judicial Committee observed that, although there may have been some irregularity in drawing up the decrees then in question, they were substantially decrees in respect of a joint debt of the family, and against the representative of

(1) 2 M. 328. (2) 5 M. 201. (3) 7 M. 87.
(4) 8 M. 484. (5) 6 I.A. 233 (237).

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the family and might be properly executed against the joint family property. Hence it was held by the Full Bench that the intention to implead the karnavan as representative of the tarwad must appear from the proceedings in the first suit, and that the debt recognized by the decree must be binding on the entire tarwad. [84] Applying these principles to the case before us, we do not see our way to saying that the respondents were bound by the decree in the suit of 1879, on the ground that their karnavan then in good faith opposed the appellant's claim. There can be no doubt that the association of karnavan and the senior anandravan may be taken to disclose an intention on the part of the appellant to implead the respondents' tarwad ; but upon the facts found, we must hold that the respondents have shown that the former decree was *not* substantially correct. The Full Bench decision precludes our holding that the decision against a karnavan is binding on the members of the tarwad unless they prove *mala fides* in him, in a suit to which they were not actually or constructively parties ; if they were so, it would be immaterial whether the karnavan acted in good faith or otherwise : if they were not parties actually or constructively, it is open to them to show that the former decree is substantially incorrect, and therefore is not binding on them.

It is urged that the Judge was in error in directing that the mesne profits be ascertained in execution. But it is provided by Section 212 of the Code of Civil Procedure that the Court may determine the amount of mesne profits by the decree itself, or may direct an inquiry and dispose of the same by further orders. This objection to the decree appealed against must then be overruled.

Another contention is that the suit is barred by limitation. The respondents sued to recover certain lands of which they lost possession subsequent to 1883. Assuming that they are entitled to recover possession, their claim is certainly not barred by lapse of time. In referring to the admission made by defendant No. 1 in 1858 as fraudulent, the respondents only intended to anticipate a plea on the part of the appellant and to avoid it.

As to the objection that the burden of proving fraud lay on the respondents, the question does not arise upon the facts found, inasmuch as both parties produced evidence in support of their several contentions, and the respondents are found to have proved the jenm title of their tarwad. The result is that the second appeal fails, and we dismiss it with costs.

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10 M. 85 (F.B.).

[85] APPELLATE CIVIL—FULL BENCH.

Before Sir Charles A. Turner, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Hutchins, and Mr. Justice Brandt.

REFERENCE FROM THE BOARD OF REVENUE UNDER SECTION 46 OF THE INDIAN STAMP ACT, 1879.* [24th April, 1885.]

Stamp Act, Schedule II, *Article* 15 *(b) – Receipt given by Secretary of Club to a Member for Club bill.*

Where a receipt in writing is given by the Secretary or other Manager of a Club to a Member acknowledging a payment above Rs. 20 on account of a Club bill, it is liable to stamp duty.

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* Referred Case 3 of 1885.

1885 APRIL 24. — FULL BENCH. — 10 M. 85 (F.B.).

CASE stated by the Board of Revenue under Section 46 of the Indian Stamp Act, 1879.

The case was stated as follows:—

"This case was referred by the Collector of Madras, on an application preferred to him by the Secretary of the Madras Club to determine the question whether receipts granted by him to members of the Club for sums paid in liquidation of Club accounts exceeding Rs. 20 in amount are liable to stamp duty, or are exempt under Clause (*b*), Article 15, Schedule II of the Act.

"The primary argument in support of exemption is 'no consideration,' because the property of the Club is the property of each of its members (all members being jointly and severally liable for the debts of the Club). In making a payment, therefore, a member is not paying the Secretary, but himself. It is further urged that, as members are not legally liable to be sued for their Club bills, a legal acquittance cannot be demanded for what is not a legal indebtedness.

"On the other hand, the argument of 'no consideration' is met by the assertion that the goods supplied represent the consideration for the money paid, it being pointed out that, granting the joint ownership of the whole body of members in the Club property, the purchase by an individual member of any portion of the com-**[86]**mon property is an ordinary mercantile transaction, the receipt evidencing which becomes liable to stamp duty."

The Acting Government Pleader (Mr. *Powell*) for the Board of Revenue.

JUDGMENT.

The judgment of the Full Bench (TURNER, C.J., KERNAN, MUTTUSAMI AYYAR, HUTCHINS and BRANDT, JJ.) was delivered by

TURNER, C.J.—We assume that there is nothing in the rules of the Madras Club which distinguishes the liability of members of that Club from the liability of members of other similar societies.

The members of the Club agree that, in consideration of certain payments, they shall be supplied with certain advantages gratuitously and with accommodation and refreshments on payment of certain charges. A member engages to pay his subscriptions and also to pay for such accommodation and refreshments, as are supplied on credit, and this liability is a liability which arises out of a contract not prohibited by law.

It has been held that a Club is not a partnership and therefore that its members are not precluded from enforcing contracts made with a managing member or members in a Court of Law as distinguished from a Court of Equity; *Caldicott* v. *Griffiths* (1), also *Ragget* v. *Bishop* (2), *Ragget* v. *Musgrave* (3).

It is merely a matter of procedure as to the form in which the liability of a member for debts due to the Club is to be enforced.

If therefore we are to hold that a receipt is only an acknowledgment of a payment made in satisfaction of a debt or demand, we should hold that on payment of a Club bill there is a satisfaction of a debt or demand, but the words of the Act are sufficiently large to cover other payments of money for consideration.

We therefore reply that, where a receipt in writing is given by the Secretary or other Manager of a Club to a member acknowledging a payment in amount above Rs. 20, it is liable to a receipt stamp.

(1) 8 Ex. 898. (2) 2 C. & P. 343. (3) 2 C. & P. 556.

10 M. 87.

1886 NOV. 12.

APPELLATE CIVIL.

10 M. 87.

[87] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

CHIDAMBARA (*Plaintiff*) *Appellant v.* THIRUMANI (*Defendant* No. 2), *Respondent.** [14th October and 12th November, 1886.]

Cause of action—Suit for damages caused by false statement of witness in a suit.

No action will lie against a witness for making a false statement in the course of a judicial proceeding.

APPEAL from the decree of T. Kanagasabai Mudaliar, Subordinate Judge at Tanjore, dismissing an appeal from the decree of H. Strinivasa Rau, District Munsif of Kumbakonam, in suit 459 of 1883.

Plaintiff Chidambara Chetti sued Dandayuda Chetti for Rs. 1,292-6-0 damages. It was alleged in the plaint that, owing to a false statement made by defendant as witness in a suit brought by one Saminatha Chetti against plaintiff, to the effect that a certain deed was lost, the Court passed a decree against plaintiff, and plaintiff was obliged to pay the amount now sued for. It was also alleged in the plaint that defendant fraudulently induced Saminatha Chetti to bring the said suit.

Defendant died pending the suit, and his minor son, Tirumani Chetti, was made defendant.

An objection on his behalf, that the cause of action did not survive, was overruled, but the suit was dismissed on the ground that it would not lie.

On appeal the decree was confirmed on the ground that the damages were too remote.

Plaintiff appealed.

Ramachandra Rau Saheb, for appellant.

Rama Rau, for respondent.

JUDGMENT.

The appellant and his brother, Saminatha Chetti, entered into a partition on the 19th March 1879, and it was arranged that the former was to pay the latter a sum of Rs. 595. The appellant borrowed Rs. 405 more and executed an unregistered [88] hypothecation bond for Rs. 1,000 in favour of the latter. In May and June 1879 the appellant sold the hypothecated lands to the respondent, who undertook to pay Saminatha Chetti's debt out of the purchase money. It was provided by the partition-deed that Saminatha Chetti should redeem some 8 pangus of land mortgaged with possession to the respondent on the 15th February 1873 for Rs. 8,000; and, in accordance with this provision, Saminatha Chetti paid, on the 19th July 1879, Rs. 7,000 to the respondent; took credit for Rs. 1,000, due to him by the appellant, and redeemed the property. The appellant's case was that the respondent since colluded with Saminatha Chetti, who was his son-in-law, and instigated him to institute a suit against the appellant for the recovery of Rs. 590 with interest due thereon; that during the trial of the suit the respondent, who was cited by him as a witness to prove payment, falsely and fraudulently stated that the hypothecation bond for Rs. 1,000, which was returned to him by Saminatha Chetti on payment, was lost, and that by reason of its non-production the other evidence which he produced to prove payment

* Second Appeal 150 of 1886.

1886 Nov. 12. — Appellate Civil. — 10 M. 87.

was discredited, and that a decree was passed against him for the amount sued for with interest and costs in favour of Saminatha Chetti, and that on the 10th December 1882 he was obliged to pay in satisfaction of that decree Rs. 1,292-6-0, and that, as this loss entailed upon him was due to the false evidence which the appellant gave, *viz*., that the hypothecation bond was lost whilst it was really in his possession, he claimed a decree for compensation. Both the Courts below dismissed the suit with costs. The District Munsif considered that it was not shown that the respondent's evidence was false, and assuming that it was, he was only liable to be prosecuted for giving false evidence. The Subordinate Judge observed on appeal that, though the hypothecation deed was suppressed, other means of proving payment was available to the appellant, and for his failure to use them, the respondent was not responsible. He rested his decision on the ground that the damage sustained by the appellant was not the direct and proximate result of the wrongful act imputed to the respondent. It is urged in second appeal, (I) that the appellant had a good cause of action against the respondent, and (II) that the means at his disposal of proving payment was used by him, and that they failed because of the non-production by the respondent of the hypothecation bond which he had in his possession. **[89]** We do not think that this second appeal can be supported. No action will lie against a witness for making a false statement in the course of a judicial proceeding, and the proper remedy is a prosecution for giving false evidence. In *Barber* v. *Lesiter* (1), ERLE, C.J., observed: "It has been decided that no action lies against a witness for uttering a false statement in the course of a judicial proceeding, even though it is alleged to have been done falsely and maliciously and damage results therefrom to the plaintiff, the proper course being a prosecution for perjury, which is probably what was meant by Lord Hale in *Vanderberg* v. *Blake* when he says that to allow the action whilst the judgment is in force would be to blow the judgment off by a side wind." In the case before us, the respondent stated in his evidence that he paid the debt due to Saminatha Chetti and he was not credited, not simply because his statement that he lost the hypothecation bond was regarded with suspicion, but also for other reasons which had nothing to do with the respondent. It was the action of the Court in not accepting the evidence as a whole as proof of payment that is the proximate cause of the damage sustained by the appellant. Against him no action can be maintained either for conspiracy or any other wrong, unless it is clearly shown that the damage to the appellant was the necessary and proximate result of the respondent's act. There were two causes to which the damage might be referred, *viz*., the suppression of the hypothecation bond by the respondent and the weight which the Court attached to the evidence which was produced by the appellant to show that it was fraudulently suppressed and that the plea of payment was true, and that of those causes the act of the Court was the proximate and direct cause. Further, it is found by the District Munsif that in stating that the hypothecation bond was lost, the respondent probably spoke the truth and the Subordinate Judge accepted the finding. On this ground also, this appeal must fail, and we dismiss it with costs.

(1) 7 C.B.N.S. 187.

10 M. 90.

1886
OCT. 16.

APPELLATE CIVIL.

10 M. 90.

[90] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

GANGAYYA AND OTHERS (*Plaintiffs*), *Appellants v.* MAHALAKSHMI AND OTHERS (*Defendants*), *Respondents.**
[14th July and 16th October, 1886.]

Specific Relief Act, Section 42—Suit by reversioners of Hindu widow.

The plaintiffs, uncle's sons of R, a deceased Hindu, brought a suit as reversioners of R, for a declaration that certain alienations made by M, the widow of R, were not binding beyond the lifetime of M.

The District Judge held on the strength of *Greeman Singh* v. *Wahari Lall Singh* (I.L.R., 8 Cal., 12) that the suit would not lie under Section 42 of the Specific Relief Act:

Held, that the suit would lie.

[R., 27 A. 406 (409)=2 A.L.J. 84=A.W.N. (1905) 6; 3 C.L.J. 224 (226); 10 C.P.L. R. 1 (4).]

APPEAL from the decree of H. LeFanu, Acting District Judge of Kistna, confirming the decree of O. S. R. Kristnama, District Munsif of Masulipatam, in suit 687 of 1883.

The facts necessary for the purpose of this report appear from the judgment.

The Acting Advocate-General (Mr. *Shephard*), for appellants.

Anandacharlu, for respondents.

The Court (MUTTUSAMI AYYAR and BRANDT, JJ.) delivered the following

JUDGMENT.

The appellants, Adusumilli Gangayya and two others, claiming to be entitled in reversion to certain property on the death of respondent No. 1 Mahalakshmi, the widow of one Pedda Ramana, whose uncle's sons the appellants allege themselves to be, sued for a declaration that certain alienations of the said property made by respondent No. 1 to Upalapati Seshayya and Sayana Subbanna, respondents Nos. 2 and 3, are void as against them except for the term of the widow's life. The respondents pleaded among other things that the suit is not maintainable, and the District Judge, on the authority of the case cited, *Greeman Singh* v. *Wahari Lall Singh* (1), the reasoning of which, he says, he is unable to understand, allowed this objection.

[91] He proceeded nevertheless to dispose of the appeal on the merits.

It is contended in appeal that the suit is maintainable, and it is urged that even if the decision quoted be correct, it may be distinguished from the present case, inasmuch as here it is found as a fact that the appellants are the nearest, if not the only, reversioners, whereas in the Calcutta case there were contending reversioners.

We are unable to distinguish the cases on this ground. It is stated most distinctly in the case quoted that the suit was dismissed on the ground that the plaintiff was not entitled to a declaration, not because he was not a nearer reversioner than the defendants who also claimed to be reversioners, but that "a person who stands in the position of a

* Second Appeal 968 of 1885.

(1) 8 C. 12.

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presumptive heir upon the death of a Hindu widow is not entitled to maintain a suit for a declaration of his so-called reversionary right;" and this because "Section 42 of the Specific Relief Act refers only to existing and vested rights and not to contingent rights like those of a person who has only a chance of succeeding to the estate of a Hindu after the death of a female heir in possession."

We confess that we also are unable to follow the reasoning or to concur in the conclusion arrived at.

The language used in illustrations (*d*) and (*e*) appended to Section 42 is referred to as supporting this conclusion. Illustration (*e*) appears to us to be conclusive that a suit like the present is maintainable. With illustration (*e*) before us, and reading the section itself apart from it, we entertain no doubt that the present suit is maintainable.

The alienation to respondent No. 3 was by way of sale, and the widow and her alienee pleaded that the sale was for purposes necessary and binding on the estate.

The case of respondent No. 2 is more complicated and altogether different.

He and the widow pleaded that Ramana brought the respondent No. 2, then a young boy, to his house 16 years before suit, promising the boy (or his parents) a share in his property during his (Ramana's) lifetime, and the whole of it after his death, according to the custom of the country, the boy to be married to the daughter of Ramana, and to help Ramana and to be a member of his family; they further said that the respondent No. 2 [92] "became (or was constituted) the heir of Ramana's property after his death."

It is admitted that Ramana's daughter died before she was married to respondent No. 2, and it is found by the District Munsif that after she died Ramana selected another girl for him as wife, and, in accordance with his instructions, his widow had respondent No. 2 married to this girl.

The District Munsif found that the respondent No. 2 was taken as an "illatam" son into Ramana's family, and that, as such, he is entitled to the whole estate of Ramana, being "constituted his son at a time when he had full power over his property" and that the appellants cannot call his right in question.

The District Judge called for findings on the following issues: (1) Does the custom of "illatam" prevail amongst Kammas in this district? If so, is it a valid and binding custom? (2) Can the relationship of affiliation, otherwise termed "illatam," be established in a Kamma family in this district in cases where the person said to be affiliated has not actually been married to a daughter of the family into which he claims to have been affiliated? If so, has defendant No. 2 been so affiliated? (3) Was there, subsequent to the death of the daughter of Ramana, any agreement that, in return of his taking part in the management of the estate, defendant No. 2 should receive a share, or be substituted as heir to Ramana? Supposing such agreement to be proved, is it valid and binding so as to avail to oust the claim of the reversioners?

He found that without doubt the respondent No. 2 is not an "illatam" son-in-law of Ramana, but in appeal the right of respondent No. 2 was put on the footing of a contract supported and evidenced by a nuncupative will made by Ramana on his death-bed, the consideration being Ramana's promise to give to respondent No. 2 his daughter in marriage and a share in his property; a promise after the daughter's death to

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affiliate him and to give him half his property in his lifetime and the whole after his death, which intention he instructed his wife to carry out after his death, and also that he directed his wife to marry the young man to a girl whom he had selected, or whom she should select.

In the event the District Judge considered that the respondent No. 2 is entitled to succeed on the ground of a contract, and a [93] direction by Ramana to his wife—which, he says, may be considered a nuncupative will—to make over the property to respondent No. 2, and as to the alienation to the respondent No. 3 he held that it is open to the respondent No. 2 to repudiate or to ratify it, but that the appellants are not in a position to challenge it.

It is urged in appeal that the respondents Nos. 1 and 2 set up a special custom whereby respondent No. 2 was affiliated to, or made a member of, Ramana's family, and that they referred to certain promises said to have been made by Ramana to give respondent No. 2 a share in this property, or his property, only in proof of the alleged affiliation; that the District Munsif to whom issues were referred found the alleged custom not proved, and that respondent No. 2 had no right by inheritance; and that as the District Judge did not express dissent from those findings the plaintiffs' claim should have been allowed; that the theory of a nuncupative will was an after-thought on which the District Munsif declined to express any opinion upon the ground that he was called on for a finding as to the alleged custom only, whereas the Judge disposed of the case on considerations not arising out of the case originally stated, *viz.*, was there a contract? and was there a will? and it is argued that there is no evidence of a contract or of a will, but only an agreement which was invalid, the basis of the agreement on the part of Ramana, *viz.*, the intention to marry respondent No. 2 to his daughter, having failed by reason of her death.

We cannot look upon the instructions given by Ramana shortly before he died as in the nature of a testamentary disposition of property, because he only conferred a power upon his wife to execute a contract which he had made, but had not performed during his lifetime. The instructions given may, however, be regarded as given in furtherance of, or to complete, the prior promise, *viz.*, either the promise to give respondent No. 2 half of his property during his lifetime and the rest after his death in consideration of respondent No. 2 leaving his own family and living with and helping Ramana, coupled with a promise to give his daughter to him in marriage if she lived, or a subsequent promise to do the same, notwithstanding that his daughter had died.

And the questions we have to decide are—whether there was consideration for such promise, whether there was a contract [94] which could be legally enforced, or whether the agreement was altogether invalidated by reason of the daughter's death?

There is evidence that respondent No. 2 was allowed by his family to leave them and go permanently to Ramana's house, taking money with him, and to do service with and for him, and this of itself would constitute consideration. The giving of the daughter of Ramana to respondent No. 2 was part and part only of the consideration moving from Ramana to respondent No. 2, and if the two parties resolved to adhere to their mutual agreement notwithstanding the death of the daughter, and if respondent No. 2 relying thereon continued to work with and for Ramana, we do not see why they should not do so, nor why the contract should be regarded as at an end or incapable of enforcement or performance by

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mutual consent, nor why it should not be regarded as a fresh contract modified in reference to altered circumtsances and acted upon by both parties.

As to the contention that the promises were referred to only in proof of the alleged affiliation we have to observe that in substance they imply a contract, although such contract was not formally set out as one of the grounds on which relief was claimed; at all events the question was distinctly raised by the issues referred by the District Judge, and the appellant cannot be held to have been taken by surprise or in any way prejudiced.

The result is that the appeal is dismissed with costs.

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10 M. 94=11 Ind. Jur. 60.

APPELLATE CIVIL.

Before Sir. Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

POTHI REDDI (*Defendant*), *Appellant v.* VELAYUDASIVAN (*Plaintiff*), *Respondent.** [4th August and 5th November 1886.]

Evidence Act, Section 91—Suit for money lent—Unstamped promissory note—Cause of action.

The terms of a contract to repay a loan of money with interest, having been settled and the money paid, a promissory note specifying these terms was executed **[95]** later in the day by defendant and given to plaintiff. This promissory note was not stamped. In a suit brought to recover the unpaid balance of the loan on an oral contract to pay :

Held, that plaintiff could not recover.

[**F.**, 17 M.L.J. 126 (127); **R.**, 14 Bur. L.R. 179=U.B.R. (1907) 3rd Qr., Evidence, 5; 10 Ind. Cas. 177 (178)=21 M.L.J. 462 (463)=10 M.L.T. 55 (56); 10 Ind. Cas. 669=9 M.L.T. 281; 16 Ind. Cas. 33 (37); 19 Ind. Cas. 840 (841); 17 C.L.J. 399 (401); **D.**, 23 M. 527 (528); 29 M. 111 (113)=15 M.L.J. 484.]

APPEAL from the decree of K. R. Krishna Menon, Subordinate Judge at Tinnevelly, reversing the decree of V. Strinivasacharulu, District Munsif of Tuticorin, in suit 236 of 1884.

Plaintiff Velayudasivan Pillai sued the defendant Pothi Reddi for Rs. 596-10-10, balance of principal and interest due on account of a loan of Rs. 1,000, made on 28th March 1881, which it was alleged defendant promised orally to repay on the 12th July 1881.

Plaintiff alleged that, on the evening of the same day, defendant gave him a memorandum admitting receipt of the money and promising to repay the same on the 12th July 1881 with interest, and that defendant had paid three instalments amounting to Rs. 600 in 1881.

The Munsif held that the memorandum was a promissory note, and that, as it was not stamped, it could not be admitted in evidence under Section 34 of the Indian Stamp Act.

Rejecting it as inadmissible, the Munsif held that plaintiff could not give evidence of the oral promise made in the morning for which the written agreement was substituted in the evening.

The Munsif held, however, that plaintiff was entitled to prove the payment of consideration which preceded the promise to pay and that he might have recovered had the suit not been barred by limitation, more

* Second Appeal 149 of 1886.

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than three years having elapsed from the date of the loan before the suit was filed.

The suit was dismissed.

On appeal the Subordinate Judge held that the memorandum was not a promissory note, but merely additional evidence of the loan; that the oral contract on which plaintiff sued was proved; that the payments made subsequently were payments on account of interest as well as of principal, interest being due according to the contract, and that endorsements of such payment made and signed by the defendant on the memorandum were admissible though not stamped for the purpose of proving part-payment of principal.

The claim was decreed.

Defendant appealed on the grounds—

(1) That plaintiff's claim was barred by limitation.

[96] (2) That oral evidence was not admissible to prove the contract which was evidenced by a promissory note.

Bhashyam Ayyangar, for appellant.

Subramanya Ayyar, for respondent.

The Court (COLLINS, C.J., and PARKER, J.) delivered the following

JUDGMENT.

We are clearly of opinion that the writing is not simply a memorandum in a ledger as found by the Subordinate Judge, but that it is a promissory note, and being unstamped, it is not receivable in evidence.

It is then urged upon us on the strength of the ruling in *Krishnasami* v. *Rangasami* (1) that plaintiff may be permitted to prove the consideration which preceded the contract, and that the suit may be regarded as one for the return "of money lent" to defendant on 28th March 1881.

The ground on which that case was decided was that the cause of action was complete in itself before the giving of the note, and that therefore the case fell in the first class of those described by Garth, C.J., in *Sheikh Akbar* v. *Sheikh Khan* (2). The facts of that case do not appear in the report further than this,—that the money for which the promissory note was given was borrowed for the purpose of paying a debt incurred in family trade. Beyond that we do not know the circumstances of the particular case, and we do not understand the learned Judges to have ruled that in all cases where the original cause of action is the bill or note itself, it is open to the plaintiff—if the note be lost or not receivable in evidence—to frame his suit as one "for money lent" independently of the note. We cannot assent to such a doctrine, and to do so would entirely nullify the provisions of Section 91 of the Indian Evidence Act.

As pointed out by Garth, C.J., there is no doubt as to the principle of the authorities, and the only difficulty is in the determination in individual cases to which class a particular case belongs. A plaintiff may sue on his original cause of action if the promissory note has been given *on account of* the debt, and has not been parted with under such circumstances as will render the debtor liable upon it to some third person,—as for instance, when the promissory note is given in payment for goods sold and delivered, or for an account rendered. But when a loan is made by

(1) 7 M. 112.

(2) 7 C. 256.

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plaintiff to defendant, and in consideration of that loan the [97] defendant contracts by a promissory note to pay it with interest at a certain date, there is no cause of action "for money lent" or otherwise than upon the note, and if for want of a stamp the note is not receivable in evidence the plaintiff's claim must fail. This has before been held by this Court in *Muthalagan Ambalam* v. *Ramanadham Chetti* (1).

It appears to us the present is precisely such a case. The terms of the contract were settled in the morning and the rate of interest and the date for re-payment were agreed upon. The money was then handed over, and later in the day the promissory note specifying these terms was written and left in the plaintiff's possession.

It is a necessary condition to every written contract that the terms should be orally settled before they are reduced to writing, and to hold when such a contract has been reduced to writing, that a plaintiff can take advantage of the absence of a stamp on the promissory note to sue at once for the return of money which he may have contracted to lend for a fixed period, would entirely defeat the provisions of Section 91 of the Evidence Act.

As pointed out by the learned Chief Justice in *Sheikh Akbar* v. *Sheikh Khan* one very material distinction between the two classes of cases may be found in the investigation of the point on whom lies the burden of proving the note. In the case before us there can be no doubt that the *onus* must fall on the plaintiff.

Upon this ground the suit must fail, though we may further point out that even had it been open for the plaintiff to bring the suit as "for money lent," the receipts for the part-payments being unstamped, would not be receivable in evidence, and the bar of limitation is therefore not removed under Section 20 of the Indian Limitation Act.

The decree of the lower appellate Court must be reversed and the suit dismissed. Each party should bear his own costs throughout.

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10 M. 98.

[98] APPELLATE CIVIL.

Before Mr. Justice Parker.

VENKATESWARA, *in re.** [17th and 25th November, 1886.]

Act XX of 1863, *Section* 18—*Civil Procedure Code, Section* 622—*Order refusing permission to sue not appealable, nor subject to revision under Section* 622 *of the Code of Civil Procedure.*

An order passed under Section 18 of Act XX of 1863, refusing leave to sue, is not appealable, nor if the Judge has exercised his discretion, liable to revision under Section 622 of the Code of Civil Procedure.

[F., 19 C. 275 (286); R., 33 M. 412 (413)=5 Ind. Cas. 291=7 M.L.T. 126.]

APPLICATION under Section 622 of the Code of Civil Procedure to set aside an order of T. Weir, District Judge of Madura, refusing permission to one Venkateswara Ayyan to bring a suit under Section 18 of Act XX of 1863 against the members of the Madura Temple Committee.

Mr. *Brown*, for petitioner.

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* Civil Revision Petition 243 of 1886.

(1) 4 Ind. Jur. 568.

1886 NOV. 25.

APPELLATE CIVIL.

10 M. 98.

It was contended that even if the application under Section 622 would not lie, the order was appealable.

The Court (PARKER, J.) delivered the following

JUDGMENT.

This is an application under Section 622 of the Code of Civil Procedure, asking the Court to revise the order of the District Judge of Madura refusing leave to file a suit under Section 18, Act XX of 1863. The learned counsel referred to the decision in appeals 48 of 1885 and 49 of 1886, urging that these appeals had not been argued, and pointing out that an appeal had been allowed against an order under Section 5 of the same Act: *Sultan Ackeni* v. *Shaik Bava Malimiyar* (1).

The decisions quoted followed the Full Bench decision of this Court in Civil Revision Petition 101 of 1882 (*a*) given on March [99] 21st, 1883, but which by an oversight would appear not to have been reported.

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(1) 4 M. 295.

(*a*) Turner, C.J. (Innes, Kernan Kindersley and Muttusami Ayyar, JJ., concurring). The petitioner applied to the District Court, under Act XX of 1863, Section 18, for leave to file a suit under the Act.

The Judge refused leave. The petitioner then applied to this Court, under Section 622 of the Civil Procedure Code complaining that the Judge had referred his application on grounds other than were contemplated by the Act.

It was objected that no application lay to this Court, under Section 622, inasmuch as the order is open to appeal.

The question referred to the Full Bench is whether or not an appeal lies from the grant or refusal of leave to sue.

[99] In *Kaviraja Sundara Murtiya Pillai* v. *Nalla Naikan Pillai* (3 M.H.C.R. 93), this Court held that no appeal lay against a grant of leave, and that decision the High Court of the North-West Provinces has approved and followed; *Hajee Kaheb Hossein* v. *Sheikh Deen Ali* (4 N.W.P. 3).

The Legislature, in conferring on parties interested facilities for the institution of suits against persons charged with the management of temple property, has imposed the condition that leave should be obtained from the principal Court of original civil jurisdiction in the district. The Act directs that Court, on the perusal of the application to determine whether there are sufficient *prima facie* grounds for the institution of a suit, and if in the judgment of the Court there are such grounds, to give leave for its institution. It is to be inferred from the language of the Act that the Legislature did not intend that the grant or refusal of leave should be interfered with by an Appellate Court. A suit cannot be instituted under the Act without leave of the Court mentioned in the Act, and if leave has been given by that Court, the condition imposed by the Legislature has been complied with.

The grant of leave by the Appellate Court would not satisfy the requirements of the Act; the refusal of leave by the Appellate Court would not override the sanction accorded by the Court mentioned in the Act. It is left to the discretion of the Court empowered by the Act to determine, whether or not there exist *prima facie* grounds for the institution of a suit, and the Appellate Court has no power to constrain the judgment of the prescribed Court to pronounce affirmatively or negatively, in accordance with the views of the Appellate Court.

Where the Legislature intends that the Appellate Court shall have concurrent power with the Court of original jurisdiction to grant sanction to the institution of proceedings, it has expressly conferred the power.

It is, however, argued that an appeal is given by the provisions of the Code of Civil Procedure, enacting that the procedure prescribed by the Code shall be followed in all proceedings in any Court, other than suits and appeals, Section 647, that except when otherwise expressly provided by that Code or by any other law for the time being in force, an appeal shall lie from the decree of a Court exercising original jurisdiction, and that the refusal or grant of leave to institute a suit under the Act is a decree.

It was held by this Court in *Sultan Ackeni Sahib* v. *Shaik Bava Malimiyar* (I.L.R., 4 Mad. 295), that in virtue of the sections of the Civil Procedure Code above referred to, an appeal lay from an order passed by the District Court, under Section 5 of the Act appointing trustees, on the ground that the order was analogous to a decree as defined in the Code of Civil Procedure. We are, however, unable to hold that the grant

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In that decision the case reported at IV Madras, 294, was discussed and was distinguished from the present on the ground that it was a proceeding analogous to a decree in a suit. The grant or refusal of leave under Section 18 of the Act, to institute proceedings, is not analogous to a decree, but the sanction is a statutory condition precedent to the exercise of the right of suit.

[100] There is, therefore, no appeal, and as the Judge has not declined jurisdiction, but has merely exercised a discretion vested in him by law, there is no ground for the interference of this Court on revision.

The petition is therefore dismissed.

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10 M. 100=11 Ind. Jur. 59.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

SESHAYYA AND OTHERS (*Plaintiffs*), *Appellants v.* ANNAMMA AND ANOTHER (*Defendants*), *Respondents.**
[25th and 28th October, 1886.]

Limitation Act, Schedule II, Article 132—Registered hypothecation bond—Personal remedy barred after six years.

Article 132 of Schedule II of the Indian Limitation Act, 1877, by which a period of 12 years is allowed to enforce payment of money charged on immoveable property, refers only to suits to enforce payment by sale of the property charged and not to a claim to enforce the personal remedy on a registered bond by which immoveable property is pledged as security for the debt.

[R., 19 M. 100 (103); 26 M. 686 (714).]

APPEAL against the decree of W. F. Grahame, District Judge at Cuddapah, modifying the decree of M. Jayaram Rau, District Munsif of Nandalur, in suit 176 of 1885.

In 1885, the plaintiffs, Bandaru Seshayya and three others, sued the defendants, Kuravi Annamma and Ravanayya, to recover Rs. 858-4-0, principal and interest, due under a registered bond of 1873 executed by Kesava Bhotlu, deceased, the undivided brother of Krishnayya, deceased husband of defendant No. 1.

By the bond certain land was made security for the payment of the debt.

Defendant No. 1 was alleged to have succeeded to, and taken possession of, the estate of Kesava Bhotlu. Defendant No. 2 was made defendant as being a distant dayadi of Kesava Bhotlu.

The Munsif decreed that the defendants should pay the amount sued for before January 1st, 1886, and in default that the property pledged should be sold, and that if any balance remained [101] due to plaintiffs after sale, it should be recovered from the estate of Kesava Bhotlu in possession of defendants.

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or refusal of leave under Section 18 of the Act to institute proceedings of a special character is analogous to a decree.

The sanction is a statutory condition precedent to the exercise of the right of suit, and not an adjudication of any matter *inter partes* on a right claimed, and, on this ground, we hold that no appeal is given by the Procedure Code.

The case will be returned to the Division Bench for the disposal of the application, under Section 622.

* Second Appeal 571 of 1886.

The defendants appealed on the ground that six years having elapsed since the date of the bond, the plaintiffs could only proceed against the lands mortgaged. 1886 OCT. 28.

The District Judge allowed the appeal on the strength of the decision of the Privy Council in *Ram Din* v. *Kalka Prasad* (1). APPELLATE CIVIL.

Plaintiffs appealed.

Mr. *Norton*, for appellants.

Mr. *Shephard* and *Venkoba Rau*, for respondents. 10 M. 100 = 11 Ind. Jur. 59.

The Court (COLLINS, C.J., and PARKER, J.) delivered the following

JUDGMENT.

The only point in the present appeal is whether Article 132 of Schedule II of the Limitation Act of 1877 gives the plaintiffs 12 years in which to sue to enforce the personal remedy against defendants as well as to enforce the charge against the property. The District Judge held that decision in *Ram Din* v. *Kalka Prasad* (1) settled the question, but it was urged by the learned counsel that that decision was given under the Limitation Act of 1871, and that the wording of Article 132 had been altered in the corresponding section of the new Act. It was pointed out that whereas the description of suit formerly was "for money charged upon immoveable property," the present words were "to enforce payment of money charged upon immoveable property." and it was suggested that the object of the Legislature in making the alteration was to overrule the course of decisions in which six years had been held to be the period of limitation in a suit to enforce the personal remedy.

We are of opinion that the language of the present Act, *viz.*, "to *enforce, &c.*," is more in favour of the contention that the article in question refers only to suits "to enforce payment of money charged upon immoveable property" *by the sale of that property*, and we are fortified in this conclusion by finding that the High Court of Calcutta has taken a similar view in *Miller* v. *Runganath Moulick* (2). The grounds on which the Privy Council based their judgment in *Ram Din* v. *Kalka Prasad* appear to us equally to apply to suits brought under the present Limitation Act. There would appear no reason why a secured creditor should be put in a better position than an unsecured creditor with respect [102] to obtaining a money decree capable of execution against the general property of a judgment-debtor other than the property comprised in his mortgage.

We are of opinion that the decision of the District Judge was right and dismiss this second appeal with costs.

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10 M. 102 = 11 Ind. Jur. 102.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

VARATHAYYANGAR (*Plaintiff*), *Appellant v.* KRISHNASAMI (*Defendant*), *Respondent.** [4th and 11th November, 1886.]

"*Res judicata*"—*Estoppel.*

V. sued to eject K. from certain land, alleging that K. having entered under a lease, held as a trespasser. K. pleaded that he held as mortgagee. It was found that K. obtained possession under a mortgage deed for Rs. 1,000, which had not

* Second Appeal 394 of 1886.

(1) 7 A. 502. (2) 12 C. 389.

1886 Nov. 11, — APPELLATE CIVIL. — 10 M. 102 = 11 Ind. Jur. 102.

been registered, and that he held also a second mortgage for Rs. 50, and it was held on second appeal that K. was entitled to defend his possession by virtue of the mortgage for Rs. 50 and, as V. had not offered to redeem the charge but had sued on false averments, the suit was dismissed.

V. then sued K. to recover the land on payment of Rs. 50.

In his plaint V. stated that, though the mortgage deed for Rs. 50 was fabricated, the High Court had decided that he was bound to pay Rs. 50 before recovering the land from K. The District Court on appeal dismissed the suit on the ground *inter alia*, that as V. denied the genuineness of the mortgage, he could not sue for redemption :

Held that V was entitled to redeem.

APPEAL from the decree of D. Irvine, District Judge of Trichinopoly, reversing the decree of C. G. Kuppusami Ayyar, District Munsif of Trichinopoly, in suit 95 of 1884.

The facts necessary for the purpose of this report are set out in the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.).

Mr. *Shephard*, for appellant.

Bhashyam Ayyangar, for respondent.

JUDGMENT.

The appellant Varathayyangar is the owner of one pangu of land now in litigation. It is in respondent's possession and has been in the possession of his family from August [103] 1865. On the 22nd July 1865 the appellant executed two documents in favour of Ramayyangar, the respondent's grandfather. One of those documents purported to be a mortgage for Rs. 1,000 and the other to be a loan bond for Rs. 50. Exhibit II, which is the loan bond, contains the following provision : "I shall repay the principal, Rs. 50, within 30th Ani, Vibhava, the time fixed for the redemption of my one pangu which I have mortgaged to you this day and redeem the said pangu and this bond." Shortly after the execution of these documents a disagreement arose between the appellant and Ramayyangar. The former refused to register the mortgage bond for Rs. 1,000 and the latter applied to the District Registrar, who referred him to a regular suit under Act XVI of 1864, which contained the registration law then in force.

Thereupon Ramayyangar instituted O.S. 373 of 1866 on the file of the District Munsif of Perambalur, but the plaint in that suit as originally framed prayed for a declaration of his right as mortgagee. According to his own statement he was then in possession as mortgagee and he was not therefore in a position under the Code of Civil Procedure then in force to maintain a suit for a declaratory decree. He then asked leave to convert that suit into one to compel the appellant to register the instrument of mortgage for Rs. 1,000. The District Munsif considered that this could not be done, but the District Judge held that it might be done. It was, however, held in special appeal that the suit was unsustainable on the ground that the then plaintiff was in possession. The special appeal was decided in 1877. Meanwhile the respondent's grandfather died and the respondent, a minor, passed under the guardianship of his mother, Janaki Ammal. The appellant brought O.S. 259 of 1877 in the District Munsif's Court of Trichinopoly, and grounded his right to reject the respondent on the averment that part of the land was let to Ramayyangar in 1865 on lease for a year or two only, and that the remainder was usurped by him. The respondent denied the alleged lease and trespass and referred his possession to the mortgage of 1865. The second issue framed in that suit was whether the lease or mortgage was true and which should prevail. The District Munsif considered the lease proved and held that the instrument of

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mortgage which was unregistered was not admissible in evidence and that the other oral and documentary evidence which tended to prove the mortgage was the secondary evidence of the contents of a docu-[104]ment which was not admissible in evidence under the Registration Act then in operation. On appeal the District Judge reversed the decree of the District Munsif and remanded the suit for re-trial on certain issues, one of which was whether Exhibit II was duly executed by the appellant and the statement contained in it constituted in law and in fact an admission of existence of the mortgage set up by the respondent within the purview of Section 65, Clause 6, of the Evidence Act and if so, whether the mortgage actually took place. At the re-trial the District Munsif found this issue in respondent's favour and held that the lease set up by the appellant was not proved. From this decision an appeal was preferred and the District Judge dismissed the appeal; but he observed that Exhibit II was not admissible for the purpose for which it was used, but that the lease and the trespass alleged by the appellant were not proved, and that, unless the appellant, then plaintiff, made out his case, he was not entitled to succeed. In the concluding paragraph of his judgment he remarked, "the result will be, I think, that plaintiff can at any time have his land on redeeming the mortgage which I have not the slightest doubt he created on this land. It may seem incongruous and illogical to say this when proof of the mortgage is inadmissible, but proof of the defendant's admissions of the mortgage would certainly be admissible, and I see nothing in the judgment illogical or otherwise than in strict accordance with the ordinary rule that the plaintiff must prove his case and succeed on the cause or causes of action set forth in the plaint and not otherwise, and it is satisfactory at the same time to think, as I do think, that substantial justice will also have been done." From this decision second appeal 151 of 1882 was perferred. The High Court observed that the averments on which the appellant then came into Court were untrue; that the respondent obtained possession in virtue of a mortgage for Rs. 1,000 and of a second mortgage for Rs 50: that the first mortgage was not registered and could not be admitted in evidence; that the original instrument not having been registered, the secondary evidence of its existence and contents was practically valueless for the purpose of sustaining a charge on immoveable property exceeding in value Rs. 100; and that, although the language of Act XVI of 1864. Section 13, "no instrument........... shall be received in evidence in any civil proceedings or any Court or shall be acted on by any public officer" was not so [105] explicit as the language of the subsequent Act of 1866 in which there are added the words "or shall affect any property comprised therein," yet its effect was not less prejudicial to the person claiming under the instrument; for the Courts were prohibited from acting on an instrument which should have been, but has not been registered. The learned Judges then concluded that the respondent was unable to defend his possession in virtue of the original mortgage for Rs. 1,000, but that he might rely on the further charge of Rs. 50, which was proved by an instrument of which the registration was optional, and, inasmuch as the appellant had not offered to pay that charge but had come into Court on averments which were not true, they affirmed the decrees of the Courts below and dismissed the second appeal. This decree was passed on 30th October 1882 and the present suit was commenced by the appellant in August 1883. In his plaint he stated that the High Court set aside the mortgage for Rs. 1,000; that though

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document II was fabricated by the respondent's ancestor, the High Court decided that he should pay the sum of Rs. 50 due under it and redeem the land, and prayed for a decree directing the respondent to receive Rs. 50 and make over the land to him. The respondent contended, *inter alia*, that the claim was barred by limitation and that the appellant could only be declared entitled to redeem on payment of Rs. 1,050, but not Rs. 50 alone. The District Munsif decreed the claim, but on appeal the Judge reversed the decree on the ground that the present suit was without any cause of action at all, and if it were held that he could rest his suit on the bond for Rs. 50 then he should consider that the suit was barred by Sections 13 and 43 of the Civil Procedure Code. He observed that, as a matter of fact, the land was really mortgaged not for Rs. 50 but for Rs. 1,050 and referred to the remarks of the District Judge in his judgment in the previous suit for ejectment. The Judge also drew attention to the averments in the present plaint and remarked that, inasmuch the appellant denied the second mortgage, he could not sue for redemption. He also considered that the remark in the judgment of the High Court could not give the appellant any fresh cause of action and that it only declared that the respondent might rely on the charge for Rs. 50 and that it did not declare that the appellant could recover the land by paying that amount.

It is argued in second appeal that the effect of the High [106] Court's judgment has been misapprehended, that the suit is barred neither by Section 13 nor by Section 43 of the Code of Civil Procedure; that the Judge omitted to refer to the suit brought by the respondent's grand father and the decree therein; and that inasmuch as the land is admittedly held as a security for the sum of Rs. 50, the appellant was entitled to the decree he claimed. I do not consider that the decree appealed from can be supported. The appellant is admittedly the owner of the land in dispute and he is entitled to recover possession in virtue of such ownership unless the respondent is able to defend his possession by referring it to some valid transaction. In S.A. 151 of 1882, the High Court referred to two such transactions as named by the respondent, *viz.*, the first mortgage for Rs. 1,000 and the second mortgage for Rs. 50 and proceeded to consider whether they operated to create a charge on the land and a right to retain possession until the charge was satisfied.

After discussing the effect of the Registration Act of 1864 upon the mortgage for Rs. 1,000, the learned Judges held that the respondent was unable to defend his possession in virtue of that mortgage. They next referred to the second mortgage for Rs. 50 and considered that it was proved by an instrument of which the registration was optional and that the respondent might rely on the charge created by it for Rs. 50 in support of his possession. They then referred to the fact that the appellant came into Court on averments which were untrue and concluded that the second appeal should be dismissed.

The decision that the respondent could not defend his possession in virtue of the mortgage for Rs. 1,000 but could only defend it in virtue of the second charge for Rs. 50 was a decision on an issue the determination of which was material to the purposes of that suit. It was an action of ejectment, and the appellant being the admitted owner, would be entitled to a decree for possession, unless the respondent showed a special right to remain in possession, even though the former failed to prove the specific lease and trespass mentioned in his plaint. The learned Judges therefore proceeded to determine whether he might defend his possession as contended by him under the mortgage for Rs. 1,000 and if not under

any other and what transaction. They determined that the mortgage for Rs. 1,000 was inoperative and that Exhibit II made the payment of Rs. 50 a con-[107]dition precedent to redemption of the land and thereby created a valid charge for that amount. Having arrived at this conclusion they next held that they should not treat a suit to eject as a suit for redemption, especially as the appellant came into Court with untrue averments and accordingly dismissed his suit. The decision of the question, however, whether respondent could defend his possession under the mortgage for Rs. 1,000 and if not under document II was conclusive and binding upon the parties to that suit and the respondent is therefore estopped from now alleging the contrary.

The conclusion we come to then is that the appellant was entitled to redeem on payment of Rs. 50. As to the objection to the frame of the plaint we consider that it ought to be construed as a whole. It should be remembered that the appellant alleged in the former proceedings that document II was not true and that he might have feared that if he departed from his former statements except to the extent that document II was decided by the High Court to have created a charge for Rs. 50 and that he was bound to pay that amount before he could lawfully claim possession, he might render himself liable to prosecution for perjury. In the view we take of the effect of the decision of the High Court in S.A. 151 of 1882, the suit can be barred neither by limitation nor by Section 43 of the Code of Civil Procedure. As to the observation that the mortgage for Rs. 1,000 was true, we have only to observe that the respondent's grandfather failed to comply with the provisions of the Registration Act or pursue the remedy provided by it for enforcing compulsory registration, and that we are precluded from ignoring the policy of the Registration Act. We set aside the decree of the District Judge and restore that of the District Munsif and direct in the special circumstances of the case, that each party do bear his own costs.

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10 M. 108 = 1 Weir 668.

[108] APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

QUEEN-EMPRESS *v.* NARAYANASAMI.*
[2nd and 13th September, 1886.]

Army Act, 1881 (44 *&* 45 *Vict.*, *c.* 58), *Section* 156.

Under the Army Act, 1881 (44 & 45 Vict., c. 58), Section 156, any person who takes in pawn a military decoration from a soldier is liable to punishment :

Held that this section of the Army Act, 1881, is applicable to a person who takes a medal in pawn from a sepoy in India.

THIS was an application under Section 439 of the Code of Criminal Procedure against an order passed by H. R. Farmer, Acting District Magistrate of Trichinopoly, dismissing a complaint against one Narayanasami Pillai, under Section 203 of the Code of Criminal Procedure.

The facts necessary for the purpose of this report are set out in the judgment of Brandt, J.

The Acting Government Pleader (Mr. *Powell*) for the Crown.

The accused was not represented.

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* Criminal Revision Case 106 of 1886.

1886 SEP. 13. — APPELLATE CRIMINAL. — 10 M. 108= 1 Weir 668.

The Court (KERNAN and BRANDT, JJ.) delivered the following

JUDGMENTS.

KERNAN, J.—The Indian Articles of War relative to the Native Army are in Act V of 1869, which does not contain a clause prohibiting, in terms, a person not subject to the Articles of War from taking in pledge, &c., any regimental equipments, medals, &c., of a native soldier.

Section 47 prohibited the pledge, &c., by the soldier and made the act punishable.

That Act related to the Native Indian Forces alone.

The Army Act, 1881 (44 & 45 Vict., c. 58), is an Imperial Act, and, except when specially excepted, applies to the regular forces, which expression by Section 190, sub-Section (8), includes Her Majesty's Indian forces. Sub-Section 2 (*h*) of Section 180 provides that Part Two of the Act shall not apply to Her Majesty's Indian forces. Therefore all the Act, except when excepted, does apply to the Indian forces.

[109] The Act of 1881 in sub-section (6) of Section 190 provides that the expression "soldier" applies to any person subject to the Articles of War, and therefore to the native soldier. There is nothing in Section 156 inconsistent with the context of Section 190: therefore the term "soldier" in both sections applies to all soldiers within Section 190. The Acts of 1879 and 1881 are *in pari materia* and to be construed together. The subsequent Act enacts a new provision, Section 190, which is in no wise contrary to, or inconsistent with, the prior Act, nor does it, within Section 180 of the Act of 1881, sub-section (2) (*a*), prejudice or affect the India military law respecting officers or soldiers or followers in Her Majesty's Indian forces, though Section 156 no doubt affects persons *not* officers, soldiers or followers.

The order of dismissal by the District Magistrate must be set aside, and the case re-tried.

BRANDT, J.—The District Magistrate of Trichinopoly on the 24th November 1885 dismissed, under Section 203, Criminal Procedure Code, a complaint against a civilian shopkeeper charged with having received in pledge a medal from a sepoy, an offence, as the case for the prosecution was, under the Army Act, 1881, and under Act VII of 1867.

It appears that in a precisely similar case tried by the predecessor in office of the District Magistrate, the accused was convicted.

The District Magistrate states that, for reasons given, he is, in his opinion, more likely to be wrong than right in the decision finally come to by him.

The reasons given for his conclusion are that it does not clearly appear that the Legislature intended to make the act an offence, and that the word "soldier" when used in Section 156 of the Army Act, 1881, does not include a native soldier, *i.e.*, a sepoy of Her Majesty's Indian troops; the reasons given for arriving at the latter conclusion are that it is provided in Section 180 of that Act that "nothing in that Act shall prejudice or affect the Indian military law respecting soldiers * * * in Her Majesty's Indian forces being natives of India:" that the Indian Articles of War provide expressly for the punishment by a Court Martial of a sepoy, and of any other person subject to those Articles who pawns any medal, granted for service in the field or for general good conduct, while, unlike the Army Act, 1881, they contain no provision for the punishment of any person, not being an officer, soldier, or **[110]** follower, who knowingly

receives a sepoy's medal in pawn; and the question therefore arises whether if a man is punished under the Army Act, 1881, for receiving in pawn a medal from a sepoy, such act, not being punishable under the Indian Articles of War, does not affect the Indian military law respecting soldiers in Her Majesty's Indian forces, being natives of India, in which case the punishment would, with reference to Clauses (*a*) and (*b*), sub-section (2), Section 180 of the Army Act, be illegal.

1886 SEP. 13. — APPELLATE CRIMINAL. — 10 M 108 = 1 Weir 668.

It was decided in *Nathud Bi* v. *Jafar Hussain* (1) that there is nothing in the provisions of Clause 1 of Section 145 of the Army Act, 1881, which prohibits the application of that section to soldiers of Her Majesty's Indian forces; and that Clause 2 also applies. The decision turned on the interpretation to be placed on the third clause with which we are not here concerned; and agreeing with the learned Judges who decided that case as to the effect of Section 190, the only question we have to determine is whether, as the District Magistrate holds, the effect of Clauses (*a*) and (*b*), sub-section (2), Section 180, is to protect any person taking in pawn any military decoration of a sepoy from the penalties provided in that section.

The proviso in Section 180 on which the District Magistrate bases his decision makes an exception in the case of officers, soldiers and followers in Her Majesty's Indian forces being natives of India: it does not make any exception in the case of persons other than the above; and the object of it clearly is to secure to such officers, and others being natives of India, in trials by Court Martial convened in pursuance of the Act, reference to the Indian military law and to the established usages of the service: no special provision is made in the case of persons other than such officers, soliders and followers being natives of India in respect of such law or usages.

This appears to be sufficient for the disposal of the question before us: but we may refer to the concluding sub-section in Section 156 as additional, if not conclusive proof that that section applies to the case of any person taking in pawn a military decoration from a sepoy.

I would accordingly set aside the District Magistrate's order and direct him to restore the complaint to his file and to dispose of it in due course.

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10 M. 111.

[111] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

ALAGIRISAMI AND OTHERS (*Petitioners*), *Appellants* v. RAMANATHAN AND OTHERS (*Respondents*), *Respondents*.* [17th September, 1886.]

Civil Procedure Code, Section 292—Pleaders not officers of the Court within the meaning of that section.

Pleaders of parties to a suit are not debarred by Section 292 of the Code of Civil Procedure from purchasing property sold in execution of the decree.

[D., 15 M. 389 (398).]

APPEAL against an order of A. J. Mangalam Pillai, Subordinate Judge of Madura (West), rejecting an application to set aside a sale of land in execution of the decree in suit 36 of 1878.

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* Appeal against Order 186 of 1885.

(1) 8 M. 365.

1886 SEP. 17. — APPELLATE CIVIL. — 10 M. 111.

Alagirisami Nayak and two others, defendants 2, 3 and 5, presented petitions to the Court to set aside the sale on the ground, *inter alia*, that the sale of some of the land was illegal, inasmuch as it was purchased by the vakil of the plaintiff and that such purchase was opposed to Section 136 of the Transfer of Property Act.

Bhashyam Ayyangar and *Kalyanaramayyar*, for appellants.

Rama Rau and *Subramanya Ayyar*, for respondents.

The Court (COLLINS, C. J., and BRANDT, J.) delivered the following

JUDGMENT.

There is no evidence whatever of any loss or injury to the appellants in consequence of irregularity in the proceedings even if there were such irregularities, as to which we need express no opinion.

The appeal then fails as against respondents Nos. 1 and 3 and is dismissed as against them with costs.

It is contended that a vakil is an officer of the Court having a duty to perform in connexion with a sale in execution of a decree in a suit in which he is engaged by a party to the suit. If this is so, the sale in so far as the three items of property purchased by R. Rama Subbayyar, respondent No. 2. are concerned must be set aside as void.

[112] It is true that vakils are spoken of, and are in some sense officers of the Court, but we think that the words used in Section 292 of the Code of Civil Procedure are not used in this sense, and that a vakil cannot be said to have a duty to perform in connexion with the sale as therein required. *Goshain Jug Roop Geer* v. *Chingan Lal* (1) has been cited as indicature of the probable intention of the Legislature, but it appears to us that if the Legislature having that case in view had intended to prohibit vakils generally fron purchasing, they would have said so in plain language as they have in the Transfer of Property Act.

We must have regard rather to being assured that a civil right has been expressly taken away from a class or section of the public than to what may or may not be desirable.

We consider the appeal fails as against the respondent No. 2 also and dismiss it with costs.

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10 M. 112.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Kernan.

VENKATAVARAGAPPA (*Defendant*), *Appellant v.* THIRUMALAI AND OTHERS (*Plaintiffs*), *Respondents.**
[30th September and 5th October, 1886.]

Landlord and tenant—Hindu law—Wells dug with consent of landlord—Compensation.

Where tenants from year to year, with permission of the landlord, sank wells in the land demised.

Held, that they were not entitled under Hindu law to any compensation therefor from the landlord after the determination of the tenancy.

[R., 27 M. 211=14 M L.J. 25 (34); 11 Ind. Cas. 745 (755)=21 M.L.J. 891 (916)=10 M.L.T. 193 (208).]

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* Second Appeals 56 to 61, 65, 66 and 73 of 1886.

(1) 2 N.W.P. 46.

APPEALS from the decrees of K. R. Krishna Menon, Subordinate Judge at Tinnevelly, modifying the decrees of G. Ramasami Pillai, District Munsif of Tinnevelly, in suits 167, &c., of 1883.

1886 OCT. 5. — APPELLATE CIVIL. — 10 M. 112.

The facts necessary for the purpose of this report are set out in the judgment of the Court (COLLINS, C. J., and KERNAN, J.).

Bhashyam Ayyangar, for appellant.

Subramanya Ayyar, for respondents.

JUDGMENT.

[113] In these several cases the appellant is the defendant in several suits brought by different respondents hereto.

There is, however, one point in each case, the determination of which by this Court will decide the rights of the parties respectively.

That point is whether tenants holding from fasli to fasli, who by permission of the landlord during the tenancy sunk wells in the land demised, are entitled at the end of their tenancy to be compensated by the landlord for their expenditure laid out in sinking the wells.

It is not alleged in any of the cases that the landlord ever contracted to pay for such expenditure or to compensate the tenants therefore at the termination of their tenancy. Neither is it alleged that there exists any custom in the country that the landlord should, in such circumstances, make such compensation.

The wells are found to be not built-up wells, but wells sunk in the following manner, *viz.*, first 6 feet in clay, then for 1¼ yards in gravel, and then down to the bottom in quarried rock.

It was argued that, according to Hindu law, the tenants were entitled to such compensation ; but no authority in Hindu law has been cited so as to support such proposition.

The authority of Narada cited in *Thakoor Chunder Paramanick, in re* (1) refers to the right of a person, who erected a house under the *bona fide* belief he was entitled to the land, and who when ejected, Narada held, was entitled to take away the house, or to be compensated therefor. To a similar effect is the extract from the Hidayah cited in the same case when land is let for building or for planting.

Shib Doss Banerjee v. *Bamun Doss Mookerjee* (2) is to the same effect in the case of an expired tenancy.

These authorities refer merely to cases where there is at the time of the expiration of the tenancy a house, or other building of any sort which has been erected on the land by the tenant, and which remains there when the tenancy expires, and which is capable of being removed by the tenant.

In this case there was nothing to remove, as the clay, the gravel, and the rock are part of the freehold and belonged to the landlord and never belonged to the tenant.

[114] The Transfer of Property Act does not affect this case, the facts of which took place in 1877.

In the absence of contract or of custom, the tenants had no right to be paid for their expenditure in sinking the wells, though the landlord assented to such sinking

The appeals in these several cases must, therefore, be allowed.

In each case the following decree will be made ; the decree of the Lower Appellate Court, so far as it awards compensation to the respondent

(1) B.L.R. Sup. Vol. 595.

(2) 15 W. R. 360.

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(or respondents) for sinking the well, as claimed in this suit, and costs in relation thereto, will be reversed with costs throughout including the costs of this appeal; the decrees of the Lower Appellate Court in other respects are confirmed.

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10 M. 114 (F.B).

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Brandt, and Mr. Justice Parker.

POKALA (*Plaintiff*) *v.* MURUGAPPA (*Defendant.*)*
[26th October, 1886.]

Presidency Small Cause Courts' Act, 1882, *Section* 18—*Suits for maintenance cognizable.*

Presidency Small Cause Courts, constituted under Act XV of 1882, are not debarred from entertaining suits for maintenance not based on contract or declaratory decree.

CASE referred by the Judges of the Small Cause Court of Madras.

The question referred was whether a suit for maintenance, where the amount had not been fixed by contract or declaratory decree, is cognizable by Presidency Small Cause Courts.

Ambrose, for plaintiff.

Defendant did not appear.

The Full Bench (COLLINS, C.J., KERNAN, MUTTUSAMI AYYAR, BRANDT and PARKER, JJ.) delivered the following

JUDGMENT.

It was by oversight, no doubt, that the Court, in their letter of November 1882, stated that in Presidency Small Cause Court suits for maintenance could not be maintained. It **[115]** was so under the old Presidency Small Cause Court Act IX of 1850.

The Presidency Small Cause Court Act XV of 1882, Section 18, authorizes the Court to entertain all suits of a civil nature, except those specially set out, and a suit for maintenance is not one of the latter.

The practice of the Small Cause Court before the Act of 1882 to entertain such suits was justified by the jurisdiction given by the words of the Act 26 of 1864, *viz.*, "debt, damage or *demand*." The words used in Act IX of 1850 were "debt or damage."

We answer the question referred in the affirmative.

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* Special Case 81 of 1885.

10 M. 115.

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APPELLATE CIVIL.

10 M. 115.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Kernan.

ALUBI (*Plaintiff*), *Appellant* v. KUNHI BI AND OTHERS (*Defendants*), *Respondents*.* [14th September, and 21st October, 1886.]

Limitation Act, Schedule II, Articles 131, 132, 140, 144—*Claim for arrears of revenue by grantee from Government.*

The right to the revenue on certain land having been granted to the trustees of a mosque, the said grant was confirmed by Government in 1866.

In 1883, a suit was brought to recover arrears of revenue from the owners of the land. It was found that no payment of revenue had ever been made by the defendants to the trustees, and the suit was dismissed as barred by limitation under Article 144, Schedule II of the Limitation Act:

Held, that the suit was not barred and that the plaintiff was entitled to recover 12 years' arrears of revenue.

[R., 83 P.R. 1906=89 P.L.R. 1907; D., 15 M. 161 (163).]

APPEAL from the decree of L. Moore, Acting District Judge of North Malabar, confirming the decree of B. D'Rozario, District Munsif of Pynad, in suit 19 of 1883.

The facts necessary for the purpose of this report are set out in the Judgment.

Bhashyam Ayyangar and *Anantan Nayar*, for appellant.

Jaga Rau Pillai, for respondents.

The Court (COLLINS, C.J., and KERNAN, J.) delivered the following

JUDGMENT.

[116] This is a suit by the plaintiff (Valagath Syed Alubi bin Hassan Hydros Koya Thangal) as inam-holder and manager of a mosque to recover revenue of Rs. 8 per annum charged on the plaint paramba. It is admitted by the defendants (Kunhi Bi and two others) who are the jenmis of the paramba, that it is charged perpetually with Rs. 8 per annum in favor of Government. It is also admitted that the Government transferred the revenue of the paramba very many years ago in the time of Tippu Sultan to the trustees of the mosque. The Inam Commission deed is dated the 23rd April, 1866. The trustees of the mosque therefore became, on the transfer by Government, entitled to recover from the jenmis of the paramba the revenue which thereafter became due and payable. It has been found that the rent or revenue of Rs. 8 per annum has not been paid by the jenmis to the trustees of the mosque at any time, although payment was demanded more than 12 years before suit. The question raised in the Courts below and here is whether the right of the trustees of the mosque is barred by limitation.

The District Judge has decided that the relation of landlord and tenant never subsisted between the plaintiff and the trustees of the mosque and the jenmis, and that the plaintiff's suit is barred by adverse possession under Article 144 of the Limitation Act. But it is clear that there has been no adverse possession of the land by the defendants, inasmuch as the defendants are entitled to hold the land, and the plaintiff does not seek to recover possession.

* Second Appeal 115 of 1886.

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The possession of the land by defendants is not adverse to plaintiff, as defendants admit they hold the land subject to the payment of the revenue to the party entitled. The plaintiff is the person entitled to the revenue which defendants are bound to pay. Article 140 of the Limitation Act does not apply. The plaintiff does not seek to recover the possession of immoveable property or any interest therein within the meaning of Article 140.

What the plaintiff seeks to recover is rent or revenue which has accrued. Each year's rent or revenue is a recurring right within Article 131. It is not correct to say that the relation of landlord and tenant did not subsist between the trustees of the mosque and the jenmis, inasmuch as the plaintiff is the party entitled to recover the rent or revenue payable out of the land, and the defendants as the jenmis in possession of the land are bound to pay the plaintiff **[117]** such rent. We think the plaintiff is entitled to recover 12 years' rent or revenue up to the date of suit under Article 131 as a recurring right, and also under Section 132 as money charged on land. The fact that the trustees of the mosque did not proceed to recover rent which accrued more than 12 years before suit cannot bar their right to the rents accrued during 12 years before suit.

We reverse the decrees of the Lower Courts and make a decree for payment by the defendants who admit their possession of the lands during the accruing of the 12 years' rent or revenue with costs of this suit and appeal.

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10 M. 117=11 Ind. Jur. 100=11 Ind. Jur. 294.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

RAVUNNI MENON (*Plaintiff*), *Appellant v.* KUNJU NAYAR AND OTHERS (*Defendants*), *Respondents.**
[18th August and 4th November, 1886.]

Civil Procedure Code, Section 244.

R having obtained a decree for money against K, the karnavan of the defendants, K died and the defendants were made parties to the suit as representatives of K.

Tarwad property was then attached by R, and the defendants having objected, the Court raised the attachment. R sued for a declaration that the property released was liable to be sold :

Held, that the suit was barred by Section 244 of the Code of Civil Procedure.

[Appr., 23 M. 195 (200) **(F.B.)**; **R.,** 12 A. 73 (78); 23 B. 237 (241); 17 M. 399 (401).**]**

APPEAL from the decree of V. P. D'Rozario, Subordinate Judge of South Malabar, reversing the decree of T. Subbannacharyar, District Munsif of Kutnad, in suit 77 of 1884.

The facts appear sufficiently from the judgment of the Court (COLLINS, C. J., and BRANDT, J.)

Parthasaradhi Ayyangar and *Sankaran Nayar*, for appellant.

Sankara Menon, for respondents.

JUDGMENT.

Padinharam Kunnath Ravunni Menon, the appellant (plaintiff), obtained a decree for money in original suit 314 of 1882 on the file of the

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* Second Appeal 297 of 1886.

1886 Nov. 4. — APPELLATE CIVIL. — 10 M. 117= 11 Ind. Jur. 100=11 Ind. Jur. 294.

District Munsif of Chowgat against Kondi Menon, the late karnavan of the defendants (respondents).

[118] The judgment-debtor having died, the respondents were brought upon the record in Original suit 314 of 1882, on the application of the appellant: when the latter proceeded to execute the decree by attaching certain immoveable property, the respondents objected on the ground that the property attached was tarwad property and therefore not liable in execution of the decree: on their petition of objection, an order, purporting (as we are informed) to be passed under Section 280, Civil Procedure Code, was made on the 13th April 1883, releasing the property from attachment. On the 12th February 1884, the appellant filed this suit.

The respondents pleaded, first that the judgment-debt was not incurred by Kondi Menon in his capacity of karnavan; that if it was, it was incurred for purposes not binding on the tarwad; and that the properties were not, as alleged by the plaintiff in the suit, the self-acquisition of Kondi Menon.

The Court of First Instance gave decree for the appellant. On appeal, the Subordinate Judge dismissed the suit on the ground that the questions in dispute between the parties are questions arising between them in execution of the decree in Original suit 314 of 1882, and must therefore be decided in execution, under the provisions of Section 244, Civil Procedure Code, and cannot be made the subject of a separate suit; and he refers to the case of *Kuriyali* v. *Mayan* (1).

It is contended in appeal that the present suit will lie: that an order having been made against the appellant under Section 280, Civil Procedure Code, he must either file a suit as allowed under Section 283 or accept the decision as final; and reference is made to *Arunachala* v. *Zamindar of Sivagiri* (2), to *Ramakrishna* v. *Namasivaya* (3), and to *Ittiachan* v. *Velappan* (4).

On the other side, it is urged that *Kuriyali* v. *Mayan* is directly in point, and concludes the appellant, and that the other cases cited are not to the point or may be distinguished.

The Full Bench case of *Ramakrishna* v. *Namasivaya* is not in point here: the two members of the undivided family who had hypothecated the family property were alive; the sons of those members had not been made parties to the original suit, either before or after decree.

[119] One of the learned Judges who took part in the case of *Kuriyali* v. *Mayan* also sat on the bench which decided *Arunachala* v. *Zamindar of Sivagiri*, but no reference is made in the latter to the former case. It is to be presumed then that the learned Judge who heard both cases was of opinion that there is nothing contradictory in the two decisions; and if there is not, then there is nothing to prevent us from following the decision in *Kuriyali* v. *Mayan*.

A claim may be preferred by a judgment-debtor, as well as by a stranger, under Section 278, Civil Procedure Code, provided that the claim be of the nature specified in the following sections, *e.g.*, on the ground that the property when attached was in the possession of the judgment-debtor, not on his own account, but in trust for a third party (see *Shankar Dial* v. *Amir Haidar* (5) and cases there cited); but where, as in this case, the objection that the property attached is not liable to

(1) 7 M. 255. (2) 7 M. 328. (3) 7 M. 295.
(4) 8 M. 484 (488). (5) 2 A. 752.

1886 Nov. 4. — Appellate Civil. — 10 M. 117 = 10 Ind. Jur. 100 = 11 Ind. Jur. 294.

attachment is made, not on one of the grounds specified in Section 281 or in Section 282, but on a ground which raises a question determinable under some other special section, *e.g.*, under Section 234 and Section 244, in execution, then the order made should not be passed under Section 280; and the fact that an order was passed purporting to have been made under that section cannot give the appellant a right to file a separate suit, whether under the provisions of Section 283 or otherwise. It remains to decide whether *Arunachala's case* is clear authority for the proposition that a suit of the nature before us will lie; and we are of opinion that it is not.

The transactions out of which the suit in that case arose were very similar to those which led to the suit eventually disposed of in appeal by the Privy Council, *Muttayan* v. *Zamindar of Sivagiri* (1). The latter suit was in the first instance thrown out on the ground that the questions therein raised could be disposed of in execution of a decree in another suit in which the plaintiff had already taken out execution, but this Court reversed that judgment stating that "the questions raised......... are the liability of the property in the hands of the present zamindar to satisfy the decree obtained by the plaintiff against the late zamindar.........The question of liability and of its extent being one of very considerable difficulty.........a suit regularly conducted was the [120] most appropriate method of determining it," and the suit was determined by their Lordships on the merits.

This fact, however, clearly cannot be taken as authority for the proposition that any and every question at issue between parties in execution of the decree should, even if it might, be determined by separate suit.

The decision in *Arunachala's case* was based, in the first instance, on the ground that the Judicial Committee had allowed a similar suit in precisely similar circumstances against the same judgment-debtor, and that after that decision of the Privy Council, it could not be denied that the zamindari ought to be made available, if not in execution (and in proceedings in execution, the defendant had succeeded in his contention that the zamindari was not assets in his hands available in execution) than in a separate suit; and, secondly, that after the death of the original debtor-zamindar "since it had been decided that the estate did not constitute assets which could be seized in execution," it was open to the creditor by a separate suit to enforce the debt, so far as it was binding on the deceased debtor, against his successor.

In the case before us, it is not clear on what ground execution was refused, whether on the ground that the properties attached did not constitute assets of the deceased decree-debtor in their hands, or that being tarwad property it was not liable in execution of a decree not passed against the deceased in his capacity of karnavan of the tarwad; but it does appear that the appellant then pleaded that the property was the separate property of the deceased (in which case, supposing that it was undisposed of at his death, it would have become the property of the tarwad) and it is to be presumed, the contrary not being shown, that the finding on this point, *viz.*, whether or not the property was the separate property of the deceased was against the appellant, and had the order then made been made, as it could and should have been made, not under Section 278 but under Section 244, the appellant would have had a right

(1) 6 M. 1.

of appeal against that order, and of second appeal from any order passed in appeal therefrom, and as before said, the erroneous passing of an order purporting to be made under Section 280 cannot give him a right to bring a separate suit.

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From the decision in *Ittiachan* v. *Velappan*, it does no doubt appear that a separate suit was held to lie for a declaration that [121] tarwad property attached in execution of a decree obtained by the plaintiff in another suit, and released from attachment on the objections of two members of the family, defendants in the second suit, was liable in satisfaction of the decree in the original suit: but in that case, the debtor who had contracted the debt was alive, and was a party to the second suit: and what was decided by the lower courts was that the circumstances were insufficient to invalidate the obligation created by the karnavan, the original debtor, and that the money having been raised and used for the benefit of the tarwad, and the property being tarwad property, it was available for sale to satisfy the original decree.

It was held eventually by this court that the original debtor not having been in the first suit impleaded as karnavan, and there being nothing on the face of the proceedings to show that he was impleaded as karnavan, the suit must fail. But this is immaterial for our present purpose.

In the present case, however, it is, as before stated, not shown that the question in issue in execution between the judgment-creditor and those whom he had himself brought on the record, as the representatives of the deceased judgment-debtor, was not one which could not have been, and ought not to have been, decided in execution and in execution alone, and we hold that it was rightly decided that the present suit will not lie; and we dismiss this appeal with costs.

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10 M. 121.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar, Mr. Justice Brandt, and Mr. Justice Parker.

QUEEN-EMPRESS v. KAMANDU.*

[12th April, 28th July and 29th October, 1886.]

Boat Rules in Madras Ports—Refusal to carry cargo without reasonable excuse.

By the Boat Rules of a certain port it was provided, (1) that all licensed boats must carry such number of passengers and quantity of goods as should be expressed in the license; and (2) that the owner of a licensed boat who should refuse to let his boat on [122] hire without assigning reasonable and satisfactory grounds for such refusal should be liable to a penalty:

Held, that a refusal by a person in charge of a licensed boat to receive goods on board unless a tally-man was sent with them, on the ground that he could not count, was not a reasonable and satisfactory cause.

[R., 9 Cr. L.J. 56 (57)=4 N.L.R. 163].

CASE referred under Section 438 of the Code of Criminal Procedure by A. L. Lister, Sessions Judge of Godavari.

The facts are fully set out in the judgments of the Court (MUTTUSAMI AYYAR, BRANDT and PARKER, JJ.).

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* Criminal Revision Case 706 of 1885.

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JUDGMENTS.

PARKER, J.—The defendant is the syrang of a boat at Cocanada and has been convicted by the Port Officer as Special First-class Magistrate for refusing to hire out his boat, punishable under Section 14 of the Boat Rules for that port.

The evidence shows that the cotton to be shipped was brought alongside the wharf, but the defendant refused to receive it on board without a tally-man. Mr. Wilkinson, the godown-keeper of Messrs. Simpson Brothers (the shippers), told him that the responsibility for the safety of the goods was on him, the syrang, but defendant would not admit this. In his defence he stated that he was not acquainted with English or Hindustani nor did he know how to count, and therefore he refused to ship the cargo unless a tally-man were given him to take the responsibility for the delivery of the goods off his hands. Defendant further stated that Mr. Wilkinson then told him he did not want his (defendant's) boat.

Section 14 of the Boat Rules provides a penalty for any owner of a licensed boat who shall refuse to let his boat on hire without assigning reasonable and satisfactory cause for such refusal. Mr. Wilkinson does not in his evidence say that defendant refused to let his boat, but that he refused to take the goods unless a tally-man were sent with them. The question is whether defendant assigned reasonable and satisfactory cause for such refusal.

It appears to me that he did. His inability to count and to speak English or Hindustani was an argument which a reasonable man might not unfairly assign for refusing to be held responsible for goods when for their proper custody such knowledge was required. It is not shown that the reasons assigned were untrue, and the Sessions Judge has explained that it was a physical impossibility for the defendant under the circumstances to perform the duty which Mr. Wilkinson sought to impose upon him.

[123] I observe that the Port Officer (Mr. Baker) allowed the complainant (Mr. Wilkinson) to put questions to the accused as to what took place on the occasion—apparently with a view of convicting defendant out of his own mouth. Such a procedure is quite unauthorized by law. Section 342 of the Criminal Procedure Code allows the Court,—but never the complainant,—to put questions to the accused; but the power of the Court itself to put questions is limited to the single purpose of enabling the accused to explain circumstances which appear in evidence against him.

I would set aide the conviction and direct that the fine, if levied, be refunded.

BRANDT, J.—The Session Judge refers the conviction in this case as unsustainable on the ground that the accused had reasonable cause for refusing to let on hire for the carriage of goods a boat licensed to ply for hire at the port of Cocanada.

The grounds on which the Session Judge bases his reference are that the accused pleaded that not being acquainted with English or with Hindustani he could not count, or "tally" an account: that "the physical impossibility of a syrang counting bags or bales of goods, guarding them through the night, and watching them while he is steering the boat to the steamer and then seeing them delivered, is so apparent that the hesitation of the syrang to incur criminal responsibility for short delivery seems natural," that is, that his refusal to carry the goods unless a tally peon was sent by the shippers in charge, to relieve him from responsibility for custody of the goods was "reasonable and satisfactory."

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The Session Judge says, "the question at issue really is whether a syrang is responsible for the safety of the goods placed on his boat;" and he refers to a case in which another syrang at the same port was convicted of criminal breach of trust as a carrier in respect of one bag of jaggery, which conviction was reversed in appeal by this Court.

I am of opinion that the conviction in this case is not bad in law. Under the rules framed by Government under the provisions of Act VII of 1867, the owners of only such boats, as are duly licensed, are authorized to ply for hire at the several ports named, and this being so it is not unreasonable that under the terms of the license issued (which the rules provide shall be fully explained to the owners), they should be, as they are, bound to let their boats on [124] hire for the carriage of goods or passengers, as the case may be, unless "reasonable and satisfactory" cause for refusal be shown.

There is no question here as to the "criminal" responsibility of the owner or syrang, and the fact that one syrang was charged with criminal breach of trust in respect of certain goods committed to his charge does not affect the question.

That the owner of a licensed boat, or person deputed by him, who is required under Section 14 to let his boat on hire for the carriage of cargo, is *prima facie* responsible for the carriage, safe custody and delivery of such goods admits, as it seems to me, of no question; to what extent he is so liable may admit of question, having regard to the special circumstances of each case, but the ordinary rule would certainly seem to me to apply, *viz.*, that when goods are bailed by one to another for carriage it is no answer to an action brought for recovery of damages for breach of the engagement, to say that the goods were lost on the way; the very fact of the loss affords *prima facie* evidence of neglect and want of care.

In the criminal case to which reference was made above, the shippers had, it appears, voluntarily sent a tally-man or peon in charge of the goods shipped, and it was found that he had the key of the hold in which the goods were placed, and therefore had immediate custody of them, and the question was not as to the civil liability of the carrier, but as to whether the latter was guilty of the criminal offence imputed.

The excuse that the accused could not count the goods because he did not know English or Hindustani appears to me not reasonable: it does not follow that because he did not know those languages he could not keep count of such things as bales of cotton, to the number which his boat would hold; and acceptance of the license, in my opinion, implies an undertaking on the part of the owner of the boat to accept for conveyance goods to be carried from the port to vessels in the roads or harbour, and for delivery of such goods, at the side of such vessels, and *vice versa*; if the excuse in the case is held to be reasonable and satisfactory, a person employing such a boat for hire must always provide a servant to have the goods counted as embarked, and again when disembarked. Even then the liability of the boat-owner or syrang as a carrier would remain the same between the time when receipt was given for the goods counted and delivered, and the time when they were again taken charge of by the tally-man for the purpose of unloading; [125] unless, as the Session Judge would appear to suggest, the carrier can insist that he is under no liability for the safe custody of goods carried on his boat, but only for their conveyance, on the responsibility and in the custody of the shipper's servant in charge. For such a proposition there is, as it appears to me, no foundation.

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I am then of opinion that the cause assigned by the accused for refusal to hire his boat for conveyance of the goods tendered in this case for carriage, *viz.*, "that he would not ship the cargo unless a tally-man was given," was not reasonable and sufficient.

I agree with Mr. Justice Parker's remarks as to the impropriety of the Magistrate's procedure commented on at the end of his judgment.

Owing to the difference of opinion in the Court the case was referred to a third Judge under Section 429 of the Code of Criminal Procedure.

The Acting Government Pleader (Mr. *Powell*), for the Crown.

MUTTUSAMI AYYAR, J.— The facts of the case are sufficiently stated by my learned colleagues in their judgments, and I do not consider it necessary to repeat them at length. It appears that some cotton to be shipped was brought alongside the wharf at Cocanada, but the accused refused to receive it in his boat without a tally-man. Mr. Wilkinson, the godown-keeper of Messrs. Simpson Brothers, the shippers, told him that the responsibility for the safety of the goods was on him, the syrang, but the accused denied that it was so. In his defence he said he was not acquainted with English or Hindustani and he did not know how to count, and that he therefore refused to ship the cargo unless a tally-man were given. It is provided by Section 14 of the Boat Rules that any owner of a licensed boat or person deputed by him refusing to let on hire his boat without assigning reasonable and satisfactory cause for such refusal should be liable to a penalty not exceeding Rs. 10. The question for decision is whether in declining to take in the cargo unless a tally-man were provided, the accused assigned a reasonable and satisfactory cause. It may be that if there was nothing in the rules themselves, a person who did not know how to count might reasonably require the assistance of a tally-man. But it is provided by Section 8 that if any boat is loaded with passengers or cargo beyond what is specified in the license, the tindal of such boat shall be liable to a fine, and by Section 7 that all boats must carry such number of passengers and **[126]** quantity of goods as shall be expressed in the license, a refusal to take which will subject the owner to the loss of hire and suspension of license, if considered necessary. These sections presuppose that the person in charge of a licensed boat is able to count the number of passengers taken into the boat and compare it with the number mentioned in the license and to ascertain the quantity of cargo shipped and compare it with the quantity specified in the license. As all the sections must be read and construed together, I do not consider that the cause assigned by the accused for his refusal, *viz.*, his inability to count, is a reasonable and satisfactory cause within the meaning of Section 14. The accused ought not to have taken charge of a licensed boat unless he knew how to count or was provided by the owner with men who knew how to count for him.

The conclusion I come to is that the refusal of the accused to let his boat on hire unless the shippers provided a tally-man was not a refusal for a reasonable and satisfactory cause within the meaning of Section 14. I am also of opinion that the criminal revision case mentioned by the Session Judge is not in point.

I quite agree with the remarks of Mr. Justice Parker on the Magistrate's procedure.

The result is the conviction will stand, and this Court must decline to interfere on revision.

10 M. 126 = 1 Weir 256.

1886 DEC. 29. APPELLATE CRIMINAL. 10 M. 126 = 1 Weir 256.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

In re RATNA MUDALI.*
[10th and 29th December, 1886.]

Penal Code, Sections 295, 297—*Defiling a place of worship—Trespass on a place of sepulchre.*

R, a Hindu, had sexual intercourse with a woman within an enclosure surrounding the tomb of a Muhammadan Fakir. He was convicted under Section 295 of the Indian Penal Code:

Held, that in the absence of proof that the place was used for worship or otherwise held sacred, the conviction was bad, and that it should be altered to a conviction under Section 297 of the said Code.

[R., U.B.R. (1892—1896) 199 Cr.]

THIS was a case referred for the orders of the High Court under [127] Section 438 of the Code of Criminal Procedure by E.C. Johnson, Acting District Magistrate of Chingleput.

The facts necessary for the purpose of this report appear from the judgments of the Court (MUTTUSAMI AYYAR and BRANDT, JJ.).

Counsel were not instructed.

JUDGMENTS.

BRANDT, J.—The finding is that the accused had sexual intercourse with a woman within an enclosure surrounding a tomb or "in one corner of the sepulchre" under which the remains of a Muhammadan 'Fakir,' venerated by some of his co-religionists, are buried, and that finding must be accepted.

The accused has been convicted under Section 295 of the Indian Penal Code and sentenced to rigorous imprisonment for three months. The District Magistrate is of opinion that the First-class Divisional Magistrate's conviction cannot be supported in law, on the grounds (1) that there is not sufficient evidence on the record that the place is "held sacred by any class of persons," (2) that an intention to insult is not only not proved, but negatived by the evidence as to the time when and the circumstances in which the act was committed, (3) that it is at least doubtful whether a knowledge that any class of persons was likely to consider the act as "an insult to their religion" can legally be imputed to the accused. I concur with the District Magistrate in considering that *the intent* to insult is negatived by the time at which the act was committed, *viz.*, 9 P.M., and by the fact that his detection was the result of a mere chance, and that the only reasonable inference is that the place was selected as one in which the accused might gratify his passion in reasonable hope or on a calculation that he would not be discovered. I am further of opinion that there is not sufficient legal evidence that this place is a place "held sacred by any class of persons," within the meaning of the words as used in Section 295 of the Penal Code; nor that the knowledge that the act, if detected, would be considered an insult to *the religion* of such persons, can be legally inferred.

There is a distinction, not arbitrary, between objects which are objects of respect and even veneration and objects which are held sacred;

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* Criminal Revision Case 697 of 1886.

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as an example of the former, I may refer to a place of sepulchre (not actually consecrated, as in the case of ground specially consecrated for that purpose according to the rites of Christian churches), as distinguished from a place for worship to the deity or where an idol or altar is kept; and such distinction [128] appears to have been kept in view by the Legislature, for while Section 295 deals with the latter class of objects and places, Section 297 deals more especially with trespasses on places of sepulchre and places set apart for the performance of funeral rites and as depositories for the remains of the dead.

Now there is no evidence before us that this place was specially consecrated, and though we are aware that Muhammadans not uncommonly resort to gardens and enclosures where their ancestors or holy men have been buried, for the purpose of saying their prayers, and from time to time to perpetuate the memory of the dead, there is no evidence that this place was so used, and we cannot take judicial notice of the custom.

I am then of opinion that there are not grounds on which it can be held that the accused must have been aware that his act was likely to be considered as an insult to *the religion* of any persons.

There was, however, undoubtedly a trespass in a place of sepulchre, and the question is whether the accused must be held to have known that he was likely to wound the feelings of any persons by such trespass, and I am of opinion that the accused must be held to have had sufficient knowledge of the general sentiment and practice of the community amidst which he lived, and that he cannot be excused on the ground that perchance there were no persons specially interested, or none ready to resent the act and prosecute for it, or that his act might as likely as not escape detection; he was detected, and as the event proved there were persons whose feelings were likely to be wounded; the act was the result of culpable heedlessness and disregard for the feelings of others, resulting from a determination to gratify personal lust, despite the consciousness of the consequences of his act if discovered, and failure to exercise that circumspection which it was incumbent on him to exercise; he might then properly be convicted under Section 297, and as the accused will not be prejudiced by substitution of a conviction under that section in lieu of that under Section 295, I would set aside the conviction under the latter section and substitute a conviction under the former.

As regards the punishment, I think it is excessive, any positive intention being negatived, and consider that a sentence of one month's rigorous imprisonment would have sufficed; I would direct that the accused be released from jail on the completion of that period.

[129] MUTTUSAMI AYYAR, J.—In this case the accused, a Hindu, had sexual intercourse with a woman within an enclosure surrounding the tomb of a Fakir at 9 P.M. on the 5th October last. The District Magistrate considers that the accused selected the place as one in which his act was likely at 9 o'clock at night to pass undetected, and that he had no intention of insulting the religion of the Muhammadans in his village, and in this opinion I also concur. Though the primary intention of the accused was to gratify his lust in a place where his act was considered likely to escape detection, I cannot say that he had no knowledge that his act was likely, if detected, to be considered by the Muhammadans to be a defilement, insulting to their religion or to wound their feelings. There is, however, no evidence to show that the tomb in question was used as a place of worship or that any particular object held sacred was

defiled, and therefore the conviction under Section 295 cannot be supported. But I also think that upon the facts found a conviction under Section 297 can be supported. The accused committed a trespass on a place of sepulture and knew that his act, if detected, was likely to wound the feelings of the Muhammadans. I do not consider that his belief that the act would probably not be detected would make any difference though it may no doubt well be taken into consideration in awarding punishment. I would alter the conviction to one under Section 297 and reduce the sentence as proposed by Mr. Justice Brandt.

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10 M. 129=11 Ind. Jur. 138.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

KAVERI (*Judgment-debtor*), *Appellant v.* ANANTHAYYA (*Decree-holder*), *Respondent.** [3rd and 6th December, 1886.]

Transfer of Property Act, Sections 2, 99—*Attachment of property mortgaged prior to* 1882.

In 1884, a mortgagee obtained a decree for arrears of interest due under a mortgage-deed of 1879 and in execution of the decree attached and applied for the sale of the land mortgaged :

[130] *Held*, that by reason of Section 99 of the Transfer of Property Act, 1882, the land could not be sold otherwise than by a suit instituted under Section 67 of the said Act.

[R., 35 C. 61=6 C.L.J. 320 (330)=11 C.W.N. 1011 (F.B.); 4 O.C. 231 (232); D., 14 M. 74 (75).]

APPEAL from an order of J. W. Best, District Judge of South Canara, reversing an order of M. Mundappa Bangera, District Munsif of Karkal, passed in execution proceedings in suit 199 of 1884.

The decree-holder, Ananthayya, having in 1884 obtained a decree for arrears of interest due under a mortgage deed executed in 1879 by the judgment-debtor, Kaveri Amma, applied to have the mortgaged property attached and sold in satisfaction of the decree.

The judment-debtor objected to the sale under Section 99 of the Transfer of Property Act, 1882.

The Munsif allowed the objection and dismissed the application.

On appeal the District Judge reversed this decree on the ground that, under Section 2 of the Transfer of Property Act, Section 99 was not applicable to the case.

The judgment-debtor appealed.

Srinivasa Rau, for appellant.

Respondent was not represented.

The Court (COLLINS, C.J., and PARKER, J.) delivered the following

JUDGMENT.

The decree was obtained in 1884 for arrears of interest due for three years and in execution of that decree the plaintiff got the mortgaged property attached. The District Munsif held that Section 99 of the Transfer of Property Act debarred the decree-holder from bringing the property to sale otherwise than by instituting a suit under Section 67 of that Act.

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* Appeal against Order 87 of 1886.

1886 DEC. 6. —— APPELLATE CIVIL. —— 10 M. 129 = 11 Ind. Jur. 138.

On appeal the District Judge reversed this order and directed execution to proceed on the ground that Section 2 saved any right or liability arising out of a legal relation constituted before the Act came into force, or any relief in respect of such right or liability from the provisions of the Act.

Although the legal relation of mortgagor and mortgagee was constituted in 1879, the right to attach the property and bring it to sale and the relief in respect to such right arose only out of the decree in 1884 which was subsequent to the passing of the Transfer of Property Act. The right to enforce the decree is a substantive right, but the mode of enforcing it is a matter of procedure. By **[131]** the decree in 1884 the decree-holder did not, through the operation of Section 99 of Act IV of 1882, gain a right to have the property sold in satisfaction of the decree, and therefore his procedure must be governed by Section 67. See *Dinendra Nath Sannyal* v. *Chandra Kishore Munshi* (1), and *Bhobo Sundari Debi* v. *Rakhal Chunder Bose* (2).

The order of the District Judge must be set aside with costs, and that of the District Munsif restored.

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10 M. 131 = 1 Weir 665.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

QUEEN-EMPRESS *v.* BODAPPA.* [17th December, 1886.]

Arms Act, 1878, *Sections* 5. 19.

B. having obtained a license under the Arms Act, 1878, for a match-lock, had the same converted into a percussion gun. He was convicted under Section 19 of the said Act, on the ground that the license did not permit him to keep a percussion gun:

Held that the conviction was bad.

CASE referred under Section 438 of the Code of Criminal Procedure by G. Stokes, Acting District Magistrate of Cuddapah.

The facts of the case were stated as follows by the District Magistrate:—

"The accused has been charged with possessing a cap gun, while the license he produced covered only a match-lock. The defence of the accused is, that the gun now in his possession and about which the question has arisen is the same that he had with him when he obtained the license, but that for convenience sake he had it altered from a match lock to a cap gun after he obtained the license.

"In convicting the accused, the Joint Magistrate has not been without doubt as to the legality of the conviction. He has found distinctly that the license produced was granted for the very gun in question. I consider that the legality of the conviction is very **[132]** doubtful and therefore refer the case for the orders of the High Court."

The Acting Government Pleader (Mr. *Powell*) for the Crown.

The Court (MUTTUSAMI AYYAR and BRANDT, JJ.) delivered the following—

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* Criminal Revision Case 467 of 1886.

(1) 12 C. 436. (2) 12 C. 583.

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CRIMINAL.
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1 Weir 665.

JUDGMENT.

The question is, whether the accused had in his possession an "arm" in contravention of the provisions of Section 19 of the Arms Act, 1878, that is, whether he had in his possession a firearm "not in the manner and to the extent permitted" thereby. As to the extent there is no question: that clearly refers to the number of arms or quantity of ammunition &c., for which the license is given, and as to the manner the license does not cease to protect the possession by reason of its having been altered from a match-lock to a percussion gun; the word "manner" as used in Section 5 appears to us to have reference to the conditions under which a license for the weapon is given; *e.g.*, as to how it is to be kept and used, and as to its being produced at the times required. There is no distinction drawn in the Act between the various kinds of explosive firearms; and if reference is had to Schedule II, it will be seen that a distinction is there drawn not between the different kinds of guns, as for example a rifle and a smooth-bore but between firearms and firearm barrels, and pistols and pistol barrels. We must hold that the conviction is not good in law, and we set it aside and direct that the fine, if levied, be returned to the accused.

It was suggested that the accused might have been and may now be convicted with reference to the provisions of Section 5 of the Act, which enacts that "no person shall manufacture, *convert*, or sell, or keep or offer for sale any arms, ammunition, &c., without a license." On referring to the statement made by the accused, we find he first said that he had the gun converted from a match-lock into a percussion gun; it is true he afterwards used the words "I changed it into a percussion-gun," but, reading the statement as a whole, we cannot say that he intended that he himself in fact converted it, and we are not prepared to convict him of an offence different from that which he was called upon to meet.

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10 M. 133.

[133] APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

KRISHNASAMI CHETTI AND OTHERS (*Plaintiffs*), *Appellants v.* VIRASAMI CHETTI AND OTHERS (*Defendants*), *Respondents.**
[2nd September and 16th December, 1886.]

Custom—Caste usage—Expulsion of member of caste under mistake of fact and without notice.

In a suit relating to the management of the common property of the members of a Hindu caste, the plaintiff's right to sue was denied on the ground that, having violated the rules of the caste, he had been expelled from it:

Held, (1) that it was open to the Court to determine whether or not the alleged expulsion from caste was valid;

(2) that if the plaintiff had not in fact violated the rules of the caste, but was expelled under the *bona fide*, but mistaken belief that he had committed a caste offence, the expulsion was illegal and could not affect his rights.

Per KERNAN, J.—A custom or usage of a caste to expel a member in his absence without notice given or opportunity of explanation offered, is not a valid custom.

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* Appeal 24 of 1885.

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[F., 33 M. 67 (69)=3 Ind. Cas 955=19 M.L J. 714=6 M.L.T. 290; R., 12 B. 247 (261); 19 B. 507 (525); 23 B. 122 (125); 26 B. 174 (187); 23 M 171 (177).]

APPEAL from the decree of Muttusami Ayyar, J., in Civil suit No. 376 of 1883, dated 9th September 1885.

The facts necessary for the purpose of this report appear from the judgment of Muttusami Ayyar, J., which was as follows :—

"The parties to this suit are members of the Beri Chetty caste in the Black Town of Madras. They belong to a class of Chettis or Vaisyas, consisting generally of merchants and tradesmen who are influential and enterprising. Beri Chettis are to be found throughout the Presidency, but it appears that in the City of Madras the class has a special caste organization. It is sub-divided into about 18 or 20 divisions, each division having its headman or headmen. Questions of caste are dealt with in the first instance at divisional meetings, and their resolutions are submitted either for revision by or for the information of the entire caste. The meeting of the entire caste, before which such resolutions are laid or which deals with questions concerning the whole caste, is designated as the Periyagramam meeting. The suit before me is instituted by four members of the caste in regard to the endowment **[134]** of a religious and charitable institution, styled Dharmasivacharyar matham. The plaint prays, among other things, for an account being taken of properties constituting the endowment, for their being secured for the benefit of the institution, for a scheme of management being settled, for plaintiff No. 1 and other competent persons being appointed trustees, and for adequate provision being made for the due administration of the endowment. The plaint also specifies the several charities performed in the institution, as consisting in the maintaining of a priest called Dharmasivacharyar, in the performance of certain religious rites and ceremonies, and in the feeding of Brahmans on behalf and for the spiritual benefit of the whole caste.

"The account, however, given by the defendants, of the scope and object of the institution, is somewhat different. Whilst admitting that the institution is a purely caste institution, the defendants assert that a section of the caste called Maligaikarar Vaguppu is not entitled to the benefit of the endowment, as that section seceded from Dharmasivacharyar and became the disciples of another priest called Sattanada Gurukkal, about 200 years ago. This averment is, however, immaterial to the present inquiry, the only issue which I have to decide being whether the plaintiffs continue to be members of the Beri Chetti caste. It is not alleged that they belong to the class of seceders mentioned above. It is further contended by the defendants that Dharmasivacharyar is bound to worship an idol called Visvesvarasami and to perform all rites and ceremonies for the due performance of such worship for the benefit and on behalf of those of the caste who are his disciples, to pronounce benedictions upon those disciples and to advise and guide them in spiritual matters, and that the endowment belongs to Visvesvarasami and the Dharmasivacharyar matham. However this may be, it is sufficient for the present inquiry to say that both parties agree in describing the institution as a caste institution, and that none but those who are in the caste and who belong to Dharamasivachariyar matham are interested in the endowment and in the due performance of the charities for which the institution is maintained. In advertence to their status, the plaintiffs aver that they are members of the Beri Chetti caste and followers of the Dharamasivacharyar matham

and contributors to that institution, that plaintiff No. 1 is also one of the hereditary headmen of the whole caste, and that all the plaintiffs are [135] interested in the property and management of the institution. But it is denied by defendants Nos. 1 and 2 that the plaintiff No. 1 is a hereditary headman, though it is admitted that he was a hereditary councillor of the headman. It is next asserted that, though the plaintiffs were members of the Beri Chetti caste, they have violated the usages and customs of the said caste and thereby forfeited their privileges as members of such caste, and that they have been expelled from it. It is contended, therefore, that, by reason of such forfeiture and expulsion, their interest in the property and management of the institution has ceased and that they are not entitled to maintain the suit. An issue has been framed with reference to this preliminary contention and set down for trial in the first instance. The question then and the only question which I have now to decide in this are the plaintiffs competent to maintain this suit, or have they ceased to be members of the Beri Chetti caste, as alleged in the 67th paragraph of the written statement. At the commencement of the trial, a question was raised on the form of the issue as to the right to begin. As it is admitted that the plaintiffs were once in the caste and interested in the institution, and as the right to begin depends rather on the substance than on the form of the issue, I held that the *onus* of proof was on the defendants who resisted the claim and that they were, therefore, bound to begin. The next contention had reference to the precise questions of fact and law, which it is necessary to decide in coming to a finding on the preliminary issue. It was alleged for the defendants, that the factum of removal from caste is the only one I have to investigate, and that otherwise Civil Courts would arrogate to themselves an appellate jurisdiction over caste assemblies, which it is not competent for them to do. It may be open to argument how far Civil Courts are entitled to examine into the reasons assigned for expulsion from caste, and this question I shall consider presently. But there is in my judgment no doubt that the issue in its present form raises a mixed question, a question of fact, *viz.*, the factum of expulsion and a question of law, *viz.*, the legal effect of such expulsion in determining the interest which the plaintiffs admittedly had at one time in the property and management of the institution. As to the factum of the plaintiffs' removal from caste, there is considerable evidence on record. It is to be regretted that the fact was not once admitted, for, in [136] that case it would not have become necessary to record much of the voluminous evidence recorded at the trial. No less than 36 witnesses were examined for the defendants, and the evidence in so far as it relates to the fact of removal from caste is overwhelming. Some witnesses depose to the resolutions arrived at by the divisional meetings which they attended, to the effect that the plaintiffs should be removed from caste. Several depose that those resolutions were laid before the Periyagramam meetings which they attended and that they were either adopted or confirmed by those members of the caste who attended such meetings. A large number of witnesses deposed further to the intimation they had in regard to the plaintiffs' removal from caste and to their having acted upon that intimation and ceased to invite and be invited by the plaintiffs for meals and for auspicious and inauspicious ceremonies. There is also some evidence that the first plaintiff attended the first Periyagramam meeting held in regard to his removal from caste.

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"In answer to this evidence, the plaintiffs only allege irregularities in the procedure followed on these occasions, and say in substance that they do not know whether they were put out of caste or not, and that what is alleged to be their expulsion from caste is not legal. They admit, however, that since 1881, they have not invited and been invited by the majority of the caste for meals and for auspicious and inauspicious ceremonies. This appears to me to corroborate materially the evidence adduced for the defendants in regard to the factum of expulsion. The conclusion I come to is that the division to which the plaintiffs belong and the Periyagramam resolved that the plaintiffs be put out of caste and that the majority of the caste acted upon the resolution and forbore to invite them for food and for auspicious and inauspicious ceremonies and still to continue to do so.

"The plaintiffs next impugn the validity of their removal from caste on the ground (i) that the procedure followed by the caste meetings was highly irregular, unreasonable and unjust, (ii) that they committed no caste offence, (iii) that no civil right could be forfeited by loss of caste under Act XXII of 1850, (iv) that the expulsion was the result of enmity and personal ill-will, and (v) that it is no bar to their maintaining this suit. It is urged on the other hand for the defendants that Civil Courts have no appellate jurisdiction over caste assemblies, and that the decision of such **[137]** assemblies that a particular person has rendered himself liable to be expelled from caste is final and conclusive.

"It would appear that expulsions from caste were rare among Beri Chettis in this city, and that there were no caste dissensions prior to 1876. There are only two such expulsions mentioned in the evidence during this interval. One of them is the expulsion of Mylapore Kandasami Chetti and of his son. The son was expelled from caste for renouncing Hindu religion and embracing Christianity, and the father was first expelled for associating with the son, but he was readmitted into caste on ceasing so to associate. It appears, however, that the father then endeavoured to re-admit the son into caste on the performance of certain expiatory ceremonies, but this the caste was not prepared to sanction. An undertaking was taken from the father not to do so, but the latter acted in contravention of it and was again put out of caste. It appears that he has not since been readmitted into caste. The other expulsion is the one to which witness Ramasami Chetti refers in his evidence. According to him, one Pakam Sabapathi Chetti was expelled from caste for illicit intimacy with a low caste woman. It appears also that in some of the divisions there were and there are still rival parties who originally differed from each other in regard to some secular matters. Though from party feud, these did not exchange meals and did not invite each other during auspicious and inauspicious ceremonies, still they were treated merely as rival factions and no caste taint was supposed to attach to them. This was the state of things in the caste until 1876, when Ramasami Chetti's son, the late Ratnavelu Chetti of the Madras Civil Service, returned from England to Madras On his return, the question whether he might not be readmitted into caste on performance of expiatory ceremonies engaged the attention of its leaders. It is stated by Ramasami Chetti that there was some vacillation on this occasion among the members of the caste, that it was at first considered that Ratnavelu Chetti might be re-admitted, but that it was finally decided that it could not be done. However this may be, it is a fact that Ratnavelu was not readmitted, that Ramasami Chetti thought that Subraya Chetti and Somasundra Chetti opposed his son's re-admission, that several members of his division who

were in favour of re-admission sympathised and sided with him, and that dissensions thus arose in the caste owing to the difference of opinion which existed on this [138] occasion. In January 1877 those in Ramasami Chetti's division who opposed Ratnavelu's re-admission into caste put Ramasami Chetti out of caste until he renounced caste intercourse with his son. Those persons who sympathised and continue to mix with him were also removed from caste. This split in Ramasami Chetti's division extended to other divisions, and the sectarian feeling gained strength, and the number of persons put out of caste increased.

"Ramasami Chetti continued to treat his removal from caste with indifference till 1878, when he considered it desirable to seek reconciliation with the caste. He was readmitted into the caste and continued in it till 1880. In 1879, a meeting of the caste was held for the election of a Dharmakarta for Kandasami temple, and to this meeting some 28 persons were not invited. Defendant No. 5, one of those put out of caste for siding with Ramasami Chetti, pointed out this irregularity to the High Court in a suit in which a motion was then pending. Subraya Chetti filed an affidavit justifying his conduct. He alleged that some of the persons not invited to the meeting had ceased by transgressing the usages of the caste to be its members, and that as the headman of the caste it was for him to decide who ought to be invited to the meeting of the caste. Ramasami Chetti objected at the caste meeting to this portion of the affidavit. Some of those who were not invited sued the headman, Subraya Chetti, for damages in original suits Nos. 59, 203 and 204 of 1880, but these suits were dismissed. When they were pending, the headman, Subraya Chetti, convened a meeting to raise funds for defending those suits. At this meeting again Ramasami Chetti opposed Subraya Chetti, and urged that the litigation should not be treated as one concerning the Periyagramam. Amarambedu Subraya, defendant No. 5, brought original suit 269 of 1880 against the headman of his division for not inviting him to the meetings of the caste; the headman justified his conduct and contended that he was one of those who were put out of caste for joining Ramasami Chetti when he associated with his son, and that though Ramasami Chetti was since re-admitted into caste, defendant No. 5 did not seek re-admission and continued to associate with persons who had been put out of caste, but not been re-admitted. This suit was also dismissed.

"Palayam Somasundra Chetti, one of the leading members of [139] the caste, instituted original suit No. 166 of 1880 against the present first plaintiff and others in regard to the dharmakartaship of the temple at Tiruvattur. But this suit also eventually failed.

"About the end of 1880, plaintiff No. 1 was put out of caste for taking part, as it was said, in the karmantram ceremony of the daughter of Mylapore Kandasami Chetti. Early in 1881, Ramasami Chetti was again put out of caste. There was a festival shortly before in honour of the idol Yagattal worshipped by the caste, and during this festival it was customary to take to the temple in procession certain presents as an offering to the idol. The headman, Subraya Chetti, desired that the procession should start from a place called Natakasala, whilst Ramasami Chetti and the plaintiffs opposed the headman and started a rival procession from one Linga Chetti's house. A breach of the peace appeared imminent and both processions were stopped by the Police. Some time afterwards, plaintiffs Nos. 2 and 3 were put out of caste on the ground that they associated with Ramasami Chetti. Subsequently plaintiff No. 4 was put

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out of caste for the reason that he attended the funeral ceremony performed by Ramasami Chetti on the occasion of his son, Ratnavelu Chetti's death.

"It appears from the foregoing summary that it was usual in the caste to expel persons from it for caste offences, that renouncing Hindu religion, illicit intimacy with low caste women and association with expelled persons were treated as such offences.

"It shows also that Ramasami Chetti considered that his son was not re-admitted into caste owing to the opposition offered by Subraya Chetti and Somasundra Chetti, that he often opposed Subraya Chetti at caste meetings, that some of those who originally sided with him and were put out of caste sued the headmen for damages, and that there was thus no cordial feeling between Ramasami Chetti and his adherents on the one hand and Subraya Chetti and his supporters on the other.

"I shall now consider the several grounds on which the validity of the plaintiffs' expulsion is impeached. As to the procedure follwed at these caste meetings, it is admitted that it was not judicial. It appears that no evidence was taken, no formal record was kept, that the person accused of a caste offence was not invited to the meeting, that no explanation was demanded from him, and that no previous notice of the business done at each meeting was given to the members of the caste. It is not contended that the [140] procedure was otherwise, but it is justified on the ground that it was in accordance with custom. Seeing that the members who attended the meeting were neighbours and fellow castemen, there is ground for the contention that according to custom more importance was attached to their opinions than to any formal procedure. It appears, however, to be the customary procedure of the caste, and there is nothing in the evidence to lead me to a contrary conclusion.

"In connection with this point, it is contended for the plaintiffs that there were two headmen for each division, and that it was competent to the Periyagramam to reverse or modify the decision of divisional meetings. In regard to the plaintiffs, there was no difference of opinion between the Periyagramam and the divisional meetings, and the contention is not material to the present inquiry. As to the contention that there were two hereditary headmen for each division and for the Periagramam, it appears to me to be well-founded. The defendants do not deny that there was another person who assisted the headman, but they assert that the second was only an adviser or councillor, and that he was not recognized as one who possessed the privileges of the headman. This suggestion is, however, inconsistent with several documents which were executed before there were any dissensions in the caste and in which both are described as headmen. It appears also that Subraya Chetti referred to two headmen in several of the suits instituted against him. Though I consider that there were two headmen for each division, I think that, when proceedings are instituted against one of them, the meeting convened by the other is not incompetent to put him out of the caste. In this view it seems to me that the contention whether there was one headman or there were two headmen is immaterial.

"As to the allegation that no caste offence was committed, I do not think that it can be supported in regard to plaintiffs Nos. 1 and 4. Several witnesses for the defendants depose that they saw plaintiff No. 1 attend the funeral ceremony performed on account of Kandasami's daughter, and that though the ceremony was performed in the house of Kandasami's son-in-law, Ladu Chetti, both he and his wife, it is stated, had

associated with Kandasami. I see no reason to discredit the evidence on this point, and plaintiff No. 1 himself does not deny it, though he states that he did not take his meals in Ladu Chetti's house. During his **[141]** examination, plaintiff No. 4 admitted that he attended the funeral ceremony performed by Ramasami Chetti on account of his son, Ratnavelu Chetti. There is also evidence to show that, when a person is put out of caste, those in the caste are, according to custom, bound not to associate with him either by taking meals with him or attending auspicious and inauspicious ceremonies in his house. I find that the author of the Mitakshara on ceremonial law treats such acts as association with one who is out of caste, and I cannot say that, in so far as plaintiffs Nos. 1 and 4 are concerned, they committed no caste offence according to the usage obtaining among Beri Chettis. Manu, Madava, Devala and Vignyanesvara speak of association with those put out of caste as a ground for removal from caste. As regards plaintiffs Nos. 2 and 3, the balance of evidence is to the effect that Subraya Chetti stated at the Periyagramam meeting that he saw them attend ceremonies and take meals in Ramasami Chetti's house. But no evidence was given at the trial before me that they actually did so. The conclusion I come to in regard to them is that they were put out of caste in the *bona fide* belief that they committed a caste offence, but that there is no reliable legal evidence before me to show that they actually committed it.

"As to the contention founded on Act XXII of 1850, I do not consider that it is applicable to this case. The right in contest is in its nature a right to participate jointly with fellow castemen in the benefit of a caste institution, and the continued possession of status as a casteman is a condition precedent to the enjoyment of such right. It is also the understanding on which contributions to the endowment must be taken to have been made, regard being had to the usage of the particular caste to which the parties belong and of similar institutions. As to the assertion that the plaintiffs' removal from caste was not *bona fide* and due to personal ill-will, I do not think that it is borne out by the evidence. There was no doubt no good feeling between Ramasami Chetti and his party on the one hand, Subraya Chetti and his friends on the other. But it must be remembered that the plaintiffs' expulsion was the act, not individually, of Subraya Chetti, but of the members of their respective divisions and the Periyagramam. It may well be that Ramasami Chetti and his friends hated Subraya Chetti because he was hostile to the readmission of Ramasami Chetti's son. The evidence affords no warrant for the suggestion that the plaintiffs' **[142]** divisions and the Periyagramam voted the removal from caste from personal spite and not from a *bona fide* belief that there was a caste transgression. It is argued for the plaintiffs that it is not competent to me to examine into the validity of the plaintiffs' expulsion, and that, if the factum of expulsion is proved, it must be taken to be valid. In this opinion, however, I am unable to concur. It is true that matters relating to caste are within the exclusive cognizance of caste assemblies, and that, when they act *bona fide* in the exercise of their jurisdiction, their decision must be taken to be conclusive. To this extent, I accept the contention. Here I must observe that at first I felt some doubt whether I should not insist on strict legal proof of the commission of a caste offence, and that the judgment I come to on further consideration is that to do so would be to assume an appellate jurisdiction over caste assemblies in regard to matters of caste. But I must satisfy myself that they dealt *bona fide* with a caste offence. Otherwise there would

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be no spiritual basis for their action. As to the legal effect of the removal from caste over the right in contest, I consider that it suspends the exercise of the right until the plaintiffs obtain readmission into caste. It is alleged that the plaintiffs are allowed to enter the caste temple and worship the idol there, to make offerings to it and to perform festivals on particular occasions. It is also said that plaintiff No. 1 is the dharmakarta of the temple at Tiruvattur. But I must say that Dharmasivacharyar matham is not a precisely similar institution. Religious instruction has to be afforded in the Matham, and according to ceremonial law no priest is competent to afford such instruction to one who is put out of caste. It may be a matter for regret that the matter in contest was not settled out of Court, and that the ceremonial law of the caste does not meet the requirements of progress. But in dealing with the question here, I have no choice in the matter, and my decision should be in accordance with the usage and ceremonial law of the caste. On the ground, therefore, that the plaintiffs were removed from caste by their caste who act *bona fide* and in accordance with the customary procedure, I have to find the issue against the plaintiffs and dismiss the suit with costs."

Plaintiffs appealed.

Mr. *Grant*, for appellants.

Mr. *Branson* and Mr. *Norton*, for respondents Nos. 1—4 and 6.

Anandacharlu and *Sundaram Sastri*, for respondent No. 5.

[143] The Court (KERNAN and BRANDT, JJ.) delivered the following

JUDGMENTS.

KERNAN, J.— [After finding that it was not proved that plaintiffs Nos. 1 and 4 had committed any caste offence or had in fact been expelled in the manner stated by the witnesses, proceeded as follows] :—

There still remains the question whether, if plaintiffs were expelled according to caste procedure or custom, their expulsion is valid. The learned Judge states the matter thus : "As to the procedure followed at these caste meetings, it is admitted that it was not judicial. It appears that no evidence was taken, no formal record was kept, that the person accused of a caste offence was not invited to the meeting, that no explanation was demanded from him, and that no previous notice of the business done at each meeting was given to the members of the caste. It is not contended that the procedure was otherwise, but it is justified on the ground that it was in accordance with custom. Seeing that the members who attended the meeting were neighbours and fellow castemen, there is ground for the contention that, according to custom, more importance was attached to their opinions than to any formal procedure. It appears, however, to be the customary procedure of the caste, and there is nothing in the evidence to lead me to a contrary conclusion."

Again, the learned Judge says : "It may be a matter for regret that the matter in contest was not settled out of Court, and that the ceremonial law of the caste does not meet the requirements of progress. But in dealing with the question here, I have no choice in the matter, and my decision should be in accordance with the usage and ceremonial law of the caste. On the ground, therefore, that the plaintiffs were removed from caste by their caste who act *bona fide* and in accordance with the customary procedure," the learned Judge acted on what he found was the procedure of the caste, founded on custom or usage, *viz.*, to charge, and condemn and expel from caste a member, in his absence, without notice either

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of the intention to hold a meeting to consider his conduct or of the time or place of the meeting, or of the nature of the charge, and without any explanation being called for, or an opportunity given him of explanation or of meeting the charge. The evidence shows that the custom is this, *viz.*, a meeting of the division (to which the member to be expelled belongs) of the caste is called, but [144] no notice is given to him of the meeting or of the object of it. The division decide that the member has broken a caste rule, and agree to expel him. After that, a meeting, called Periyagramam, of all the headmen of the different divisions is called in the morning for that evening, and as counsel for defendant admits, no notice is given to the member of that meeting, no evidence is taken, no explanation is demanded; that meeting merely records the exclusion recorded at the division. The proceedings of the two meetings affect to be judicial. The maxim *audi alteram partem* contains a fixed principle of justice. It prevails in all countries subject to the British rule. It is not confined to public Courts of Justice, but applies to all tribunals, public or private, of every kind which are vested with or assume power to decide on the conduct or rights of parties. In a very recent case decided by this Court, very many of the decisions on this subject are referred to—see *Gompertz* v. *Goldingham* (1). That was a case where a member of a club was expelled, and two of the cases referred to in that report were also cases where members of clubs were expelled. In each case it was held that the committee who expelled were bound in the exercise of their functions by the rule expressed in the maxim *audi alteram partem*, that no man shall be condemned to consequences resulting from alleged misconduct without having an opportunity of making his defence. Lord Justice Brett says it would be a denial of natural justice if a decision of the club was come to without his having an opportunity of being heard. There is no reason why this principle should not apply to the proceedings of caste meetings which undertake to decide on the conduct of a member of the caste, which conduct is alleged to be contrary to caste rules and usages. To be expelled from caste causes most serious prejudice to the member expelled and to his family and in their social relation. In this case it is contended that the expulsion disentitles plaintiffs from any right to investigate the accounts of the charity which has been created partly by their and their ancestors' subscription to it.

The caste institution is not above or outside the law. The usages and customs of caste exist only under and not against the law.

Whenever a custom or usage is opposed to the law, it cannot be a good custom. Colebrook B. 1, Chapter 2, Section 2, IX, On [145] Usage—Practice which is founded on law prevails. Hence Usage inconsistent therewith must be abrogated. A custom must be reasonable. But the custom which the learned Judge has followed is not reasonable, inasmuch as, according to it, a member may be expelled although he has no opportunity of meeting the charge against him. If reasonable notice of the time and place of the intended meeting and of the substance of the charge was given to him, and if he was allowed to attend the meeting and explain or defend himself, then the law would be complied with. What would be reasonable notice the caste may determine, provided it be reasonable. The application of this rule of law does not infringe on any legal usages and arrangements of the caste, or affect any decision they may come to at their meeting of which notice was given. If after the member has

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received such reasonable notice, he does not choose to attend the meeting and is not prevented from doing so by any reasonable cause, then the caste may proceed to make a decision according to their usual procedure and custom. As to the alleged custom, all that appears in the evidence is that it is not usual to give notice to offenders. There is no proof of any expulsion by the caste prior to 1864 ; and though an expulsion is proved to have been made then and others in 1874 or 1875. yet no evidence was given that the persons expelled had not notice of the meeting.

P. Ramasami Chetti says that in 1878 he was expelled though he got no notice, and that, for the reasons that he gives, he recognized the authority of the expulsion. But he was re-admitted to caste, and it is alleged that he was expelled again, and this expulsion he disputes, and states he got no notice of the meetings.

Immemorial custom cannot prevail against the principle contained in the maxim *audi alteram partem*—see *Williams* v. *Lord Bagot* (1).

In my judgment, therefore, the alleged expulsion of the plaintiffs is invalid on the ground that they had no notice of the meetings to expel them or of the charges made against them, and that they had no opportunity given to them of defending themselves against such charges. They were not present at any of such meetings.

Though the learned Judge acted on the custom, he does not say that he approves of it, nor does he decide that it was a good legal custom.

[146] On the evidence I think that this very illegal practice has produced much mischief in this caste. Several expulsions since 1878 have taken place, and it is probable that, if opportunity had been given of explanation, such expulsions would not have taken place. A question was partly argued before us whether, according to Hindu law, an expulsion can take place except for some serious offence and not merely for a slight transgression of caste usage. However, this question was not open as it was not raised in the Court below.

Expulsion from caste must necessarily mean expulsion from the whole caste. If the alleged expulsions took place, it seems to me that in the evidence the expulsions were only partial. The evidence of plaintiff No. 1 and of others is that many members of the caste not belonging to the faction of defendants Nos. 1—3 do associate with plaintiff No. 1 and others and have always done so. Moreover, plaintiff No. 1 is admittedly dharmakarta of the Tiruvattur temple to which members of the Beri Chetti caste subscribe and where many of the caste and others worship. It appears not probable that a person put out of caste by his caste would be allowed to act as dharmakarta. Defendant No. 1 in his evidence said plaintiffs are eligible for re-admission into caste, and *that prohibition extends only to attending meetings for auspicious or inauspicious ceremonies, or attending when invited for taking food* ; and that it does *not* extend to anything else. and that they are not entitled to be invited to caste meetings. If this is correct, it would seem that on this ground the expulsion is only partial and not complete for all purposes.

The facts of the case of plaintiff No. 4 seem to support this view. He admits he was expelled by Periyagramam, though he says he got no notice of the division meeting. He says (and he is not contradicted) that he worships at the Kandasami pagoda (this is the special temple of the caste) and conducts there the Pradosham festival every fortnight, and that he enters the inner precincts of that temple. If he was expelled from the

(1) 3 B. & C. 786.

entire caste, it is not accounted for by the defendants why he, an out-caste, is still allowed to enter the inner precincts of the special temple of the caste, and to conduct ceremonies there, unless the reason is that the expulsion does not amount to exclusion from all caste privileges.

I do not think the defendants have proved that the expulsion is an exclusion from all caste privileges, as alleged by the defend-[147]ants in paragraph 67 of their written statement. This being so, the plaintiffs are entitled to maintain this suit seeking for the relief prayed by them, even if the alleged expulsion took place.

As regards plaintiff No. 4, the learned Judge's finding that he committed a caste offence is not vey clear, although he does find that the allegation that no offence was committed cannot be supported. He refers to this plaintiff's admission that he attended a funeral ceremony of Ratnavelu at Ramasami Chetti's house, and that he invites Ramasami Chetti to food. This plaintiff, however, says that Ramasami Chetti was not legally expelled. The date of the ceremony was in or shortly after September 1881. Ramasami was, as he admitted, expelled in January 1877 and was re-admitted to caste in August 1878. As a matter of fact several members of the caste signed a document of the 9th of January 1881 expelling him, but Ramasami says he got no notice of the meeting at which, it is said, he was expelled, and that he is in caste still. In order to establish that plaintiff No. 4 committed a caste offence, the defendants should state clearly the offence they allege against him and prove it. The offence alleged being association by him with Ramasami and attending ceremonies with him, it lies on defendants to prove that Ramasami was then out of caste. The production of the document of the 9th of January 1881 is not sufficient for that purpose, as it has not been proved that notice of the meeting to charge was given to him or that an opportunity was given to him to defend himself. The evidence is that Ramasami did not get such notice. I am not able therefore to see that the expulsion of plaintiff No. 4 binds him.

In my judgment, we are bound to reverse the finding and decree of the learned Judge, and to find the issue in favour of the plaintiffs, and to decree that the plaintiffs have not ceased to be members of the Beri Chetti caste, as alleged in paragraph 67 of the defendants' statement, and that they are entitled as members of the caste to file this suit. Whether they can succeed in it must depend upon facts which have not yet been tried.

We reverse the decree of the learned Judge of the 9th day of September 1885, and we find that the plaintiffs are competent to maintain this suit and they have not ceased to be members of the Beri Chetti caste, as alleged in the 67th paragraph of the written statement. This is a finding in favour of the plaintiffs, and under the order at issue the case is to be remitted to the Issue Court to [148] frame issues as to the other questions in dispute. As to the costs of the trial of the preliminary issues in the Court below and in appeal, we think that the defendants Nos. 1 to 4 and 6 should pay to the plaintiffs the costs of such trial and appeal, and order accordingly. We make no order as to the costs of defendant No. 5.

BRANDT, J.—I concur in the conclusions arrived at by my learned colleague, and generally in the reasons stated by him for coming to those conclusions: the voluminous evidence is so fully and clearly set out in his judgment that I am saved a great deal of labour: it may, however, be satisfactory to both parties that I should state as briefly as I can the manner in which the case presents itself to me after full consideration; in

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nearly all respects I take the same view of it as I did before I had the advantage of reading the judgment of Mr. Justice Kernan.

The issue, *viz.*, are the plaintiffs competent to maintain this suit, or have they ceased to be members of the Beri Chetti caste as alleged in the 67th paragraph of the defendants' written statement, by reason that they violated the usages and customs of the caste and have thereby forfeited all the privileges of the said caste, and have been expelled from it, and by such forfeiture and expulsion have ceased to have any interest [enforceable at law?] in the property and management of the Dharmasivacharyar matham and of the Visvesvarasami idol, and to be entitled to participate in the worship and services of the said matham, contains in fact two propositions, a finding on each of which is essential to a finding on the whole issue; and those two propositions are—

That the plaintiffs have been guilty of what may be called certain caste offences, on account of which they rendered themselves liable, according to the custom and usages of the caste to which they are bound to submit, to expulsion from the caste, and that they were in fact expelled for such misconduct.

Now on the finding of the learned Judge who tried the case there is no legal evidence to which credit can fairly be given, in proof of the fact that two of the plaintiffs, the 2nd and 3rd, were guilty of any caste offence; and that being so, these plaintiffs' alleged expulsion from caste cannot legally render them incapable of enforcing the civil rights which they possessed, even if those who profess to have expelled them did not act in bad faith and from motives of personal spite, but in the *bona fide* but mistaken belief that they had transgressed caste rules.

[149] As my learned brother puts it, it is not sufficient to say that certain things have been done in connection with the enforcement of caste rules and observances, (to which those affected must submit either by reason of their voluntary submission to the *forum* which, in accordance with the custom of the caste, deals with the breach of such rules and observances, or to which all members must submit, involuntarily it may be, for the very and only reason that they are born in such caste), and that members of the caste have in fact been expelled for a supposed breach of such rules and observances, even if those ordering and enforcing the expulsion acted in good faith, although under a mistake as to the facts which give to those enforcing the rules jurisdiction to enforce them. It appears to me contrary to general and well-established rules of justice that such a plea or argument should be allowed.

Nor do I see anything inconsistent in so holding and in holding at the same time that within its own sphere and in the exercise of its social and religious jurisdiction the decisions of those who properly represent a caste shall be final, so far as the civil tribunals are concerned, and not open to revision or even discussion by such tribunals.

The learned Counsel for the respondents strongly and repeatedly insisted that it was sufficient to prove the *factum* of expulsion, and to show that it was not arbitrary; and that, this being shown, it matters not whether those who decided on and gave effect to the order of expulsion had or had not before them evidence of the commission of a caste offence by those expelled: a very extreme case being suggested, he did indeed go so far as to say that if the caste tribunal expelled from caste a member thereof alleging the personal appearance of such member to be displeasing to the tribunal or to the caste or some members thereof, the expulsion would be good for all purposes, religious, social and civil.

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It is well that the effects of a supposed principle should be so illustrated; the illustration indicates the consequences of admitting an authority such as is postulated; and it does not in my opinion admit of doubt that the civil power has authority—not inconsistent with the fair exercise by a caste of exclusive jurisdiction in all religious, moral or social concerns connected with it—to decide that a caste-man does not *ipso facto* lose all the rights of a citizen in respect of property belonging to the caste as a body, if he be expelled by the tribunal which represents the caste or by a faction **[150]** in it, provided that such body acts under a mistaken but *bona fide* belief that the accused person has committed a caste offence, when in fact he has not done so, and to secure to those aggrieved the civil rights of which it is attempted to deprive them.

The case incidentally raises many curious and some difficult questions: into several of these it is not necessary to go. I would, however, refer to some of them for the purpose of showing how very uncertain the defendants seem to have been as to the basis on which they should rest their defence. At one time in the course of argument it was suggested that there can be no half measures, and no intermediate position: that a man is either in caste or he is an outcaste. But the defendants' own evidence shows that there is (according to some) "exclusion" from caste, which is one thing, and "expulsion" from caste, which is another; we heard also suggestions of "exclusion" from one of the caste divisions without expulsion from caste by the Periyagramam, the body which consists of all the other divisions, in conclave assembled; of temporary as opposed to complete exclusion or expulsion; and of exclusion or expulsion which is complete, by which the member condemned becomes spiritually dead, but can be made alive again and restored to all his rights and privileges on payment of a few annas.

Does this give an impression of systematic and well considered dealing with the case of persons who, for associating with those guilty of the "great offences" "the heinous crimes" specified by Manu, must perform penance for the sake of expiation "since they who have not expiated their sins will again spring to birth with disgraceful marks?"—See Manu, Chapter XI, Sections 54 and 55; 56 to 59; 60 to 67. Are the violations of caste customs and usages alleged, akin to the offences which Manu describes in Section 68 as "*jati brahmsakara* (causing a loss of class)?" or (Section 69) as degrading the offender to a mixed tribe? or as cause for exclusion from social repasts, Section 70? or as causing defilement, Section 71?

The impression which the evidence as a whole gives me is that the division of the people of the Beri Chetti caste in Madras Town into "gramams," which collectively constitute the "Periyagramam," and the organization thereof either was in its inception or has in course of time come to resemble in no slight degree a guild or federation of guilds in many respects not dissimilar from **[151]** those with which students of European History are familiar; and that the organization is concerned at least as much with enforcement of social observances and of conduct deemed to be for the good of the community—and possibly for regulation of its trade, though of this there is naturally not much, if any, evidence taken in this case—as with the punishment of ceremonial offences.

There certainly are more than traces, I think there is positive evidence, of the distinction between a sort of social ostracism, the subjecting of an offender to certain social penalties and disadvantages, and exclusion from caste, which distinction has been noted, commented on and recognized

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elsewhere (see *Sudaram Patro* v. *Soodha Ram*) (1) and it is not unimportant to consider this with a view to determining whether in the case of the plaintiffs Nos. 1 and 4 the caste as a body, or the divisions to which they belong did in fact "expel," "excommunicate," "exclude," "keep aloof," these plaintiffs or either of them for the commission of what constituted a caste offence; or whether the allegation of such "expulsion" or whatever it may be, was made subsequently to the time at which the expulsion is now alleged to have taken place, and whether it is not the result of a combination formed not for the purpose of punishing a caste offence, but with a view to bringing to bear what in the case of a Hindu is perhaps the most powerful lever which can be conceived, in order to coerce plaintiff No. 1 or these two plaintiffs to comply with the wishes of another very powerful member of the caste. My learned colleague has forcibly stated many, if not all, of the cogent reasons which appear on the record in this case for coming to the latter conclusion, and in that conclusion I entirely concur.

I do not believe that plaintiff No. 1 was excluded or put out of caste in the manner and at the time alleged by those who profess to speak to it. The *factum* of the alleged expulsion is relied on as the best proof of the commission of the caste offence or offences imputed: that evidence I do not believe, and there are other admitted and proved facts which appear to me to be irreconcileable with the alleged exclusion on account of the commission of such offences or the violation of such caste requirements and usages as are made the basis of the plea set up in the 67th paragraph of the defendants' written statement.

[152] (After dealing with the evidence on this point, the judgment proceeded as follows.)

Then there is the objection stated by my learned colleague as to no notice having been given to plaintiff No. 1 of the intention to put him out of caste.

I think it unnecessary to decide whether if it were proved to be in accordance with the custom and usage of the caste not to give an accused person an opportunity of being heard, we could hold such custom to be bad—I by no means say it would be a good or reasonable custom—but I think it unnecessary to decide the point, as I do not believe that there was an expulsion in fact.

I agree that the suit must be remanded for adjudication on such of the merits as have not yet been gone into, and I agree as to the order proposed in respect of costs.

Solicitors for the appellants: *Barclay* and *Morgan*.

Solicitors for the respondents 1, 4 and 6: *Branson* and *Branson*.

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(1) 11 W.R. 457.

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APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

ANNAJI RAU (*Plaintiff*), *Appellant* v. RAMA KURUP AND OTHERS (*Defendants*), *Respondents*.* [19th January, 1887.]

Jurisdiction—Suit to declare land liable to be sold in execution of decree—Civil Procedure Code, Section 373—Withdrawal of part of claim.

In a suit brought in a District Munsif's Court to declare certain land liable to be sold in execution of a decree for more than Rs. 2,500, the defendants pleaded that the Court had no jurisdiction. The Munsif allowed the plaintiff to amend the plaint by stating that he abandoned his claim to execute the decree against the land for more than Rs. 2,500.

On appeal, the District Judge held that the plaint could not be amended after the first hearing:

Held, on appeal to the High Court, that the claim was not one which could be amended so as to bring the suit within the pecuniary jurisdiction of the District Munsif.

APPEAL from the decree of W. P. Austin, District Judge of North Malabar, reversing the decree of A. Chathu Nambiar, District Munsif of Badagara, in suit 423 of 1884.

The plaintiff, Annaji Rau, sued the defendants, Rama Kurup **[153]** and three others, for a declaration that certain land (valued at Rs. 100, being five times the revenue assessment thereon) was liable to be sold in execution of a decree obtained by plaintiff in suit 81 of 1880.

This land had been attached by plaintiff, but was released on the intervention of defendants 2 to 4 on August 13, 1883.

The suit was filed on August 11, 1884. On the 10th October 1884 the plaintiff presented a petition to the Court, stating that, although the amount of decree exceeded Rs. 2,500 (the pecuniary limit of the jurisdiction of the Court), the plaintiff relinquished the amount in excess of Rs. 2,500.

The Munsif held that the amount to be enforced by the decree sought, was the criterion for determining the question of jurisdiction, and, as the plaintiff had relinquished his right to enforce the decree for more than Rs. 2,500, held that he had jurisdiction and decreed for plaintiff. On appeal, the District Judge held that, as it was admitted by both parties that the amount of the decree was the criterion in this case for determining the question of jurisdiction (see *Krishnama Chariar* v. *Srinivasa Ayyangar*, I.L.R. 4 Mad. 340,) the Munsif had no jurisdiction. He held that the relinquishment could only be made at the time of presentation of the plaint and that the amount relinquished should be shown in the plaint (Section, 50 (*f*) of the Code of Civil Procedure). As the relinquishment had not been made until after the first hearing, when the defendants Nos. 2—4 objected to the Court's jurisdiction, the District Judge reversed the decree of the Munsif and directed the plaint to be returned to plaintiff.

Plaintiff appealed on the grounds—

(1) That the withdrawal of portion of the claim was not objectionable.

(2) That the plaint as amended was cognizable.

(3) That the value of the property attached ought to have been ascertained by inquiry.

Anantan Nayar, for appellant.

Mr. Wedderburn, for respondents.

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* Second Appeal 596 of 1886.

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For the plaintiff it was contended that the plaint could be properly amended under Section 373 of the Code of Civil Procedure (see also Sections 50 and 53).

For the respondents it was urged that Section 373 was not applicable to the present case, inasmuch as plaintiff did not seek to recover [154] money and abandon part of his claim, but sought to declare the whole property liable to sale.

He could not be said to abandon any portion of his claim by stating that he desired to sell this property to liquidate his decree to the extent of Rs. 2,500 only. The only possible decree was that the property was or was not liable to sale.

The Court (BRANDT and PARKER, JJ.) delivered the following

JUDGMENT.

The claim in suit was not in respect of a sum of money, but for a declaration that certain property is liable in execution of a decree already obtained, and the appellant cannot be said to have abandoned a part of his claim when he expressed his willingness to forego proceedings against the property attached by him in excess of the sum of Rs. 2,500.

Being of opinion that it was not open to the District Munsif to decide the suit in respect of which he had not otherwise jurisdiction, by reason of the appellant's signifying his willingness not to claim anything in excess of Rs. 2,500 out of the sum which might be realized by the sale of the property in suit, we uphold the decree of the Lower Appellate Court and dismiss the appeal with costs.

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10 M. 154=11 Ind. Jur. 140=2 Weir 170.

APPELLATE CRIMINAL.

Before Mr. Justice Brandt and Mr. Justice Parker.

In re VENKATACHALA PILLAI AND OTHERS.* [19th January, 1887.]

Criminal Procedure Code, Section 195—*Registration Act, Section* 41—*Sanction of Registrar—Condition precedent to trial for forgery of will registered.*

A Sub-Registrar acting under Section 41 of the Registration Act, 1877, is a "Court" within the meaning of Section 195 of the Code of Criminal Procedure.

[Appl., 15 M. 138 **(F.B.)** ; **D.,** 12 M. 201 (202) ; 4 M.L.J. 189 (192).**]**

CASE referred to the High Court by J. A. Davies, Acting Sessions Judge at Tanjore.

The facts were stated as follows :—

"In this case, five persons have been committed for trial on a charge of forging a will, punishable under Section 467 of the Indian Penal Code.

"The will alleged to be a forgery was duly registered by the Sub-Registrar of Mayaveram, under Section 41 of the Registration Act, after satisfying himself that it was genuine.

[155] "Exception is taken by the prisoners' vakil to the commitment on the ground that the Sub-Registrar acting under Section 41 of the Registration Act is a 'Court,' and his sanction to the prosecution is accordingly required before this Court can take cognizance of the offence according to the terms of Section 195, Clause (*c*) of the Code of Criminal Procedure, and that such sanction is wanting in the present case.

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* Criminal Revision Case 478 of 1886.

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"Section 537 of the Code of Criminal Procedure declaring that no finding, sentence or order, &c., shall be reversed or altered for the want of any sanction under Section 195, refers only to proceedings in appeal or revision, or when sentences are submitted for confirmation under Chapter XXVII, and it is therefore inapplicable here. The objection that has been taken appears to have been also raised before the Committing Magistrate, but he has not noticed it. The question for determination simply is whether a Sub-Registrar acting under Section 41 of the Registration Act of 1877 is or is not a 'Court' within the meaning of Clause (*c*) of Section 195 of the Code of Criminal Procedure.

"There is no definition of the word 'Court' in the Code of Criminal Procedure, and it is used ambiguously. In some places it means a personal judicial authority and in others a place. It seems to have this second signification in Section 195 itself, 'proceeding *in* any Court;' and compare Section 352, 'the *place*, in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open *Court*.' The last clause of Section 4 however provides that 'all words and expressions used herein and defined in the Indian Penal Code and not hereinbefore defined shall be deemed to have the meaning respectively attributed to them by that Code.'

"But neither in the Penal Code is there any definition of 'Court.' There is a definition of 'Court of Justice' in Section 20, but that term is evidently not synonymous with 'Court,' for by illustration (*d*) of Section 19 giving the definition of Judge which enters into the composition of the definition in Section 20, it is declared that 'A Magistrate exercising jurisdiction in respect of a charge on which he has power, only to commit for trial to another Court, is not a Judge.' If the expression 'another Court' does not sufficiently imply that such Magistrate is himself a Court, the doubt is set at rest by a reference to Section 6 of the Code of Criminal Procedure which describes all Magistrates as Courts—and it is only **[156]** to them that power is or can be given to commit for trial under Section 206 of the same Code. Therefore though Magistrates when holding preliminary inquiries, are not 'Courts of Justice' they are 'Courts,' and so it follows that the terms are not identical.

"Looking elsewhere for a definition of 'Court' we find none in the General Clauses Act, but we do find one in the Evidence Act of 1872. 'Court' is there defined in Section 3 to include 'all Judges and Magistrates and all persons, except arbitrators, legally authorized to take evidence.' A Sub-Registrar is generally so authorized under Section 63 of the Registration Act of 1877, besides a special authorization in Sections 33 and 35. The High Court of Calcutta have accordingly ruled that a Sub-Registrar is a Court within the meaning of the Criminal Procedure Code. *Sardhari Lal, in re* (13 B.L.R. Appendix, 40).

"Though this ruling was passed when the Criminal Procedure Code of 1872 was in force and that Code does not contain like the present Code the reference to the Penal Code for definitions yet as the Penal Code is silent in the matter, as I have shown, there is nothing to affect the validity of the ruling.

"As the Evidence Act is an Act of general application, the definition it gives of the word 'Court' should, I think, be taken in the absence of any other definition either in the Code of Criminal Procedure, or in the Penal Code, or in the General Clauses Act, as what the Legislature intended the word should ordinarily signify, when not otherwise defined for the purposes of any particular Act.

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"It might be answered that the Legislature clearly did not contemplate Sub-Registrars or Registrars as 'Courts' under the Criminal Procedure Code, or they would not have declared they should be deemed as such only in certain instances (*vide* last clause of Section 84 of the Registration Act as modified or impliedly repealed by Section 483 of the Code of Criminal Procedure). But this doubt was considered in the case of Registrars by the Madras High Court in their proceedings, No. 962, dated 12th May 1881 (Weir's Criminal Rulings, pages 399-401), and it was there held that a Registrar was a 'Court' under the Criminal Procedure Code in other cases than those contemplated by the Legislature when framing Section 84 of the Registration Act.

"At any rate I am bound by the Calcutta High Court decision, there being none to the contrary by the Madras High Court to hold that the Sub-Registrar is a 'Court' under the Criminal **[157]** Procedure Code, and as such under Section 195, Clause (*e*), his sanction was required for this prosecution.

"But it is still further contended that even under the Madras High Court Ruling referred to above a Sub-Registrar should be considered a Court when he acts under Section 41 of the Registration Act in respect to the registration of wills presented by third parties. It was held by the High Court in the said proceedings that a Registrar acting under Sections 73, 74 and 75 of the Registration Act was a Judge, and thereby a Court of Justice within the meaning of the Penal Code, and it is now urged that although with respect to an ordinary document, the Sub-Registrar is '*functus officio*' as the High Court have said, yet that in regard to wills he has the same powers as the Registrar under Sections 40 and 41 of the Registration Act. In the case of an ordinary document when its genuineness is disputed, the Sub-Registrar has no power to proceed further. He is to refuse registration. But, in the case of a will, the Registration Act confers on him extended powers. He can go into evidence and find the document to be genuine or otherwise. His powers in regard to wills do not in any way differ from those of the Registrar. So that if a Registrar is a Judge and a Court when acting under Section 41 of the Act, by analogy of the reasoning that he is a Judge and a Court when acting under Sections 73, 74 and 75, so also is the Sub-Registrar. I think there is much force in this argument, and I take it as a second or additional ground for holding that the Sub-Registrar when acting as he was in this case under Section 41 of the Registration Act was a 'Court' and therefore his sanction was required for the prosecution.

"I therefore refer this case to the High Court for the purpose of quashing the commitment under Section 215 of the Code of Criminal Procedure."

Bhashyam Ayyangar, for the accused.

The Acting Government Pleader (Mr. *Powell*), for the Crown.

JUDGMENT.

The judgment of the Court (BRANDT and PARKER, JJ.) was delivered by

PARKER, J.—We are of opinion that the term "Court" in Section 195 of the Criminal Procedure Code is not restricted to a "Court of Justice" as defined in the Indian Penal Code. Section 6 of the Code of Criminal Procedure clearly contemplates the existence of Courts constituted under other laws, and the legislature **[158]** has seen fit to use the general expression "Court" in preference to the more restricted

description "Court of Justice." A Sub-Registrar is legally authorized to take evidence under Part VIII of the Indian Registration Act for the purpose of satisfying himself upon certain points, and he is, therefore, when acting under Section 41, Act III of 1877, a "Court" within the meaning of the Indian Evidence Act. As the document has been given in evidence before him in a proceeding in which the Sub-Registrar had to determine whether the document should, or should not, be registered, it appears to us that his sanction is necessary under Section 195 of the Code of Criminal Procedure before a Court can take cognizance of an offence alleged to have been committed by a party to that proceeding.

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The Judge having reported that all the accused were parties to the proceedings the commitment is quashed.

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10 M. 158 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr Justice Brandt and Mr. Justice Parker.

REFERENCE UNDER STAMP ACT, SECTION 49.*
[18th January, 1887.]

Stamp Act, Section 3, clause 4 (b)—Bond.

A executed a document, by which he promised to pay on demand Rs. 16 to B. The writer of the document signed the document as a writer, for the purpose of attesting A's signature :

Held that the document was liable to stamp duty as a bond.

[F., 13 M. 147 (148) ; R., 3 P.L.R. 1902.]

CASE referred under Section 49 of the Indian Stamp Act, 1879, by J. D. Goldingham, District Judge of Bellary.

The case was stated by K. Lakshmana Rau, District Munsif of Narain Deverkeri, as follows :—

"In Small Cause No. 57 of 1886, the plaintiff sues upon an instrument which secures the repayment of Rs. 16. It bears date 21st September 1883 and is payable to the payee. It does not contain the words 'payable to bearer or order.' It bears the signature of its executant, as well as the signature of its [159] writer, and stands engrossed on paper to which one anna adhesive stamp is affixed.

"The plaintiff treated the instrument as a promissory note, because, as he stated, it was not attested by witnesses.

"An instrument of a similar nature, put in evidence in another case, was treated by me as a bond. I levied the proper stamp duty and penalty on it, and, under Section 35 of the Stamp Act, sent a copy of the instrument to the Acting Head Assistant Collector. That officer was of opinion that it was not an attested document, and that it should therefore be treated as a promissory note. This being the case, I feel a doubt as to the amount of duty to be paid in respect of the instrument under consideration in this case.

"Any instrument attested by a witness and not payable to order or bearer is a bond as defined by clause 4 (*b*) of Section 3 of the Stamp

* Referred Case 4 of 1886.

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Act No. 1 of 1879. In the present case, if it was not intended that the writer should be a witness to the signature of the executant, there was, apparently, no necessity for the former signing the instrument. Therefore, it appears to me that the signature of the writer is the attestation of a witness within the meaning of the above clause, and that the instrument under consideration is a bond and not a promissory note. A bond for Rs. 16 is required to be engrossed on an impressed stamp of four annas. The instrument in question, however, bears an adhesive stamp of one anna.

"The questions submitted for the decision of the High Court are :—

"1*st.*—Whether an instrument containing an unconditional promise to pay on demand and bearing the signature of its writer, a third party, is a bond or promissory note.

"2*nd.*—Whether an instrument containing an unconditional promise to pay on demand becomes a bond if it is not made payable to bearer or order."

Counsel were not instructed.

The District Judge having reported that the document was attested, the Full Bench (COLLINS, C.J., KERNAN, MUTTUSAMI AYYAR BRANDT, and PARKER, JJ.) delivered the following

JUDGMENT.

We are of opinion that the document in question is a bond, not being payable to bearer or order, and the signature of the obligor being attested by a witness.

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10 M. 160.

[160] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

VENKATA SHETTI AND OTHERS (*Defendants*), *Appellants v.* RANGA NAYAK (*Plaintiff*), *Respondent.** [11th January, 1887.]

Merger of securities—Civil Procedure Code, Sections 43, 373.

On the 5th September 1874 R, a Hindu, and his sons borrowed Rs. 5,000 from V and mortgaged to him certain land, items 1, 2 and 3 On the 7th September 1874, V borrowed Rs. 5,000 from R.N. and mortgaged his rights in items 1 and 2 and land of his own to R.N. In 1877 R.N. bought at a sale in execution of a decree against R the share of R in the said items 1 and 2 subject to the mortgage created by R., on 5th September 1874. and to another mortgage created by R., dated 11th January 1875. In 1880, R.N. sued V and the sons of R., for arrears of interest due under his mortgage bond.

This suit was withdrawn with liberty to bring a fresh suit for the principal and interest due under the bond.

In 1885, R.N. sued V and the sons of R to recover principal and interest due under his mortgage bond.

V pleaded that, as R.N. had bought R's share in items 1 and 2, subject to the mortgages created by him, R.N's rights as mortgagee were merged in his rights as purchaser.

R's sons pleaded, *inter alia*, that the suit was barred by the provisions of Sections 43 and 373 of the Code of Civil Procedure :

Held that the claim of RN was neither merged nor barred.

[Appr., 17 A. 53 (55); **R.**, 2 C.L J. 480=10 C.W.N. 8 (10); 14 C.P.L.R. 104 (106).**]**

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* Appeal 142 of 1885.

APPEAL from the decree of C. Venkobacharyar, Subordinate Judge of South Canara, in suit 3 of 1885. 1887 JAN. 11.

The facts necessary for the purpose of this report appear from the judgment of the Court (MUTTUSAMI AYYAR and BRANDT, JJ.). APPELLATE CIVIL.

Bhashyam Ayyangar and *Narayana Rau*, for appellants.

Ramachandra Rau Saheb and *Gopala Rau*, for respondent. 10 M. 160.

JUDGMENT.

This is an appeal preferred on behalf of defendants Nos. 1, 2 and 4, in original suit 3 of 1885, on the file of the Subordinate Court of South Canara. The interests of the defendants Nos. 1 and 2 are not identical with those of defendants [161] Nos. 3 and 4; the interests of the two latter are identical, but defendant No. 4 alone is before us as an appellant.

On the 5th September 1874 defendant No. 3, Krishna Shetti, appellant No. 3, Narasayya Shetti and Narayana Shetti (deceased), brothers, and their father Rama Shetti borrowed of the appollant No. 1, Venkata Shetti, a divided brother of the said Rama Shetti, Rs. 5,000 and executed in favor of the lender an instrument hypothecating landed property, items 1 and 2 in this suit, and another parcel not included in this suit, Exhibit B. On the 7th of the same month appellant No. 1, Venkata Shetti, and his son, appellant No. 2, Devappa Shetti, borrowed of the respondent, Ranga Nayak, Rs. 5,000 (the bond states the consideration as Rs. 6,000, but it is admitted that only Rs. 5,000 were advanced) and gave their mortgagee a bond hypothecating the land constituting items 1 and 2 in this suit and another parcel of land, the jenm title to which the mortgagors hold in their own right, Exhibit A.

The suit was brought for the recovery of the principal and interest due under Exhibit A.

In the year 1850 Malappa Shetti, a brother of Rama Shetti, obtained a personal decree against Rama Shetti in a partition suit, and in 1876 Malappa's son Ganapathi took out execution of that decree, and in 1877 the respondent in this suit purchased Rama Shetti's share in items 1 and 2 now in suit, subject to the incumbrances created by Rama Shetti under Exhibit A, and under another instrument, dated the 11th January 1875, whereby as security for a further loan of Rs. 8,500 borrowed of appellant No. 1, Venkata Shetti, Rama Shetti hypothecated his share in items 1 and 2 now in suit, and also three other parcels of land. The share which the auction-purchaser the respondent was eventually held to have purchased consists of $\frac{1}{4}$th of plaint item No. 1 and $\frac{1}{8}$th of plaint item No. 2.

The respondent filed a suit 164 of 1880 against his mortgagors, appellants Nos. 1 and 2 and against defendant No. 3, and appellant No. 3 for arrears of interest only, then accrued due under Exhibit A: that suit was by permission withdrawn with leave to institute a fresh suit for recovery of the principal (then due) and interest. Defendant No. 5, Venkatesa Mala, was made a party to the suit by the respondent, on the ground that the purchase of Rama Shetti's share in execution of the suit of 1850 [162] was in fact made by Defendant No. 5, but the finding is that the respondent is the real purchaser, and no appeal has been preferred against this finding and nothing turns upon it in appeal.

Appellants Nos. 1 and 2 pleaded that by the purchase of Rama Shetti's share in items 1 and 2 in suit subject to the incumbrances created by Exhibit A and by the mortgage of 1875, the respondent's mortgage

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rights under Exhibit A were lost, by merger of the latter in the right acquired by him under his purchase.

Defendant No. 3 and appellant No. 3 pleaded that in no circumstances can they be held liable in respect of either principal or interest due under A; they further raised the objection taken by the appellants Nos. 1 and 2 on the ground of merger of the securities in the hands of the respondent, and appellants Nos. 1, 2 and 3, and defendant No. 3 all contended that, notwithstanding the permission given to the respondent to withdraw his suit No. 164 of 1880 with leave to institute a fresh suit as above stated, the present suit is barred by the provisions of Sections 43 and 373 of the Code of Civil Procedure.

The Subordinate Judge framed issues intended to meet the contention of the said defendants as to the character and effect of the respondent's purchase in execution of Rama Shetti's share in items 1 and 2, and held that what was purchased was the equity of redemption subject to his own incumbrance under the mortgage instrument A, and to the charge in favor of appellant No. 1 under the mortgage of 1875, but that "he did not purchase his mortgagor's right of redemption nor the right of the mortgagors of appellant No. 1, but only the interest of one of them," and that the plea as to merger was therefore untenable: he held that appellants Nos. 1 and 2 are primarily (and personally) liable, and that the respondent is entitled to recover the principal and interest due under A "by sale of the properties mortgaged" under A; the decree is thus worded "that the plaintiff do recover" the amount decreed and costs "from 1st and 2nd defendants and from the mortgaged properties described below, unless the said sums be paid within six months" from date of the decree; and the several properties are then specified in a schedule appended to the decree.

The Subordinate Judge disallowed the objection that by reason of the provisions of Sections 43 and 373 of the Code of Civil **[163]** Procedure, the suit is not maintainable, on the ground that the permission to withdraw from the suit of 1880 was given by the District Munsif in the exercise of his discretion and that that discretion was not improperly exercised.

The first ground of appeal argued at the hearing was that the respondent should have sued appellants Nos. 1 and 2 alone, and for sale of their mortgage right in items 1 and 2 and of their jenm right in item No. 3, and that they had no cause of action against the original mortgagors, defendant No 3 and appellant No. 3, but it was subsequently conceded that to a suit for realization of respondent's security under A, the original mortgagors, as having an interest in the property items 1 and 2, were not improperly made parties, and the contention was confined to the terms of the decree; it was then admitted on behalf of the respondent that so far as items 1 and 2 are concerned the interest which the appellants Nos. 1 and 2 have therein under Exhibit B, and nothing more, can be sold in satisfaction of the respondent's claim under Exhibit A. The decree of the lower Court will accordingly be amended by substituting for the words "by sale of items 1 and 2" the words "by sale of the mortgage rights of the 1st and 2nd defendants in items 1 and 2:" the order for the sale of "the mortgaged property" as regards item 3 is correct. It was contended for the respondent that the allowing of the appeal to this extent is a matter of form only; but this is not so; and by consent, for the purpose of assessing costs in this appeal only, the

value in respect of which the appellants must be taken to have succeeded is assessed at Rs. 1,500.

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But, in respect of the second ground of appeal that there was merger of the securities, by reason of which the respondent is barred from enforcing his mortgage lien, we must hold that the appellants fail. The doctrine of merger applies in cases in which a higher security is given between the same parties ; but this alone is not sufficient ; the remedy given by the higher must be co-extensive with that given by the original lower security ; the rights which unite must be in respect of the same property; but here the property mortgaged and the property sold are not identical ; all that was sold was Rama Shetti's interest in, that is, the right of one of several sharers to redeem part of the property mortgaged. The respondent's purchase then has not the effect of [164] depriving him of his right to put up to sale the mortgage rights of appellants Nos. 1 and 2 in plaint items 1 and 2.

As to the third and only remaining argument in appeal that the statutory bar to a second suit brought in respect of a portion of a claim, a portion of which a party has omitted to sue in respect of in a former suit, subsists, notwithstanding that such former suit has been withdrawn by permission of the Court with leave to institute a fresh suit founded on the same cause of action ; if this construction be put upon the two sections it is not possible for them to stand together, but the sections must be reasonably construed together so that they may if possible both stand, and we are of opinion that it is not necessary to hold that Section 43 applies in the case of a suit withdrawn by permission under Section 373, but that the effect of such an order is to leave matters in the position in which they would have stood had no such suit been instituted. The obvious intention of the Court which made the order was to allow the respondent to sue for principal and interest, instead of compelling him to proceed with his claim for interest alone, in which case any second suit for the principal would have been met by the plea that the suit is barred by Section 43 of the Code ; and if the contention now raised were to prevail, the anomaly would be presented of an order made by a competent Court as to a matter within its discretion to which order no legal effect could be given.

Section 373 was presumably intended to allow of mistakes or omissions being corrected, within the discretion of the courts concerned, and we do not think it necessary to hold that Section 43 is a bar to the entertainment of the present suit.

The result is that the appellants fail in respect of the main grounds of appeal argued before us, but succeed in so far as the decree is amended in the manner hereinabove provided.

The appellants will then pay the proportionate costs of the respondent in respect of the amount in regard to which they fail, and the respondent will pay the appellants' proportionate costs in respect of the amount in which the latter succeed, and these amounts are, for the purpose of estimating such costs only, by consent taken as Rs. 7,500 and Rs. 1,500 respectively.

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FULL BENCH.

10 M. 165 (F.B.) = 2 Weir 30.

10 M. 165 (F.B.) = 2 Weir 30.

[165] APPELLATE CRIMINAL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Brandt and Mr. Justice Parker.

QUEEN-EMPRESS *v.* VENKATESAGADU AND OTHERS.*
[18th January, 1887.]

Criminal Procedure Code, Section 33—Penal Code, Section 65—Imprisonment in default of payment of fine.

Section 33 of the Code of Criminal Procedure, 1882, does not authorize a Magistrate to pass a sentence in default of payment of fine in excess of the term prescribed by Section 65 of the Indian Penal Code. *Reg.* v. *Muhammad Saib*, I.L.R., 1 Mad., 277, was overruled in 1881.

[R., L.B.R. (1893—1900) 494 (496); 1 Weir 31 (32).]

CASE referred for the orders of the High Court under Section 438 of the Code of Criminal Procedure by J. Thompson, Acting District Magistrate of Kistna.

Venkatesagadu and four others were convicted by the Second-class Magistrate of Mangalagiri, under Section 510 of the Indian Penal Code, of being drunk and causing annoyance in a public place. Three of the accused were sentenced to twelve hours' simple imprisonment and a fine of Rs. 5 each, and in default to 2 days' simple imprisonment, and the other two to a fine of Rs. 3 each and in default to 2 days' simple imprisonment. The fines were levied.

The District Magistrate referred this case on the ground that the maximum punishment for the offence being twenty four hours' simple imprisonment, the alternative imprisonment awarded in excess of six hours was illegal under Section 65 of the Penal Code and Section 33 of the Code of Criminal Procedure.

The case was referred to a Full Bench by Muttusami Ayyar and Brandt, JJ.

The Acting Government Pleader (Mr. *Powell*), for the Crown.

The Full Bench (COLLINS, C.J., KERNAN, MUTTUSAMI AYYAR, BRANDT and PARKER, JJ.) delivered the following

JUDGMENT.

[166] The case, *Reg.* v. *Muhammad Saib* (1), has been overruled by an unreported case of a Full Bench in 1881, published in Weir's Criminal Digest, p. 335 (*a*).

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* Criminal Revision Cases 629 of 1886.

(1) 1 M. 277.

10 M. 166 N = 2 Weir 26.

(*a*) *High Court Proceedings*, 18*th May* 1881, *No.* 994.

The defendant in this case was sentenced by the Second-class Magistrate to pay a fine of Rs. 10, or in default to suffer one month's simple imprisonment for an offence under Section 510 of the Indian Penal Code

The Joint Magistrate submits, through the District Magistrate, that the term of imprisonment awarded in default of fine was in excess of the period allowed by law, and that inasmuch as the period of imprisonment provided as a substantive penalty for the offence is limited to 24 hours, the Second-class Magistrate was not competent to sentence the accused in default of payment of the fine to a period of imprisonment in excess of 6 hours.

INNES, J.—The sentence as it stands is of course illegal and the proceedings upon which it professes to be founded do not warrant it.

The portion of these proceedings applicable to the case runs as follows :—

"But if the sentence is fine only, the imprisonment in default of payment may be

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FULL BENCH.

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[167] We follow the latter ruling—see also *Empress of India* v. *Darba* (1).

the whole period of imprisonment which the Magistrate is competent to inflict for the offence."

The Magistrate, therefore, when imposing fine only and imprisonment in default, is limited as to the term of imprisonment in default, in two ways—

First.—He cannot go beyond the substantive term of imprisonment fixed for the offence, because that is the outside measure of the imprisonment that it is competent to inflict *for the offence.*

Second.—He has to see whether that term of imprisonment is beyond his own powers as a Magistrate. If it is not, he may impose the whole of it in default of payment of fine. If it is beyond his powers, he can only impose such a term of imprisonment as is within his powers. In the present case, the Magistrate simply considered what were his general powers; he altogether neglected to consider what he was competent to inflict *for the offence.* The limit of his competency in this respect was 24 hours. As the fine was paid, the High Court could only interfere setting aside the sentence of one month's imprisonment.

The Magistrate referring the case would read the words "or as is allowed by law" in the last clause of Section 309 as meaning "as limited by Section 65 of the Indian Penal Code," which would admit of only one-fourth of the term of substantive imprisonment as the outside measure of the imprisonment impossible in default of payment of fine when fine alone is inflicted. In either view, however, the Sub-Magistrate was clearly acting illegally in the sentence he imposed.

HUTCHINS, J.—On either view of the question, the sentence referred is wrong, because a sentence of imprisonment for one month for an offence under Section 510 is not one "allowed by law" however those words are to be construed. The more important question remains, whether those words in the third clause of Section 309 of the Procedure Code mean "allowed by law as the full substantive penalty for the offence" as held by this Court, or allowed by the particular section applicable to the offence and Section 65 of the Penal Code "taken together," as held by the High Court of Allahabad (*Empress* v. *Darba*, I.L.R. 1 All. 461).

It will hardly be denied that when such a general expression as "allowed by law" is used, its most natural meaning is "allowed by all the provisions of the law taken together." If the Legislature had intended that [167] nothing but the particular section applicable to the offence was to be looked at, surely there would have been no difficulty in finding apt words to express that meaning. "As is provided by law for the particular offence" would have auswered their purpose well enough.

I think therefore that the construction adopted by the Allahabad Court is the natural construction of the third clause of Section 309, even if it stood alone.

Mr. Knox, who makes this reference, has pointed out other reasons for coming to this conclusion. The section purports to deal exclusively with cases punishable with imprisonment in addition to fine, and its first provision is that in all such cases, whether the sentence be a fine alone or a fine with imprisonment, and whether the Court be one of limited jurisdiction or competent to inflict the full penalty provided for the particular offence, the period of imprisonment is to be regulated by Sections 64 and 65 of the Indian Penal Code. In other words, it starts with one general principle, *viz.*, that no Criminal Court shall award alternatively a longer term of imprisonment than one-fourth of that which the law provides as the maximum substantive punishment where it provides imprisonment at all as a substantive punishment.

Then comes in the proviso, which is applicable only to Magistrates whose powers to imprison have been further limited by the preceding sections. If they choose to imprison as well as to fine, then their power to add a further term of imprisonment for non-payment of the fine is further restricted. Not only shall they not impose more than a fourth of the maximum term provided for the particular offence, but they shall not exceed a fourth of the term to which the previous sections had restricted their general powers.

The clause in question comes next. It also is applicable to Magistrates only, but it deals with cases in which they might have passed a substantive period of imprisonment, but have chosen to fine only. In such a case, the additional restriction which had been imposed by the preceding clause is removed, and the Magistrate may go up to the full term which he has been generally empowered to inflict, provided that the sentence is one otherwise allowed by law. I do not think that a sentence of alternative imprisonment exceeding one-fourth of the maximum substantive term provided for the

(1) 1 A. 461.

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Let the case be remitted to the Division Bench for disposal.

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offence (when such a term has been provided) is in any case "allowed by law." I would therefore rescind the ruling of this Court I may add that it is clearly recognized by this very Section (309) that the penalty to which a man is subject is to be determined by reference to the Penal Code. The Procedure Code does not in any case alter penalties and is only concerned with the officers by whom they are to be inflicted and the limits within which the various classes of Courts may inflict them.

TURNER, C.J.—The ruling of this Court reported in the Indian Law Reports, 1 Madras 277, cannot in my judgment be supported.

The 309th section of the Criminal Procedure Code declares that Criminal Courts without exception shall in every case punishable under any law in force for the time being with imprisonment as well as fine govern themselves by the provisions of Sections 64 and 65, Indian Penal Code, in awarding the period of imprisonment in default of payment of fine.

This provision would ordinarily have found its proper place in the Indian Penal Code, which declares penalties rather than in the Procedure Code which declares the powers of Courts, but the provisions of the Indian Penal Code were confined to offences made punishable by that Act, and although the 5th Section of the General Clauses Act extended the provisions of the Penal Code to all fines imposed under any Act thereafter to be passed unless such Act contained an express provision to the contrary, it was convenient in an Act declaring the powers of Criminal Courts [168] to extend the provisions of the 64th and 65th Sections of the Penal Code to every case punishable with fine under any law in force for the time being.

Such I understand was the purpose of the principal clause of Section 309. But inasmuch as the Code of Criminal Procedure had, in declaring the powers of Criminal Courts of different grades, restricted the powers conferred on Magistrates to award imprisonment as a substantive part of the sentence, it was necessary to place some restriction also on the powers conferred on Magistrates to award imprisonment in default of payment of fine With this object, the second and third clauses of Section 309 were enacted. The second clause deals with cases in which the Magistrate awards imprisonment and fine and declares that, in such cases, the further imprisonment to be awarded in default of the payment of fine shall not exceed one-fourth of the whole period the Magistrate would be empowered to inflict as a substantive part of the sentence. The third deals with cases in which the Magistrate imposes a sentence of fine only and declares the Magistrate may in such cases impose such term of imprisonment in default of payment of fine as is allowed by law, provided it is not in excess of his powers under the Act.

The "term of imprisonment in default of payment of fine allowed by law" is the term which in the particular case is prescribed by Sections 64 and 65 of the Indian Penal Code. The construction adopted by this Court involves the anomaly that a Magistrate could in the case of certain offences impose a more severe penalty in default of payment of fine than could be imposed by a Court of Session, and requires the transposition of the terms of the provision and the introduction of the words "for the offence" after the words "allowed by law."

MUTTUSAMI AYYAR, J.—Section 65 of the Indian Penal Code presupposes an offence punishable with imprisonment as well as fine and fixes the maximum alternative sentence at one fourth of the term of imprisonment sanctioned by the Code as a substantive sentence. Offences may be punishable with imprisomnent or fine under a special or local law, and the first paragraph of Section 309 extends Section 65 to those offences. The second paragraph refers to a case decided by a Magistrate where imprisonment is actually awarded as a penalty and directs that in that case the alternative sentence shall not also exceed one-fourth of the maximum term of imprisonment which it is competent to the Magistrate to award. The last paragraph refers to a case in which there is a sentence of fine only and provides that the additional restriction mentioned in paragraph 2 shall not apply. Reading them together, I think the restriction in the first paragraph, *viz.*, "that the alternative imprisonment shall not exceed one-fourth of the substantive imprisonment sanctioned by law, is applicable to all offences punishable with imprisonment or fine, whether the sentence actually passed is one of imprisonment or fine, and that neither of the restrictions mentioned in the first and second paragraph is applicable to an offence punishable with fine only. The ruling in I.L.R., I Mad., 277, gives no effect to the words in the first paragraph of Section 309, "whether with or without imprisonment," and the words in the third paragraph "allowed by law" do not necessarily imply that Section 65 is not applicable, and that Sections 65 and 66 are not the provisions of law referred to as regulating the amount of alternative imprisonment. In either view, the sentence under reference is clearly illegal and must be set aside.

INNES, J.—Having had the advantage of seeing the opinions of the Chief Justice and the other Judges who have taken part in the consideration of this question, I am of opinion that our ruling was erroneous and should be overruled.

[N.B.—This Footnote Case has been referred to in, 1 Weir 31 (32); L.R.R. (1893-1900), 494 (496). ED.]

10 M. 169.

[169] APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

SAMI AYYAR (*Plaintiff*), *Appellant v.* KRISHNASAMI AND NINE OTHERS (*Defendants*), *Respondents.**
[29th September and 16th December, 1886.]

Civil Procedure Code, Sections 268, 274—*Sale of interest of obligee in a hypothecation bond.*

The interest of the obligee in a bond hypothecating certain land as security for a debt having been attached under Section 274 of the Code of Civil Procedure and sold, a suit was brought by the purchaser upon the said bond; it was objected that the suit was not maintainable because the bond had not been also attached as a debt under Section 268:

Held that the fact of the bond not having been attached as a debt under Section 268, did not affect the right of the purchaser to realize the amount due under it.

[R., 13 Ind. Cas. 91 (92) = 22 M.L.J. 105 (107) = 10 M.L.T. 503 (504) = (1911) 2 M.W.N. 590.]

APPEAL from the decree of T. Ganapathi Ayyar, Subordinate Judge of Tanjore, at Kumbakonam, in suit No. 8 of 1884.

Bhashyam Ayyangar and *Desikacharyar*, for appellant.

Subramanya Ayyar, for respondents Nos. 1, 9 and 10.

Balaji Rau and *V. Ramachandra Rau*, for respondents Nos. 2, 3, 4, 5, 6 and 7.

Respondent No. 8 did not appear.

The facts necessary for the purpose of this report are set out in the judgments of the Court (KERNAN and BRANDT, JJ.).

JUDGMENTS.

KERNAN, J.—The appellant, Sami Ayyar, is the plaintiff in original suit No. 8 of 1884, on the file of the Subordinate Court of Kumbakonam. The Subordinate Judge dismissed the suit with costs.

The facts are not in dispute, and the questions in this appeal are questions of law. The plaintiff seeks to recover, out of the lands particularized in the plaint, the amount due on a hypothecation deed, dated the 12th of March 1869, executed by Muttu Ayyan, the father of defendant No. 1, for Rs. 5,000 to Kuppusami Ayyan payable on the 11th of March 1872.

[170] The defendants claim the lands specified in the hypothecation deed, under different titles and in different shares.

The first question is whether the plaintiff has acquired the right and interest of Kuppusami, the grantee in the hypothecation deed of 12th March 1869, to the debt thereby secured and whether he is entitled to enforce that security against the lands.

The plaintiff's claim is founded on a purchase of the right of Kuppusami in execution of a decree. The respondents contended that the proper proceedings were not adopted to attach the debt due on the hypothecation bond and that therefore plaintiff is not entitled to maintain this suit.

* Appeal 145 of 1885.

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There are various other defences afterwards referred to, but the main question is whether plaintiff has title to maintain the suit. The facts on this question are as follows, *viz.*—The plaintiff obtained a decree in suit No. 15 of 1875 in the Court of the Subordinate Judge of Kumbakonam against Venkataram Ayyan and others, sons of the same Kuppusami, for money; and attached the deed of hypothecation under Section 269 of the Code of 1877, which is in terms the same as Section 269 in the present Code; and became the purchaser thereof for Rs. 1,200; and obtained a certificate of the purchase, and possession of the deed of hypothecation. The plaintiff afterwards filed suit No. 63 of 1877 against several of the respondents to this appeal founded on the purchase so made, but that suit was dismissed upon the ground that the plaintiff had not in suit No. 15 of 1875 attached the debt secured by the hypothecation deed in the manner prescribed for attachment of debts by Section 268, *i.e.*, by obtaining an order under that section. After such dismissal, the plaintiff attached in suit No. 15 of 1875 under Section 274 the estate and interest of the defendants in that suit in the deed of the 12th March 1869 and in the lands thereby pledged as security for the debt. Plaintiff became the purchasers at the auction-sale held on the 15th of June 1880, and on the 21st of September 1880 received a certificate of sale in these terms, *viz.*—"It is hereby certified that, in the auction-sale held on 15th June 1880 in execution of the decree passed in this suit, the aforesaid plaintiff, K. Sami Ayyan, has been declared to have purchased for Rs. 1,200 the hypothecation bond along with the said defendants' interest therein, executed on 12th March 1869 by Muttu Ayyan in favour of the defendants' father, Kuppusami Ayyan, for Rs. 5,000, hypothecating the two houses bearing Municipal Door Nos. 4 and 61 **[171]** in Pachayappa Mudaliar Agraharam in Kasba Kumbakonam, attached to the Sub-registration District of Kumbakonam, in Tanjore District, veli 1 and gulis $93\frac{3}{8}$ of nanja, punja and other lands in Pulukappu Kattalai village, in Kumbakonam Taluk, in the aforesaid District; 1 ma and $43\frac{1}{10}$ gulis of nanja land in Somanadhan Kattalai, in the aforesaid taluk; and 5 velis, 13 mas and $90\frac{5}{16}$ gulis of nanja, punja and other lands in Puttur village, Melayur Maganam, attached to Mathyarjanam Sub-registration district, in the aforesaid District—total for the three villages being 6 velis 16 mas and $26\frac{3}{4}$ gulis—in order that the amounts thereof may be fully recovered on the liability of the hypothecated properties, and that the said sale has been duly confirmed by the Court."

Upon these facts the question of law is whether, by reason of the debt not having been attached in the mode pointed out by Section 268, *viz*, by a restraining order, the title of the plaintiff to sue for the recovery of it under the deed of hypothecation is defective. If the debt only was intended to be sold or if it was intended to be sold jointly with immoveable property in order to recover it by personal remedy, it should have been attached under Section 268. Section 284 only authorizes the sale of attached property. But it has been held by this Court, in *Appasami* v. *Scott* (1), that the interest of a defendant secured by hypothecation of land is an interest in land and should be attached under Section 274. Under that section an order duly proclaimed prohibits the defendant from transferring or charging the property in any way, and prohibits all persons from receiving the same by purchase, gift, or otherwise. The interest of the mortgagee in the hypothecated property was the right to realize thereout the amount due

(1) 9 M. 5.

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under the hypothecation deed. The mortgagee had no interest in the property hypothecated except as security for the debt for payment of which it was hypothecated. The attachment and sale were not of the interest of defendant No. 1 in the land alone, but of the right of defendant No. 1 to recover the amount of the bond secured on the land.

As the Court had power to sell the interest of defendant No. 1 in the property to realize the debt, I am unable to see how an attachment of the debt alone was necessary to enable the Court to sell the interest attached under Section 274. In the case of decrees [172] to raise the amount of mortgages or charges on land which have been attached, it has been held that the attachment should be made under Section 274, *Hari G. Joshi* v. *Ramchandra* (1) *Musammat Bhawani Kuar* v. *Gulab Rai* (2). No doubt in cases of such decrees the debt passed into a decree, but no distinction was made on that ground. In *Musammat Bhawani Kuar* v. *Gulab Rai* the Court say :—"The decree is for money recoverable by sale of property hypothecated for its payment. The right and interest which it creates is a right in a judgment-debt recoverable by sale of immoveable property charged with its payment. The decree gave to the decree-holder a subsisting interest in the nature of a charge on hypothecated property, and the sale of their rights under the decree must be held to be a sale of an interest in immoveable property."

It is not necessary to decide whether a sale of the interest of the mortgagee after attachment under Section 274 could carry the right to the purchaser to recover the debt by personal remedy against the debtor, as the plaintiff admits such remedy is barred by limitation.

For the above reasons I think the plaintiff's title to realize the debt from the hypothecated property is not defective by reason of the absence of attachment of the debt under Section 268.

I may add that the mortgagee has not assigned the debt, but he produced the hypothecation deed in Court before the sale, and the plaintiff has had the possession of it since the sale.

The next question is whether the share (½) of defendant No. 1 in the plaint ancestral property is liable to pay the amount due on the hypothecation deed of the 12 of March 1869.

The Subordinate Judge found that the debt secured by that deed was not, nor was any part of it, to use his language, "contracted for the purpose of the family of defendant No. 1 and that his share is not liable." The Subordinate Judge does not explain what he means by the expression "contracted for the purpose of the family of defendant No. 1."

The facts appear to be these : Muttu Ayyan, the father of defendant No. 1, was in possession of ancestral property mentioned in Exhibit A, the hypothecation deed ; and after the birth of defendant No. 1, Muttu Ayyan borrowed from Kuppusami Ayyan [173] Rs. 4,000 and executed therefor two bonds, one for Rs. 3,000 and one for Rs. 1,000 on the 25th January 1869 ; Muttu Ayyan lent money to a son of Kuppusami named Sabhapati, who on the same day executed a bond to Muttu Ayyan for Rs. 5,000. On the 12th of March 1869 Muttu Ayyan again, in order to relieve himself from a pressing decree, borrowed from Kuppusami Rs. 936, and therewith paid off the decree. For the amount of these three bonds Muttu Ayyan executed hypothecation deed, 12th March 1869, to Kuppusami Ayyan as security charging the ancestral property. The two bonds for Rs. 3,000 and Rs. 1,000, interest thereon, and the amount of the

(1) 9 B.H.C.R. 64.

(2) 1 A. 348.

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decree for Rs. 936 were the debts due by Muttu Ayyan antecedent to the execution of the hypothecation deed, and Muttu Ayyan was entitled as against his son, defendant No. 1, to give security therefor on the ancestral property, even though those debts were incurred not for family benefit or necessity, and for which debt the family never received any benefit. *Girdharee Lall* v. *Kantoo Lall* (1). The plaintiff did not allege that the debts secured by the deed of 12th March 1869 were incurred for any family benefit or necessity.

The evidence before us is sufficient to enable us to say that the deed of 12th March 1869 was given by Muttu Ayyan to pay or secure antecedent debts to the extent of Rs, 5,000 due by him.

The Judge has erroneously referred to Exhibits XI, XXVI and XXVII as leading him to the conclusion that the full Rs. 5,000 was not advanced, and further leading him to the conclusion that Muttu Ayyan and Sabhapati had been leading immoral lives. In his judgment he admits that these documents are not, as he says, "strictly speaking evidence against the plaintiff." If so, he should not have relied on them.

As the plaintiff proved that the deed of 12th March 1869, was executed as security by Muttu Ayyan to pay antecedent debts due by him, the *onus* lay on defendant No. 1 to prove, if he could, that such antecedent debts were incurred for illegal or immoral purposes, and this he has not done; nor has the Subordinate Judge found that the debts were incurred for such purposes.

In was contended rightly by defendant No. 1 that Muttu Ayyan could not have given a security to affect his share for the **[174]** bonds for Rs. 3,000, and Rs. 1,000 when they were executed, and it was contended that it would be illusory to allow Muttu Ayyan to charge the share of defendant No. 1 by giving a renewal, as it was called, for those two bonds. If the giving of the deed of March was merely a device resorted to by Muttu Ayyan and Kuppusami to enable Muttu Ayyan to give a security binding on defendant No. 1 such device could not be allowed to succeed, and the plaintiffs' case should so far fail. But we see no reason to believe there was any such device resorted to. Muttu Ayyan was on the 12th of March 1869 liable to pay a decree for Rs. 936, and when applying to Kuppusami for a loan to pay the latter sum, it is not improbable that Kuppusami required security for the two prior debts. There is not any evidence to lead us to the belief that the full sum, Rs. 5,000 was not due by Muttu Ayyan to Kuppusami when the deed of hypothecation was executed. No evidence has been referred to as showing that Kuppusami was aware at the time when he lent it that the money was borrowed in order to lend it to his son Sabhapati. Such knowledge cannot be inferred from the fact that Exhibit A recites that the loan of Rs. 3,000 was taken to lend to Sabhapati. Nor is there satisfactory legal evidence that the money was spent by Sabhapati for illegal or immoral purposes.

The Subordinate Judge has held that the plaintiff is not entitled to redeem mortgages affecting the plaint property vested in respondents Nos. 2, 3, 4, respectively, granted by Muttu Ayyan prior to the 12th of March 1869, upon the ground that the mortgagees obtained decrees on such mortgages and for sale of the property and that defendants 2, 3 and 4 have purchased the lands they hold under such decrees.

(1) 1 I. A. 321.

This view of the Subordinate Judge is wrong, inasmuch as neither the plaintiff nor Kuppusami nor defendant No. 1 was made a party to any of the suits brought on foot of such mortgages, and they are not bound by the sales in such suits. The plaintiff is clearly entitled to redeem the mortgages prior to the deed of the 12th March 1869, provided he do so within 6 months from the date of the decree in this appeal. He will have to pay the sums due respectively on foot of such prior mortgages and interest and costs, and in default of such payment this suit should be dismissed as regards those defendants with costs.

[175] The plaintiff alleges that some of the defendants, Nos. 1, 2, 3, have sold lands not mortgaged to them.

The defendants Nos. 5, 6, 7 claim different portions of the property comprised in the deed of the 12th March 1869 by purchase or mortgage from defendants Nos. 2, 3, 4, and the Subordinate Judge held that their lands are not subject to plaintiff's claim. The rights of these defendants Nos. 5, 6, 7, as between them and the plaintiff are the same as the rights of their grantors or mortgagors, defendants Nos. 2, 3, 4, and if the plaintiff redeems the mortgage vested in defendants Nos. 2, 3, 4, he will be entitled to sell the lands held by defendants Nos. 5, 6, 7. But of these latter defendants such of them as hold mortgages will be entitled to deduct the mortgage debt from the fund paid to redeem the prior mortgages to their mortgagors. As to the purchasers from defendants Nos. 2, 3, 4, such purchasers may then have an equity to be paid the value of their interests out of the sums paid to discharge the prior mortgages vested in defendants Nos. 2, 3, 4. But except by agreement between the parties, the application of this equity, if upon the facts it exists, must be determined by suit between these parties.

Under the hypothecation deed, Exhibit A, interest was payable half-yearly, and suit No. 1 of 1870 was brought in the Kumbakonam District Munsif's Court against defendant No. 1, and a decree was obtained by the plaintiff. This decree was assigned by the plaintiff to defendant No. 8, and he by execution thereof sold the estate and interest of defendant No. 1 in part of the lands comprised in the hypothecation deed A and became purchaser thereof. After such purchase defendant No. 8 sold to the defendants Nos. 9 and 10 portions of the land so purchased in suit No. 1 of 1870. The defendants Nos. 8, 9, 10 contend, amongst other defences, that, as the interest due on the bond was charged on the land under the hypothecation bond, Exhibit A, and as the land was sold in suit No. 1 of 1870 to pay that interest, the land cannot now be resold to pay the principal sum.

They rely on *Srinath Dutt* v. *Gopal Chundra Mittra* (1), in which, and in other cases, decided by the different High Courts, it was held that if a mortgagee obtains a money decree on the footing of the mortgage debt and sells the mortgaged property in **[176]** execution for payment of principal and interest, such sale passes the interest of the mortgagee to the purchaser free from the mortgage. I do not think that principle applies to this case, inasmuch as the decree, though for the amount due for interest, was only a money decree, and was assigned to defendant No. 8 who sold in execution and who was not entitled to any lien on the land. Defendant No. 8 in selling in execution did not stand therefore in the position of a mortgagee who sells to realize the principal amount in respect

(1) 9 C. 511.

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of which he has a lien, and also an execution for the debt and who cannot in the sale separate his lien from the interest he sells under the execution.

Moreover, the defendant No. 1 had an equity of redemption in the lands, and this was the right and interest which defendant No. 8 bought in the lands. The interest under the hypothecation deed in all the lands vested in defendants, Nos. 8, 9, 10 may be sold. But they are entitled to redeem from the plaintiff if they so desire.

There is no question of limitation.

The decree of the Subordinate Judge will be reversed and a decree given for the plaintiff for the amount due and subsequent interest at 6 per cent. till date of payment, to be recovered from the hypothecated lands; that the plaintiff do pay to the prior mortgagees and assigns, parties to the suit, the amount due to them respectively and their costs of this suit within six months from the date of this decree, and in default of such payment this suit shall stand dismissed against the said prior mortgagees with costs.

In case the plaintiff shall redeem the said prior mortgagees as above directed, then the lands comprised in Exhibit A are to be sold by auction, and out of the proceeds the plaintiff is to be paid the amount paid by him to the prior mortgagees for principal and interest and also the amount due to the plaintiff upon Exhibit A.

It is represented by the vakils on either side that there is not sufficient information as to what lands are comprised in the plaint hypothecation bond given to plaintiff, and we think this is so and frame the following issues:—

I. Whether any and if so what items of land mentioned in the plaint bond A are comprised in the prior hypothecation bonds D. E. F.

[177] II. What is the amount, inclusive of kist, payable under D. E. F. on the dates on which the lands therein specified were sold in execution.

III. Whether the items of lands in possession of defendants Nos. 1, 5 and 7 which were comprised in the prior hypothecation bonds D. E. F. have been exonerated from the first prior mortgage by reason of the razinama in suits 207 of 1885 and 272 of 1881.

IV. Whether any and which of the lands in possession of defendant No. 1 were comprised in the plaint bond A.

The Subordinate Judge is requested to try the above issues on the existing evidence and upon such further evidence as the parties may offer, and to submit his finding thereon in two months from the date of the receipt of this order, when 10 days will be allowed for objections.

BRANDT, J.—I only wish to add a few observations regarding the first question, *viz.*, whether or not this suit is maintainable by reason of the plaintiff having failed to attach in execution the mortgage instrument on which he sues, both as a debt, under Section 268 of the Code of Civil Procedure and also under Section 274 as immoveable property or an interest in immoveable property.

It is not alleged that what was sold was not duly attached and brought to sale *qua* immoveable property under the execution proceedings taken by the appellant in 1880.

In execution of the decree in original suit No. 15 of 1875, obtained by the plaintiff against the sons of Kuppusami Ayyan, the interest of the

latter under the mortgage instrument A was attached and sold as moveable property. 1886 DEC. 16.

A suit brought by the plaintiff on the strength of his purchase at such sale was dismissed on the ground that under the attachment no interest in the immoveable property passed under the sale; and this is not questioned. The decision is in accordance with authority, *Appasami* v. *Scott* (1). In support of his decision that unless the interest of the mortgagee be attached under Section 268, as well as under Section 274, the plaintiff took no title under his purchase, the Subordinate Judge refers to *Mahadeo Dubey* v. *Bhola Nath Dichit* (2); *Fida Husain* v. *Kutub Husain* (3); and *Srinath Dutt* v. *Gopal Chundra Mittra*(4).

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[178] The question for consideration in the first case cited was whether a sale in execution of a simple money decree is *de facto* void where there has been no attachment, and the question was answered as might be expected in the affirmative.

The case is not opposite here, for here there was an attachment, and there is nothing to show that it was not "a regularly perfected" attachment: the question is whether the appellant must fail because there were not (as it is said) two attachments, one as of a debt, and the other as of immoveable property. The second case cited has no bearing whatever on the point before us; it appears to have been cited in the Court below simply because the case of *Mahadeo Dubey* is mentioned in it.

In *Srinath Dutt* v. *Gopal Chundra Mittra* the learned Judges do no doubt throw out a suggestion that in the case of sale in execution of a debt secured by a mortgage there should be an attachment under both sections, *viz.*, 274 and 268, but the only point really determined was that the sale of such a debt as a debt alone, under the provisions of the Code applicable to moveable property, was a material irregularity producing substantial injury to the judgment-debtor; and that may well be; but in the case before us the interest of the mortgagor in the immoveable property was attached and sold, and it is difficult to see what injury there could be to the mortgagor by reason of its not having been attached and sold as a debt also.

The particular question before us has not, so far as I know, been decided, and the objection appears then to me to be purely technical; it remains to consider whether it must prevail.

The facts of this case are in some respects singular. It was conceded that the personal remedy of the mortgagee against the mortgagor is barred by time, and that fact was relied on as showing that there was no debt to attach; and it was argued that there can be no "debt" unless there is personal liability. The argument would have been stronger, if for "no debt" there had been substituted the words "no such debt as is contemplated under Section 268 of the Code of Civil Procedure;" but even then the necessity for an attachment under that section might be put on the ground that, before the execution-creditor should sell, the mortgagor might otherwise pay the amount secured to a third party and the land could not then be sold as the security.

[179] The attachment of the debt, *qua* debt, was necessary not so much, if at all, in the interest of the judgment-debtor as of the judgment-creditor; and as a matter of fact no payment of the money due was made to a third party. And it was not contended that it would be necessary where attachments have been made both under Section 258 and under

(1) 9 M. 5. (2) 5 A. 86. (3) 7 A. 38. (4) 9 C. 511.

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Section 274 that whatever is attached should be sold both as a debt or moveable property and also as immoveable property; and a sale of the interest put up to sale as immoveable property might, and in the present case at all events did, in my opinion, convey all that was capable of being sold; and that, as my learned colleague has put it, was the interest of the mortgagee in the hypothecated property,—that interest consisting of the right to realize the amount due under the hypothecation deed; and the right of the appellant was to have that property sold in satisfaction of the amount due under Exhibit A.

I also am therefore of opinion that the sale of such interest as defendant No. 1 had in the property mortgaged was, in the circumstances of this case, a valid sale.

I have nothing to add in other respects to the judgment of my learned colleague, in which I entirely concur as regards the other questions arising and disposed of by him.

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10 M. 179 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Brandt and Mr. Justice Parker.

VENKATASAMI (*Plaintiff*), *Appellant v.* STRIDAVAMMA AND ANOTHER (*Defendants*), *Respondents.**
[16th August and 23rd December, 1886.]

Receiver, appointment of—Appealable order—Civil Procedure Code, Sections 503, 505, 588.

An order rejecting an application to appoint a Receiver is an order passed under Section 503, and is therefore appealable under Section 588, Clause 24, of the Code of Civil Procedure.—*Subramanya* v. *Appasami*, I.L.R., 6 Mad, 355, overruled.

[F., 17 C. 680 (682); R., 24 B. 38 (42); 31 C. 495 (498); 6 Ind. Cas. 659=36 P.R. 1910=72 P.L.R. 1910=53 P.W.R. 1910; 18 C.L.J. 39=19 Ind. Cas. 553; 20 M.L.J. 78=5 Ind. Cas. 991.]

IN suit No. 12 of 1884 in the District Court of Kristna the plain- [180] tiff, Makarla Venkatasami Nayudu, applied for the appointment of a Receiver under Section 503 of the Code of Civil Procedure.

The application was dismissed with costs.

Against this order plaintiff appealed to the High Court.

Mr. *Grant*, for appellant.

Bhashyam Ayyangar and *Anandacharlu*, for respondents.

The case was heard on the 16th August 1886, and on the 23rd August the Court (COLLINS, C.J., and PARKER, J.) delivered the following

ORDER.—The petitioner appeals against an order of the District Court of Kistna, refusing to appoint a Receiver under Section 503 of the Code of Civil Procedure. The petitioner has by litigation established his status as an adopted son, and the suit is for recovery of moveable property valued at over a lakh of rupees. Defendant No. 1 has given a list of moveables to the value of Rs. 2,560 only and the petitioner prays that a Receiver be appointed to take charge of the property in suit pending the taking of an account.

* Appeal against Order 66 of 1886.

It is objected that an order refusing to appoint a Receiver is not appealable under Section 503 of the Code of Civil Procedure—*Subramanya* v. *Appasami* (1). 1886 DEC. 23.

We have ascertained that one of the learned Judges who decided that case (Muttusami Ayyar, J.) has subsequently entertained doubts of the correctness of the ruling, and we find that the High Court of Calcutta has ruled that an order refusing to appoint a Receiver is appealable.—*Gossain Dulmir Puri* v. *Tekait Hetnarain* (2). FULL BENCH. 10 M. 179 (F.B.).

It has been held both by this Court in Appeal against Order 115 of 1885, (3) and by the Calcutta Court in *Birajan Kooer* v. [181] *Ram Churn*

(1) 6 M. 355. (2) 6 C.L.R. 467.

(3) Appeal against order 115 of 1885.

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10 M. 180 N. = 10 Ind. Jur. 58.

Muttusami Ayyar and Parker, JJ.

SUNKARALINGAM CHETTY AND ANOTHER v. CHOCKALINGAM NADAN AND SEVEN OTHERS. [21st September, 1885.]

Section 505, Code of Civil Procedure—Appointment of Receiver.

A Subordinate Judge nominated under Section 505 of the Code of Civil Procedure a certain person to be appointed as a Receiver.

The District Judge refused to sanction the appointment of any Receiver.

Held, that from such refusal there was no appeal.

JUDGMENT.

PARKER, J. (MUTTUSAMI AYYAR, J., concurring).—The Subordinate Judge in Original Suit No. 17 of 1885 nominated under Section 505 of the Code of Civil Procedure a certain person to be appointed as a Receiver. The District Judge expressed an opinion that the suit would not lie in its present form and refused to sanction the appointment of any Receiver. This appeal is presented against the order of the District Judge, and it is objected that the order of the District Judge is passed under Section 505 of the Code of Civil Procedure, from which Section 588 of the Code of Civil Procedure provides no appeal.

Against this it is urged by the learned Advocate-General that as the power conferred by Chapter XXXVI can only be exercised by High Courts and District [181] Courts, the order of the District Judge must be regarded as an order passed by the District Court under Section 503, and is therefore subject to appeal.

It has already been held by this Court in *Subramanya* v. *Appasami* (I.L.R., 6 Mad., 355), that an order refusing to appoint a Receiver under Section 503 is not appealable, but it does not appear that the same question is raised in the present case. There a Subordinate Judge refused to make an order under Section 503, which in any case he could not do unless authorized by the District Court under Section 505. But here the order of the District Court is clearly passed under the last clause of Section 505. It has been held in *Birajan Kooer* v. *Ram Churn Lall Mahata* (I.L.R., 7 Cal., 719) that the concluding words "or pass such other order as it thinks fit," authorize the District Court not only to decide the fitness of the person nominated, but also the necessity for the appointment of a Receiver at all.

In the present case no order has been passed under Section 503, either by the Subordinate Court or by the District Court. The Subordinate Judge proposed to pass an order under that section and solicited sanction, but the sanction was refused.

The question therefore does not arise whether if the District Judge had approved the nominee and accorded sanction to the Subordinate Judge to make an order under Section 503, that order would be the order of the Subordinate Court or of the District Court.

I understand the argument of the learned Advocate-General to be that the order would be that of the District Court which would be exercising its powers by delegating them.

I find from the notes to Mr. Justice O'Kinealy's Code of Civil Procedure (pages 386, 387) that this subject was considered in the cases *Gossain Dulmir* v. *Tekait Hetnarain* (6 C.L.R., 467) and *Birajan Kooer* v. *Ram Churn Lall Mahata* (I.L.R., 7 Cal., 719). In the former of those cases it was laid down that an order made by a Subordinate Judge dismissing an application for the appointment of a Receiver *after*

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Lall Mahata (1), that no appeal lies from an order passed under Section 505, and in the latter case it was held that a District Court ought to decide on the necessity for the appointment of a Receiver on a reference from a Subordinate Court, before authorizing the Subordinate Judge to appoint a Receiver.

By analogy when the appellate authority is the High Court it [182] may be argued that a similar power exists, and that an application made under Section 503 can only be disposed of by an order passed under that section, which is appealable under Section 588, Clause (24).

Against this it may be urged that when orders are passed refusing applications under certain sections they have been elsewhere made expressly appealable—see Section 588, Clauses (7), (8), (9), (16), (20), (27).

As our learned colleague has doubts of the correctness of the Madras decision, and the Calcutta Court has taken a different view, we refer for the decision of the Full Bench the question—

"Is an order refusing to appoint a Receiver under Section 503 of the Code of Civil Procedure appealable under Section 588, Clause (24)?"

On the 13th October the case was heard by the Full Bench (COLLINS, C.J., KERNAN, MUTTUSAMI AYYAR, BRANDT and PARKER, JJ.).

Mr. *Grant* and *Sadagopacharyar*, for appellant.

Bhashyam Ayyangar and *Anandacharlu*, for respondents.

JUDGMENT.

PARKER, J. (the Chief Justice, KERNAN and MUTTUSAMI AYYAR, JJ., concurring).—The question referred is whether an order refusing to appoint a Receiver under Section 503 of the Code of Civil Procedure is appealable under Section 588, Clause (24).

In support of an affirmative answer we are referred to *Reasut Hossein* v. *Hadjee Abdoolah* (2), in which it was said by the Privy Council in a question raised under the 76th section of the Registration Act that the words "no appeal lies from any order under this section" must be taken to exclude not only an appeal when the Judge directs the Registrar to register a deed, but also one when the application for registration is rejected. Their Lordships observed that there would be great difficulty in saying that an order of rejection did not fall within the term "an order made under this section."

obtaining sanction from the District Judge is an order under Section 503, and not under Section 505, and therefore appealable. This would favour the view that after sanction given, it is the Subordinate Court which makes the order under Section 503 and not the District Court, the Subordinate Court having been authorized thereto under Section 505. In the latter case it was held that the first step taken by the Subordinate Judge was to nominate and that from this proceeding there is no appeal. The Judge then approves and under Section 505 authorizes the appointment, and from this also there is no appeal. Then the Subordinate Judge *appoints* the Receiver previously nominated, and from this order there is an appeal. Thus this ruling also corroborates the view that the action of the District Court is not taken under Section 503 but under Section 505, and that the appeal is from the order of the Subordinate Court under Section 503. Applying these principles to the present case it would follow that no order refusing to appoint a Receiver under Section 503 has been made either by the Subordinate Court or by the District Court, and therefore no question arises as to the correctness of the ruling in I.L.R., 6 Mad., 365. The Subordinate Judge has in fact passed no order at all. He solicited sanction to pass an order under Section 503. The District Judge under Section 505 refused to accord that sanction (or refused to delegate his power). From that refusal there is no appeal.

I would dismiss this appeal with costs.

(1) 7 C. 719. (2) 3 I.A. 221.

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Similarly the High Court of Calcutta in *Nubbi Buksh* v. *Chasni* (1) held that an order refusing an application to be made an insolvent must be considered to be one made under Section 351 of the Code of Civil Procedure, and appealable under Section 588, Clause (17). It was observed that Section 351 (like Section 503) did not expressly authorize the Court to refuse the application, but from the language of the section it was obviously within the Court's power to refuse it, and therefore that an order of refusal must be taken to be made under [183] the section. Exactly the same reasoning would apply to the application for the appointment of a Receiver under Section 503.

We find also that the same High Court has ruled that an order refusing to appoint a Receiver is appealable—*Gossain Dulmir Puri* v. *Tekait Hetnarain* (2). This decision is not however reported in the authorized Indian Law Reports.

Against this it is urged that it is the policy of the law to give an appeal only when extraordinary powers are exercised and not when the exercise is refused, and we are referred to Clauses (7), (8), (9), (16), (20), (27) of Section 588 in proof of the theory that where the Legislature intended an appeal to be given against a refusal it was careful to give that appeal by express enactment.

If the contention that the Legislature did not intend to make the refusal to exercise a power appealable were to be allowed, it would follow that there could be no appeal in the case of a refusal to remove a person under Section 503 (*b*) when such person had misappropriated property committed to his custody. We are bound to place a reasonable construction upon an Act, and the Legislature certainly could not have intended to enact this. But if an appeal would lie from a refusal to exercise a power under Section 503 (*b*), I can see no sufficient reason why there should not be an appeal from a refusal to exercise a power under Section 503 (*a*). The consequences of an improper refusal might be no less disastrous.

I am not insensible to the difficulty suggested by the other clauses of Section 588, but I would point out with respect to most of them, *e.g.*, Clauses (8), (9), (20), (27), that when an order is granted it becomes appealable in the further progress of the suit, and hence it was necessary for the Legislature to make the order of refusal specially appealable, since the effect of the order was to stop the further progress of the suit.

The absence of an appeal from an order under Section 505 is no argument for the absence of an appeal from a refusal to act under Section 503, since in the former case the District Court merely authorizes a Subordinate Court to act, and when it has acted there is an appeal from the order passed—see *Birajan Kooer* v. *Ram Churn Lall Mahata* (3).

I would answer to the Division Bench that an order of refusal [184] to appoint a Receiver is an Order under Section 503 of the Code of Civil Procedure, and is appealable under Section 588, Clause (24). I would therefore overrule *Subramanya* v. *Appasami* (4). I am fortified in this opinion by the fact that one of the learned Judges who decided the case (Muttusami Ayyar, J.) is himself not now satisfied with the correctness of that decision.

BRANDT, J.—I concur. An order or proceeding recording a refusal to appoint a Receiver is certainly "an order under Section 503 of the Code of Civil Procedure;" and orders "under" that and other sections are appealable under the provisions of Section 588, Clause (24).

(1) 6 C. 168. (2) 6 C.L.R. 467. (3) 7 C. 719. (4) 6 M. 355.

1886
DEC. 23.
FULL BENCH.
10 M. 179 (F.B.).

The principle adverted to in *Beasut Hossein* v. *Hadjee Abdoollah* (1) appears to me to be applicable in the case before us, not the less so because the order or orders under consideration in that case related to direction for registration of, and refusal to register, deeds. The power to make an affirmative order implies (in the words of the learned Judges who decided the case reported on) the power to make an order refusing to exercise powers.

There is no doubt considerable force in the arguments advanced by the learned pleader on the other side. It was pointed out that under the Civil Procedure Code of 1859 no appeal lay against an order refusing to appoint a Receiver, while an appeal allowed against an order making such an appointment; and that under Section 94 of that Code an appeal against orders made under the two preceding sections was open to the defendant only ; and it was suggested that the intention was to allow an appeal only when the extraordinary powers given were exercised, and not when a Court refused to exercise them ; and that the same intention is to be inferred from the manner in which the present Code is expressed, as it now stands, after amendments.

If regard be had to principles and to expediency it is obviously most important that a valuable property should not run the risk of being ruined because a Court has declined to exercise a power which, if the discretion given were properly used, it should have exercised.

Reference was also made to the fact that an appeal is expressly allowed from an order refusing to issue an injunction ; to the wording of Sections 351, 492, 493, 496, 497, 502 and 505, and to [185] Clauses (9), (11), (16) and (20) of Section 588, as showing that generally when the Act allows an appeal against proceedings recording refusal to make an order it does so in express terms.

Mr. Justice PARKER has noticed the inferences which may be drawn from the provisions of Sections 503, 505, and from Clauses (8), (9), (20) and (27) of Section 588, and it would be quite possible to meet many of the objections taken on behalf of the respondent, though possibly not all of them. It appears to me however unnecessary to go into details ; there may be some slight inconsistencies in the Code of Civil Procedure discoverable by acute minds ; but I see no reason to think that the Legislature intended not to allow an appeal against an order under Section 503 refusing to appoint a Receiver, and I think it is more consonant with the general principles of the Code, and with the rules of construction, as well as with the wording of Clause (24) of Section 588, to hold that an appeal does lie in the case before us, than to hold that it does not.

(1) 3 I.A. 221 (225).

10 M. 185.

1886 AUG. 18.

APPEL-LATE CIVIL.

10 M. 185.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

RAMAYYANGAR AND ANOTHER (*Plaintiffs*), *Appellants v.*
KRISHNAYYANGAR AND ANOTHER (*Defendants*), *Respondents.**
[18th August, 1886.]

Civil Procedure Code, Section 539—Sanction granted to two persons separately to institute suit in respect of breach of charitable trust.

R. instituted a suit with the Collector's sanction to compel the performance of a charitable trust; D. was subsequently joined as plaintiff, having also obtained the Collector's sanction to institute the suit:

Held that the sanction obtained by D. related back to the institution of the suit.

[Diss., 26 A. 162 (165); N.F., 21 B. 351 (364); F., 7 M.L.J. 281 (288); R., 23 M. 28 (33).]

APPEAL from the decree of J. C. Hughesdon, District Judge of Tinnevelly, in Suit No. 7 of 1885, dismissing the suit on the ground that the plaint, as filed, had not been sanctioned by the Collecter as required by Section 539 of the Code of Civil Procedure.

Parthasaradhi Ayyangar, for appellants.

Respondents did not appear.

[186] The facts and arguments appear sufficiently for the purpose of this report from the judgment of the Court (KERNAN and BRANDT, JJ.).

JUDGMENT.

The suit was instituted by appellant No. 1, Ramayyangar, after he had obtained the sanction of the Collector.

Subsequently, Ramayyangar's son, Dorasami, was added as plaintiff No. 2, and he also obtained the Collector's sanction to "institute" the suit, as it is termed in the Collector's order. Subsequently issues were framed. The Judge holds that the Collector's sanction in the case of Dorasami is not sufficient with reference to Section 539 of the Code of Civil Procedure, as at the time when the suit was instituted, the Collector's sanction had not been obtained by him. Referring to the decision of the Privy Council in *Mahammad Azmat Ali Khan* v. *Lalli Begum* (1), which appears to be an analogous case, decided with reference to the Pensions Act; we are of opinion that the sanction obtained by Dorasami relates back to the institution of the suit.

We think the order dismissing the suit was wrong; and as the Judge dismissed the suit on a preliminary ground which excluded evidence, we set aside the order and direct the Judge to restore the case to his file and to dispose of it on the merits.

The costs of this appeal to be costs in the cause.

* Appeal 70 of 1886.

(1) 8 C. 422.

1887
MARCH 1.

APPELLATE
CRIMINAL.

10 M. 186 =
1 Weir 408.

10 M. 186 = 1 Weir 408.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

QUEEN-EMPRESS *v.* PONNURANGAM.* [1st March, 1887.]

Penal Code, Sections 24, 378—*Theft of joint property by co-parcener.*

Theft of joint property may be committed by a co-parcener if he takes it from joint possession and converts such possession into separate possession.

THIS was a case referred for the orders of the High Court under Section 438 of the Code of Criminal Procedure by W. H. Glenny, District Magistrate of North Arcot.

[187] The case was stated as follows :—

"Ponnurangam, the accused, a boy of 18, took a cart from his father's mandi, or shop, without his father's knowledge, and sold it, and appropriated the proceeds. He admitted all this, but pleaded, first, the he was undivided from his father and was a joint owner of the cart ; and, secondly, that the reason he took the cart was that his father, who was married a second time, does not support either him (accused) or his mother. He kept, he said, part of the proceeds for his own support and sent the rest to his mother.

"The Second-class Magistrate took the accused person's word for all these allegations and found 'he seems to have acted under *bona fide* claim of right,' and discharged him."

Counsel were not instructed.

The Court (KERNAN and MUTTUSAMI AYYAR, JJ.) delivered the following

JUDGMENT.

The Second-class Magistrate's judgment and order are wrong. Theft of joint property of a family may be committed by one of the family though a co-parcener, if he takes it from joint possession and converts such possession into separate possession—See Weir's Criminal Rulings, p. 154, on Section 379, Indian Penal Code.

The acquittal is set aside and the Magistrate is directed to re-try the case and to have regard to the definition of theft in Section 378, Indian Penal Code, and of the word "dishonestly" in Section 24.

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10 M. 187.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

VENKAPPA AND OTHERS (*Defendants*), *Appellants v.* NARASIMHA (*Plaintiff*), *Respondent.*† [2nd March, 1887.]

Stamp—Court Fees Act—VII of 1870, *Section* 6, *Schedule II*, *Article* 17.

In a suit on a mortgage bond a decree was passed for payment of principal and interest, and in default for sale of the mortgaged property. Some of the defendants filed a memorandum of appeal against so much of the decree as declared the liability of the property, affixing a stamp of Rs. 10 only :

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* Criminal Revision Case 765 of 1886. † Referred Case No. 1 of 1887.

1887 MARCH 2. APPELLATE CIVIL. 10 M. 187.

[188] *Held* that the proper stamp to be paid was not Rs. 10 as in the case of a declaratory decree, but on the value of the debt not exceeding the value of the property.

[**R.**, 33 C. 1133=4 C.L.J. 121=10 C.W.N. 1010 (1014); 6 C.L.J. 427=11 C.W.N. 705 (711); 14 C.P.L.R. 172 (173); **D.**, 23 C. 645 (652); 30 M. 96 (98) (**F.B.**)= 16 M.L.J. 458=1 M.L.T. 311.]

THIS was a case referred to the High Court by J. W. Best, District Judge of South Canara, under Section 617 of the Code of Civil Procedure.

The facts were stated as follows :—

"The object of the original suit was to recover from the Alyasantana family of the defendants, on the responsibility of the mortgaged lands, Rs. 2,169-15-10 due under a mortgage bond; and the Court fee paid on the plaint was on this amount, namely, Rs. 135.

"Defendants Nos. 3, 4 and 5 denied the plaint mortgage and disputed the chargeability of the debt on the family estate.

"The District Munsif who tried the suit, finding that the debt was properly chargeable on the family property, decreed the plaint amount with further interest (Rs. 137-8-0) and costs to be paid by defendant No. 1, and, on his default to do so, to be recovered by sale of the mortgaged lands after a specified time.

"Against this decree, defendants Nos. 3, 4 and 5 have presented the appeal in question in order *to exonerate the lands from liability* for the amount decreed.

"The appellants have stamped the appeal with a Court-fee of Rs. 10, on the ground that the relief sought in appeal is a mere declaration that the debt is not chargeable on the family property.

"I am of opinion, however, that as what they seek is not a mere declaration to be made use of on some future occasion, but a declaration *with consequential relief* so that the lands may not be sold in execution of the original decree, the appeal should be valued according to the amount of money concerned (as in the Lower Court), and that the Court-fee to be paid is the *ad valorem* fee on Rs. 2,169-15-10, namely, Rs. 135 (Chief Justice's ruling—November 1872, quoted in the foot-notes at page 240 of Weir's Digest of Rules, &c., 1883)."

Counsel were not instructed.

The Court (KERNAN and MUTTUSAMI AYYAR,) JJ. delivered the following

JUDGMENT.

We agree with the referring officer. There was a decree directing the payment of the amount and in default that the lands of the defendants should be sold and the produce applied to payment of the debt. The defendants appealed against [189] so much of the decree as declared the liability of their property, and to be released from the decree. The relief they sought was, therefore, not a mere declaratory decree but to be released from the decree. The proper stamp to be paid, therefore, is not Rs. 10 as in a declaratory decree, but on the value of the debt, not exceeding, however, the value of the property.

The case of *Vithal Krishna* v. *Balkrishna Janardan* (1) is not in conflict with this, as there the relief sought was only to obtain a declaration of the right claimed.

(1) 10 B. 610.

1886 DEC. 21.

APPELLATE CIVIL.

10 M. 189.

10 M. 189.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

THOPARA MUSSAD (*Plaintiff*), *Appellant v.* THE COLLECTOR OF MALABAR AND OTHERS (*Defendants*), *Respondents*.*
[21st December, 1886.]

Malabar law—Rights under a kanam—Denial of jenm right by kanamdar—Adverse possession—Limitation—Declaration of escheat.

A. demised certain lands on kanam to B. in 1853. B. afterwards committed an offence under the Mapilla Act and the lands were handed over for the benefit of his representatives to C. Government subsequently, without making A. a party to their proceedings, declared the lands to have escheated, and in 1863 sold them to C. A.'s representatives now sued to recover the lands from C.'s representatives who set up an adverse title and alleged that the suit was time barred.

Held that C. was, at the time of the escheat, in the position of a manager for mortgagees; that the escheat proceedings of which the mortgagor had no notice did not affect his rights; that denial by the mortgagee in possession of the mortgagor's right to redeem is not sufficient to convert such possession into adverse possession.

[R., 27 B. 43 (59); 21 M. 153 (164)=8 M.L.J. 92.]

APPEAL from the decree of V. P. de Rozario, Subordinate Judge of South Malabar at Palghat, reversing the decree of B. Kamaran Nayar, District Munsif of Betutnad, in suit No. 359 of 1884.

The facts and arguments appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and PARKER, J.).

Mr. *Wedderburn* and *Sankara Menon*, for appellant.

[190] *The Government Pleader* (Mr. *Powell*), for the Collector of Malabar.

Sankara Nayar, for defendant No. 3.

JUDGMENT.

The plaintiff sued to recover two items of land demised on kanam by his brother to one Mahmad Kutti Muppan in 1853. Mahmad Kutti Muppan was the husband of the second and the father-in-law of the third defendant.

The facts found are that the kanam sued on was granted in amicable settlement of a suit based upon a prior deed of 1816; that three years after it was granted (*i.e.*, in 1856) the lands were attached by Government on account of an offence committed by Mahmad Kutti under the Mapilla Act, and a fine of Rs. 15,000 levied therefrom; that after realization of that fine, the lands were handed over to Ali Muppan in 1857 with the consent of Mahmad Kutti's heirs and for their benefit; that subsequently, Government came to the conclusion that the plaint property had belonged to the Betutnad Raja and had escheated to Government on his death without heirs; that Government then sold the lands to Ali Muppan who paid for them by instalments, the sale being completed in 1863; and that Ali Muppan, and after him defendant No. 3, had since remained in possession.

The District Munsif found that Ali Muppan was in possession as kanamdar, and that the suit being to redeem a mortgage of 1853, the limitation was sixty years. He therefore decreed in plaintiff's favour.

* Second Appeal 196 of 1886.

1886 DEC. 21.

APPELLATE CIVIL.

10 M. 189.

On appeal, the Subordinate Judge reversed this decision, holding that Ali Muppan was neither the mortgagee nor the assignee or representative of the mortgagee, and that even if he had been, his tenancy determined, and his possession became adverse when the Government declared the property to be an escheat and sold it to him; and hence that the suit was barred. The decision in *Ammu* v. *Ramakishna Sastri* (1) was relied on in support of this decision.

Both the Courts below have treated the kanam deed as a mortgage, and we think that they were right in so doing. The kanam was granted for the amount due under a decree and for a further advance; and in such case, the law of limitation applicable to mortgages must be applied: *Nellaya Variyath Silapani* **[191]** v. *V. M. Ashtamurti Nambudri* (2). We cannot, however, agree with the Subordinate Judge that Ali Muppan was not at the time when the Government purported to deal with the property as an escheat, in the position of representative of or manager for the mortgagees. Exhibit E appears to us clearly to show that the property was entrusted to him, with the consent of the heirs of Mahmad Kutti, for the purpose of being managed by him on their behalf.

But we do not think that the action of Government in declaring the lands to be an escheat and in selling them to Ali Muppan can affect the plaintiff's title, unless it be shown that he was aware of the proceedings, and that by the action of Government the relation of mortgagor and mortgagee ceased to exist between the plaintiff and the heirs of Mahmad Kutti, on whose behalf Ali Muppan had been entrusted with the land. In *Ammu* v. *Ramakishna Sastri* (1) the Deputy Collector appears to have held a regular inquiry and to have declared formally that the land was a Government escheat in a proceeding to which the plaintiff in that suit was a party. In the case before us, there is nothing to show what was the procedure adopted, or whether the plaintiff was a party to the proceeding. The Subordinate Judge observes that "Narayana Musad became aware of the sale by Government and sued (1859) to redeem the plaint property." It is not, however, altogether clear that the property then sued for was the same. That suit apparently referred to property which had been sold by Government in 1859 for Rs. 532, and it is not clear what that property was. Assuming the property or part of it to have been the same, Ali Muppan, no doubt, set up a title adverse to the plaintiff, but the District Munsif dismissed the suit on the ground that the Government was not a party.

We are not prepared to hold that the mere denial by the mortgagee in possession, or by the representative of the mortgagee in possession, of the mortgagor's right to the equity of redemption is of itself sufficient to convert such possession into adverse possession: *Ali Muhammad* v. *Lalta Bakhsh* (3).

The Subordinate Judge has failed to observe the plaintiff's contention that land item No. 1 was not included in the land sold to Ali Muppan in 1863. If this be so, Ali Muppan's purchase **[192]** from Government cannot possibly give rise to an adverse title with respect to this item.

With these observations we set aside the decree of the Subordinate Judge and remit the appeal for re-hearing. The costs to be costs in the cause.

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(1) 2 M. 226. (1) 3 M. 382. (3) 1 A. 655.

1887 JAN. 27.

APPELLATE CIVIL.

10 M. 192.

10 M. 192.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

AHMED KUTTI (*Defendant*), *Appellant v.* KUNHAMED (*Plaintiff*), *Respondent.** [27th January, 1887.]

Malabar law—Kanam—Construction of redemption clause—Time for redemption.

The primary intention that a kanam is to be redeemed only after 12 years, can be negatived either expressly or by implication by a special clause. *Prathenpurayil Kuridipravan Kanara Kurup* v. *Prathenpurayil Kuridipravan Govindan* (I.L.R., 5. Mad., 310) distinguished.

APPEAL from the decree of W. P. Austin, District Judge of North Malabar, affirming the decree of A. Annasami Ayyar, District Munsif of Pynad, in suit No. 601 of 1885.

This was a suit brought in 1885 to redeem a certain paramba demised to the defendant under a kanam deed, dated 11th October 1880. The marupat (Exhibit A) contained the following clause:—

"When the paramba is demanded, I shall restore the same by receiving the kuikanam and kanam amount . . . . . according to the custom of the country."

The defendant objected that he was entitled to hold the land for 12 years, but this objection was overruled by both the lower Courts.

The defendant appealed to the High Court.

Anantan Nayar, for appellant.

Sankara Menon, for respondent.

The Court (MUTTUSAMI AYYAR and PARKER, JJ), delivered the following

JUDGMENT.

[193] We are of opinion that the construction placed by the Judge on Exhibit A is correct. The words, "when the paramba is demanded, I shall restore," are inconsistent with the intention that the terms should continue for 12 years certain. It is no doubt true that when a kanam is granted, the primary intention is that it should be redeemed after the expiration of 12 years. But when that intention in negatived, either expressly or by necessary implication by a special clause, we do not consider that we are at liberty to introduce into the document words which we do not find in it, so to render the special provision operative only on the expiration of 12 years. The language of the document referred to in *Puthenpurayil Kuridipravan Kanara Kurup* v. *Puthenpurayil Kuridipravan Govindan* (1) is not the same as in Exhibit A, nor have we that document before us. We consider that the second appeal cannot be supported, and we dismiss it with costs.

* Second Appeal 509 of 1886.

(1) 5 M. 310.

10 M. 193.

1887
FEB. 25.

APPELLATE CIVIL.

10 M. 193.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

BURGESS AND OTHERS (*Plaintiffs*) v. SIDDEN AND ANOTHER (*Defendants*).* [25th February, 1887.]

Civil Procedure Code, Sections 404, 406—*Application for permission to sue as paupers presented by several paupers jointly.*

The mere fact that several persons jointly present an application for permission to sue as paupers does not authorize the Court to entertain it on behalf of applicants who do not appear in person.

THIS was a case referred for the orders of the High Court under Section 617 of the Code of Civil Procedure by W. E. T. Clarke, Subordinate Judge, Nilgiris.

The case was stated as follows :—

" A pauper petition for recovery from the executors under the will of the late Thomas Sidden of the sum of Rs. 3,888 (being 12 years' maintenance) and of Rs. 3,600, the corpus of a trust fund deposited with the said Thomas Sidden and further interest, &c., was presented to me on the 29th September 1886.

[194] " The parties to this petition are five in number, all resident beyond the jurisdiction of this Court.

" The petition was presented to me by fifth petitioner only in person ; the said fifth petitioner produced no authority authorizing him to appear and act for the other petitioners, but vakaluts were put in with the petition by which 1, 2, 3 and 5 petitioners empowered Messrs. Cowdell and Co., Solicitors at Ootacamund, to appear for them, together with a power of attorney by which petitioner No. 4 apparently authorized petitioner No. 1 to act for her in recovering the moneys alleged to be due to petitioners by the representatives of the late Mr. Sidden."

Councel were not instructed.

The Court (KERNAN and BRANDT, JJ.) delivered the following

JUDGMENT.

An application to sue as a pauper must be made to the Court by the applicant in person, unless he is exempted under Section 640 or 641 from appearing in Court (which is not the case here), and it is only in the case of persons so exempted that the application may be presented by a duly authorized agent.

The mere fact that several pauper applicants jointly presented an application cannot authorize the Court to entertain it on behalf of applicants who do not appear in person.

The application in this case was not presented on behalf of the petitioners who did not appear by an agent duly authorized to appear under Section 404, and therefore the provisions of Section 406 do not apply.

* Referred Case 8 of 1886.

1887
FEB. 25.
APPELLATE CIVIL.
10 M. 194.

10 M. 194.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

SIRIAH AND OTHERS (*Plaintiffs*) *v.* MUCKANACHARY AND OTHERS (*Defendants*).* [25th February, 1887.]

Civil Procedure Code, Sections 268, 284, 287 (*e*), 301—*Attachment of a debt due to a Judgment-debtor—Sale of debt—Payment into Court—Prohibitory order.*

A decree-holder by a prohibitory order made under Section 268 (*a*) of the Civil Procedure Code attached a debt due to his judgment-debtor. The debt was not paid into Court:

[195] *Held*, that the Court cannot, under Section 268, of the Code of Civil Procedure, call on a person subject to a prohibitory order to pay or show cause why he should not pay his debt into Court. The Court is bound to satisfy itself that a debt is due, the debt must then be sold and delivery made under Sections 284 and 301 of the Code of Civil Procedure.

THIS was a case referred for the orders of the High Court under Section 617 of the Code of Civil Procedure by W. E. T. Clarke, Subordinate Judge, Nilgiris.

The facts were stated as follows :—

"In the execution proceedings connected with original suit No. 79 of 1885 on the file of the High Court of Judicature at Madras, the decree in which was referred to this Court for execution, the judgment-creditor under Section 268, Clause (*a*) of the Code of Civil Procedure attached certain debts said to be due by various persons to his judgment-debtor; this Court issued notice to the several alleged debtors, calling on them to show cause (if any) why their debts should not be paid into Court. In answer to such notices, the alleged debtors appeared before this Court; some of them admitted their debts to be due, others said they had owed debts but had paid their amounts, and one said it depended on a settlement of accounts between the judgment-debtor and himself whether he owed anything to the said judgment-debtor or not."

Sundaram Sastryar, for plaintiffs.

Mr. Ramasami Raju, for defendants.

The Court (KERNAN and BRANDT, JJ.) delivered the following

JUDGMENT.

The first question referred for our decision is—"Whether a Court is not justified under Section 268 in issuing a notice to a garnishee, as he is styled by the Subordinate Judge, to show cause why he should not pay his debt into Court, seeing that it has power to make further orders under that section?"

The Court has not power under Section 268 of the Code of Civil Procedure to call upon a person warned by the Court not to make payment to his creditor to show cause why he should not pay his debts into Court: under the section above quoted it is optional with the debtor to pay the amount of his debt into Court. But under Section 287 (*e*) the Court executing the decree has power to summon any person whom it thinks necessary, in order to ascertain, among other things, the nature and value of the property; and we concur with the Bombay High Court—*Harilal Amthabhai* **[196]** v. *Abhesang Meru* (1)—in considering that if there is

* Referred Case 11 of 1886.

(1) 4 B. 323.

notice or reasonable cause to suppose that there is no debt due, the Court not only can, but ought to satisfy itself on the point.

The second question is: "Whether if as the result of an inquiry held under Section 287 a Court finds either that a garnishee admits a debt or that it is proved to be due by him to the judgment-debtor, a Court is imperatively bound to put such debt up for sale, or whether it may order the same to be paid into Court by the garnishee instead of proceeding to sell it?"

If the Court is satisfied that there is a subsisting debt, the debt must be sold (Section 284); and delivery is to be made under Section 301. Under Section 268 the debtor may pay the amount of his debt into Court, but the Code does not empower the Court to compel the debtor to pay the money into Court, while it does expressly provide for the mode in which sale and delivery of the debt attached is to be made. A power to compel the debtor to pay the amount of his debt into Court cannot be imported by reason of greater convenience of the course suggested by the Subordinate Judge, nor from the fact that such a course is not expressly forbidden by the Code.

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10 M. 196 = 11 Ind. Jur. 185.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

CHEKKONEKUTTI AND ANOTHER (*Plaintiffs*), *Appellants* *v.* AHMED AND OTHERS (*Defendants*), *Respondents.**
[16th November, 1886 and 26th January, 1887.]

Mapillas—Muhammadan Law—Gift to take effect at an indefinite future time.

Gifts to take effect at an indefinite future time are void under Muhammadan law.

[R., 13 B. 264 (275); 7 Bom. L.R. 306.]

THIS was a suit for a declaration of the plaintiffs' title to certain property under a deed of gift. By that deed Ahmed Haji, a Mapilla, conveyed the land in question to his wife, Mama, for life, and after her death to his daughter, Pathuma, and children born to her. Pathuma had no issue at the date of the deed, but subsequently had two children, the plaintiffs in this suit. She [197] predeceased her mother, on whose death the defendants took possession of the property as her heirs.

The suit was dismissed by K. Kunjan Menon, Subordinate Judge of North Malabar, and his decree was affirmed on appeal by W. P. Austin, District Judge of North Malabar.

Plaintiffs appealed.

Mr. *Shephard* and *Sankara Menon*, for appellants.

Mr. *Wedderburn* and *Anantan Nayar*, for respondents.

The facts and arguments appear sufficiently for the purposes of this report from the judgment of the Court (COLLINS, C.J., and PARKER, J.).

JUDGMENT.

The property which forms the subject of the present suit was given by one Ahmed Haji to his wife Mama by Exhibit A. The deed, after

* Second Appeal 454 of 1886.

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setting forth the particulars of the property, goes on: "I have agreed that the said properties should be perpetually enjoyed by you, as long as you are alive, and after your death by Pathuma who is born to me in you, and children born to her."

At the date of the deed, Pathuma had no children, and she died before her mother Mama, but left two children (the plaintiffs) surviving her. The plaintiffs now claim the property under the deed A, on the death of Mama.

The parties are Mapillas of North Malabar and are governed by Muhammadan Law. The sole question argued in the appeal is, whether the gift to an unborn person is valid. It is admitted that the question does not arise in the present suit as it is framed, whether Pathuma took a vested interest and whether plaintiffs could claim as heirs to Pathuma.

The District Munsif held that the gift was void under Muhammadan Law by reason of its indefiniteness; and the District Judge that it was void as regards Pathuma, because it was never rendered complete by seisin on her part, and was void *ab initio* in the case of her unborn children, since no one could make seisin for such a class.

Cases have been quoted at the bar to show that such a gift over to unborn children would be invalid according to Hindu Law, but no ruling under Muhammadan Law has been cited. Such a gift would not contravene the provisions of Section 12 of the Transfer of Property Act. But Section 129 of that Act directs that nothing in that Chapter, *viz.*, VII, relating to gifts, shall be deemed to affect **[198]** any rule of Muhammadan Law. We have therefore to consider whether such a gift is prohibited by the special law by which the parties are governed.

Referring to the principles of Muhammadan Law collected in the standard work of Mr. Macnaghten, we find prohibitions against a gift being made to depend on a contingency, or being referred to take effect at a future definite period (Rule 3, page 50), also in the case of a gift made to two or more donees, the interest of each must be defined, either at the time of making the gift or on delivery (Rule 7). In the present case, the gift to Pathuma and to any children that might be born to her was contingent upon their surviving Mama; and assuming such a gift to be valid subject to Mama's previous life interest, there is the condition that the interest of each donee must be defined at any rate on delivery.

Had the deed declared that on the death of Mama the property should be divided in certain definite shares between Pathuma and such of the children born to her as might be living at that date, the gift then would be defined; but as the words stand, they would include as sharers any children that might be born to Pathuma after the death of Mama. At the date of the gift, the interest of Mama alone was defined, but that of Pathuma was incapable of definition, since it would depend on the number of children that might be born to her. Even granting that the seisin required by Muhammadan Law could be postponed by Pathuma and her children till the death of Mama, no one could make seisin for an indefinite number of future children.

It may be urged that the result of English decisions in dealing with a gift to a class is to ascertain first, at what period the class is to be ascertained, and that the gift takes effect in favour of such of the class as are then capable of taking, after-born members of the class being simply excluded; but in India, in cases arising under Hindu Law, the course of

decisions has been to establish that a gift whether vested or contingent which includes or might include persons unborn at the date of the gift is wholly void, that no one can take under a gift who is not in existence and thus capable of taking at the date from which the gift speaks: *Ram Lal Sett* v. *Kanai Lal Sett* (1). The view however which the learned Judge took in that case implied some doubt as to whether the [199] previous decisions had not been carried too far; and the gift was allowed to stand with respect to persons alive and capable of taking at the date of the gift, but was set aside with regard to persons unborn at the date of the gift.

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The principles of Muhammadan Law which prohibit indefinite gifts and gifts *in futuro* appear to us equally to exclude the validity of such gifts to take effect at an indefinite future time. The rules referred to would seem to indicate that Muhammadan Law tends to correspond more closely with Hindu than with English Law in its principles. We dismiss this Second Appeal but without costs, as in the Court below, the point being a novel one, and by no means free from difficulty.

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10 M. 199.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

LAKSHMAYYA (*Plaintiff*), *Appellant* v. JAGANNATHAM AND OTHERS (*Defendants*), *Respondents*.* [9th March and 18th February, 1887.]

Limitation Act—Act XV of 1877, *Schedule* II, *Article* 85—*Mutual current accounts—Reciprocal demands.*

A employed B as his agent. B alone kept written debit and credit accounts. A sued B for a balance due on the account between them:

Held, that the debit and credit account showed reciprocal demands between plaintiff and defendants, and that the account was a mutual open and current account within the meaning of Limitation Act, 1877, Schedule II, Article 85.

[R., 22 B. 606 (610).]

THIS was an appeal against the decree of H. LeFanu, District Judge of Kistna, in appeal Suit No. 199 of 1884, modifying the decree of Subba Rao, District Munsif of Masulipatam, in Original Suit No. 631 of 1883.

Defendant No. 1 (the other defendants being undivided members of his family) worked certain harbour boats belonging [200] to the plaintiff on commission, and was authorized to pay money on the plaintiff's account for the expenses of working the boats, &c. Debit and credit accounts were rendered to the plaintiff on 31st December 1879, which showed a balance in the defendants' favour of Rs. 17-1-3. This item was brought into account rendered on 30th March 1880 and formed part of a balance in the defendants' favour of Rs. 45-3-6, which was again brought into accounts rendered on the 7th July 1880, showing a balance in defendants' favour of Rs. 179-11-4. The defendants left off working the plaintiff's boats in April 1880. On the 14th March 1881, defendant No. 1 sent signed copies of the accounts of 30th March 1880 and 7th July 1880 (Exhibit A) to the plaintiff together with a letter demanding payment of the balance (Exhibit B).

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* S.A. 472 of 1886.

(1) 12 C. 663.

1887 FEB. 18. — APPELLATE CIVIL. — 10 M. 199.

The plaintiff sued to recover a balance alleged to be due to him on the boat accounts. The plaint was filed on the 6th July 1883, and (as amended) stated that the cause of action arose on the 14th March 1881, the date of Exhibit B which was relied on as an acknowledgment within the meaning of Section 19 of the Limitation Act.

The Lower Courts held that the plaintiff's claim was barred by limitation.

The arguments employed in this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (KERNAN and BRANDT, JJ.).

Rama Rau, for appellant.

Anandacharlu, for respondent No. 1.

JUDGMENT.

The plaintiff, under a kararuamah, dated the 10th of January 1879, entrusted the defendant with the working of his boats, and authorised the defendant to receive the moneys payable by people using the boats, and to pay on his account money for expenses incurred in and for the working of the boats. The defendant was entitled to receive commission for his work. The defendant worked the plaintiff's boats from about the 10th January 1879 to April 1880. The defendant kept the accounts of receipts and payments in respect of the boats and in respect of moneys paid to the plaintiff, and of moneys paid at his request to other parties and in respect of moneys due on other accounts settled between the plaintiff and the defendant and for commission due to the defendant An account was furnished to the plaintiff by the [201] defendant up to 31st December 1879, which showed a balance of Rs. 17-1-3 due by the plaintiff to the defendant. That item is brought into another account furnished by the defendant to the plaintiff up to the end of March 1880; and the latter account showed a balance due by the defendant to the plaintiff of Rs. 45-3-6, which sum is the first item in the last account furnished by the defendant to the plaintiff down to and including a debit to the plaintiff on the 7th July 1880. This last account after crediting the plaintiff with all receipts by the defendant therein specified, and debiting the plaintiff with various payments as above mentioned, and with a charge for Rs. 200 for discontinuing the defendant in the business, showed an alleged balance of Rs. 179-11-4 due to the defendant.

The plaint was filed on the 6th July 1883. The cause of action was originally stated in the plaint to have arisen on the 7th July 1880, but the plaint was amended stating that the cause of action arose on the 14th of March 1881, the date of Exhibit B. The defendant pleaded that plaintiff's claim was barred by limitation. At the trial it appeared that the plaintiff, in April 1880, ceased to allow the defendant to work the boats, and that in Exhibit B, a letter of the defendant to the plaintiff, dated 14th March 1881, the defendant says he sent in April 1880, when the plaintiff took the boats, an account to the end of March 1880 and an account to the 7th of July 1880, and that he sent two duplicate accounts signed by the defendant, and he says, "with regard to them you owe us Rs. 179-11-4." The defendant then calls on the plaintiff to pay that sum and interest within one week, and threatens that otherwise the defendant will sue the plaintiff in a Civil Court. The duplicate accounts referred to in that letter are mutual open current accounts within Section 85 of the

Limitation Act of 1877, and the Courts below were in error in holding the plaintiff's suit barred by limitation.

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The accounts are not accounts containing only one side of the account, but they contain items of debit and credit to both parties on mutual credit, and the account between them was open and current. The case of *Catling* v. *Skoulding* (1) is probably the first reported case in which the case of mutual accounts, not being merchant's accounts was discussed. In that case another case of [202] *Cotes* v. *Harris* was referred to in which the account was all on one side; and Lord Kenyon says, in such case "the last item within the limitation in the account would not draw after it those of longer standing, but it was not doubted that if there had been mutual demands the plaintiff might have recovered." Other cases on the subject of mutual accounts are collected in the notes to *Webber* v. *Tivill* (2).

There were here reciprocal demands between the plaintiff and the defendant apparent, on the accounts, *viz.*, the money received by the defendant for the earnings of the boat formed to that extent the plaintiff's demand, and the payment by the defendant at the plaintiff's request to other parties and the paymont to the plaintiff and payments for the expenses of working the boats and the commission due to him to that extent formed the defendant's demand against the plaintiff. In order that an account shall be deemed to be a mutual account, it is not necessary that parties shall have each kept accounts in writing. It is enough if the dealing amounted to mutual debits and credits on both sides, and if the account is kept in writing, it is enough if one of the parties keeps it so. In *Khushalo* v. *Behari Lal* (3), Article 85, Schedule II of the Limitation Act, was held to apply to an account of debits and credits kept by a banker. In *Narrandas Hemraj* v. *Vissandas Hemraj* (4), it was held that when the course of business has been of such a nature as to give rise to reciprocal demands between the parties, Article 85 would apply: *Watson* v. *Aga Mehedee Sherazee* (5).

It is not necessary to consider the question raised, whether the defendant's letter of the 14th of March 1881 was an acknowledgment within Section 19 of the Limitation Act, or whether it could be received in evidence without being stamped.

The suit must for the above reasons be remanded for re-trial on the merits. Costs of the appeal to be provided for in the revised decree.

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10 M. 203.

[203] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Parker.

APPA RAU (*Plaintiff*), *Appellant v.* SURYANARAYANA (*Defendant*), *Respondent.** [26th January, 1887.]

Contract Act, Section 74—Penalty—Enhanced rate of interest and compound interest.

A mortgagor agreed that if any instalment of interest accruing due on the mortgage was not paid, he should pay compound interest and discharge the

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* Second Appeal 333 of 1886.

(1) 6 Term. Reports 189. (2) 2 Saunders 127. (3) 3 A. 523.
(4) 6 B. 134. (5) 1 I.A. 346.

1887 JAN. 26. — APPELLATE CIVIL. — 10 M. 203.

principal in one year, and further that if the principal was not so discharged he should pay interest at an enhanced rate:

Held that the mortgagee could enforce the agreement.

[F., 15 A 232 (253) (F.B.); 29 C. 823 (827); 17 M. 62 (66); 25 M. 343 (350) = 11 M.L.J. 421; 7 C.W.N. 876 (877); R, 29 M. 491 (496); 24 M.L.J. 135 (163) = 13 M.L.T. 20; 1 N.L.R. 9 (12); 11 O.C. 307 (309).]

THIS was a suit brought by a mortgagee to recover a balance of interest due on a mortgage bond in which the mortgagor agreed as follows:—

"Should I so fail to pay the amount of interest, I shall pay the interest at 2 per cent. per month as stated above, on the amount of the interest also from the expiry of the instalment. I shall pay the principal, the amount of interest due, and the amount of interest thereon, within one year in Vizagapatam. Should I fail to clear a year hence the whole amount due to you, I shall pay you the whole of the amount due, together with interest on it from that date at the rate of 3 per cent. per month."

Default was made in payment of an instalment of interest, and the principal was not discharged within the following year.

The District Munsif of Vizagapatam held that the agreement set out above was penal in character and not enforceable by the mortgagee, and that he was only entitled to interest at the original rate of 2 per cent per month and decreed accordingly.

On appeal the District Judge of Vizagapatam confirmed the decree of the District Munsif.

The plaintiff appealed.

Mr. *K. Brown* for appellant cited (*inter alia*) Contract Act, Section 74 —*Adanky Ramachandra Row* v. *Indukuri Appalarajua Garu* (2 M.H. C.R., 451); *Mackintosh* v. *Crow* (I.L.R., 9 Cal. 689); **[204]** *Behary Lall Doss* v. *Tej Narain* (I.L.R., 10 Cal., 764); *Sungut Lal* v. *Baijnath Roy* (I.L.R., 13 Cal., 164).

The Advocate-General (Honorable *P.O' Sullivan*) for respondent referred to Madras Regulation XXXIV of 1802 and cited *Dip Narain Rai* v. *Dipan Rai* (I.L.R., 8 All., 185).

The Court (COLLINS, C.J., and PARKER, J.) delivered the following

JUDGMENT.

It has frequently been held that an agreement to add interest to principal and so to pay compound interest is not a penalty. The only question is whether an agreement to pay an increased rate of interest as well as compound interest amounts to a penalty.

The old laws as to usury referred to by the learned Advocate-General have now been repealed, and the only case of authority relied upon is *Dip Narain Rai* v. *Dipan Rai* (1). It was therein held that if a lender stipulated for both kinds of damages, *viz.*, compound interest and also interest at an increased rate, the two stipulations together could not be regarded as a fair agreement with reference to the loss sustained by the lender but would amount to a penalty. The learned, Judges did not, however, refer to any authorities in support of the proposition thus laid down.

With all deference, we cannot assent to so general a rule, and are of opinion that the question must largely depend upon the circumstances of each particular case. It might easily happen that for special reasons a sum of money might be at first lent on unusually favorable terms and that,

(1) 8 A. 185.

if unpaid at the time stipulated, compound together with increased interest, would not amount to more than a fair indemnity against loss. 1887 JAN. 26.

We think the true principle of decision is that a Court should not interfere to protect persons who, with their eyes open, choose knowingly to enter into even somewhat extortionate bargains, but that it is only when a person has entered into such a bargain in ignorance of the unfair nature of the transaction, advantage having been taken of youth, ignorance or credulity, that a Court of Equity is justified in interfering, *Mackintosh* v. *Wingrove* (1). No such plea was raised in the case now before us. APPEL-LATE CIVIL. 10 M. 203.

The appeal is allowed, and, in modification of the decrees in the Courts below, we award the plaintiff the sum sued for together with his costs throughout.

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10 M. 205 (P.C.) = 11 Ind. Jur. 271 = 14 I.A. 67 = 5 Sar. P.C.J. 10.

[205] PRIVY COUNCIL.

PRESENT:

Lord Watson, Lord Fitzgerald, Lord Hobhouse, Sir Barnes Peacock, and Sir R. Couch.

[*On appeal from the High Court at Madras.*]

THAYAMMAL AND ANOTHER (*Defendants*) v. VENKATARAMA (*Plaintiff*). [12th February, 1887.]

Adoption—Widow adopting to her deceased husband, with consent of sapindas—Effect of estate having already vested in the widow of a son.

A son's widow having obtained her widow's estate in the property inherited by her deceased husband from his father, the widow of that father cannot adopt a son to the latter, whether she acts under authority from her husband or as widow with the assent of sapindas.

That the power of the father's widow to adopt a son to him is brought to an end upon the vesting of the estate in the son's widow was decided in *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (2) and *Padmakumari Debi* v. *The Court of Wards* (3).

[F., 32 C. 861 (868) = 1 C.L.J. 270; 33 C. 1306 (1319) = 4 C.L.J. 357 = 11 C.W.N. 12; R., 14 B. 463 (469); 17 B. 164 (169); 19 B 331; 22 B. 551 (F.B.); 23 B. 327; 25 B. 306; 26 B. 526 (F.B); 32 B. 499 = 10 Bom.L.R. 692 (694); 17 C. 122 (P.C.) = 16 I.A. 166 = 5 Sar. P.C.J. 379; 33 M. 228 (230) = 4 Ind. Cas. 386 (388) = 7 M.L.T. 236 (239); 13 Ind. Cas. 7 (15) = 22 M.L.J. 85 (104) = 10 M.L.T. 463 (472) = (1911) 2 M.W.N. 539 (551).]

APPEAL from a decree (21st March 1884) of the High Court affirming a decree (18th January 1882) of the District Judge of Trichinopoly.

In the suit, out of which this appeal arose, a son, adopted by the widow of a son of one of two brothers deceased, claimed a declaration that an adoption by the widow of the other brother, sapindas assenting, was invalid: and he had obtained a decree to that effect on the ground that, before the adoption now disputed, the estate had already vested in the widow of a son.

Of two brothers, Dorasami, deceased in 1858, and Subha Aiyan, also deceased, the former left a son, Kuttisami, who died in 1866, and a widow Thayammal, the first defendant in this suit. The latter brother left a son named Rangasami, who died in 1861. Kuttisami, son of Dorasami, left a widow, Thangammal.

(1) 4 C. 137. (2) 10 M.I.A. 279. (3) 8 C. 302 = 8 I.A. 229.

1887 FEB. 12. — PRIVY COUNCIL. — 10 M. 205 (P.C.) = 11 Ind. Jur. 271 = 14 I.A. 67 = 5 Sar. P.C.J. 10.

The plaintiff, claiming as adopted son of Rangasami, alleged that an adoption purporting to be made in 1877 by Thayammal, widow of Dorasami, whereby she attempted to adopt Chitambara [206] Aiyan, the second defendant, was invalid by law. One of the reasons alleged for the invalidity of the adoption was the existence of Thangammal, the widow of Kuttisami, who had (it was alleged as another reason), adopted a son to her deceased husband, thereby, although this son had since died, preventing any further adoption in the line of succession to Dorasami. Another objection was that Chitambara Aiyan was too old for the adoption to be valid; also that his upanayana had already been performed before 1877. On this last ground the Court of First Instance decreed the claim, deciding, also in favour of the plaintiff, a question of fact raised by the defence, *viz.*, whether the plaintiff had himself been adopted, as he alleged, to Rangasami.

A Divisional Bench of the High Court (SIR C. TURNER, C.J., and MUTTUSAMI AYYAR, J.) dismissed an appeal from that decree. They affirmed the finding of the plaintiff's adoption, pointing out that it was supported by what appeared in *Ramasami Aiyan* v. *Venkataramaiyah* (1), a suit in which the present plaintiff was also plaintiff as heir of Rangasami in virtue of this same adoption, suing to set aside some dispositions of property made by the widow.

As to the other part of the case, the High Court put the decision on a different ground from the first Court. The Judges held the adoption to be invalid for the reason that an adoption cannot be made by a widow after the estate has vested in the widow of the son. They referred to *Padmakumari Debi* v. *The Court of Wards* (2). The judgment is reported in *Thayammal* v. *Venkatarama* (3).

On this appeal, Mr. *J. D. Mayne* and Mr. *H. H. Shephard* appeared for the appellants.

The respondent did not appear.

For the appellant it was argued that the High Court had misunderstood the application of the judgment in *Padmakumari Debi* v. *The Court of Wards* (2), the decision in that case not having been, as it had been held to be, entirely applicable to the facts now presented; nor had it been kept in view that the adoption of the second appellant, having been intended to operate for the benefit [207] of the widow's deceased husband, accorded with principel. It was clear that if an infant son, left by the husband, had died, the widow, with the assent of the sapindas, could have adopted a son to him—See *Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya* (4).

It did not appear why this power should be taken away by reason of the son having grown up, married, and then died, leaving a widow; although it must be admitted that this widow, having inherited, would not be liable to be deprived of her widow's estate. Notwithstanding, however, that the adoption would be so far inoperative, as regards the latter purpose, it did not follow that it would be invalid altogether; and it was consistent with law that the adopted son should take on the death of the widow, and not before.

As to the prior adoption of Krishnasami since deceased by Thangammal in order to make that adoption a valid ground of objection to the adoption now in dispute, it must be shown to have taken place before the latter

(1) 2 M. 91. (2) 8 C. 302 = 8 I.A. 229.
(3) 7 M. 401. (4) 1 M. 174 = 4 I. A. 1

adoption which occurred in May 1877; and due authority for it must be shown, or else, that the appellants were estopped from disputing it.

[Sir Barnes Peacock inquired whether, in regard to the ground of the High Court's decision, the appellant's counsel would dispute, that, when once the estate had vested in the son's widow, the rights of the heirs, coming in after the widow, could not be altered. He also asked whether it was not clear that an adoption must be valid at the time when it was made, if it was to be valid at all.]

It was submitted that there might be a suspension of the rights following upon the adoption. The power and duty of adopting was continued, as for three generations male offspring, or its admitted substitute was required. It was true that an adoption must be either valid or invalid at the time when it took place; but it did not follow that this adoption was invalid for that reason, as it might be that the right of the adopted son to take possession did not accrue till after the death of the widow—an argument which none of the decisions appeared altogether to negative.

[208] Reference was made to—

Digest of the Hindu Law, by West and Buhler, Vol. II, Book II, Section III, 3rd Ed., p. 995.

Mayne's Hindu Law and Usage, paras. 163, 178.

Tagore Law Lectures, 1882.

Judgment of Jackson, J., in *Puddo Kumaree Debee* v. *Juggut Kishore Acharjee*. (1)

Mussumat Bhoobum Mhyee Debia v. *Ram Kishore Acharj Chowdhry* (2)

The Collector of Madura v. *Muttu Ramalinga Sethupati* (*Ramanad Case*). (3)

Sri Raghundha v. *Sri Brozo Kishoro*.(4)

Vellanki Venkata Krishna Row v. *Venkata Rama Lakshmi Narsayya*. (5)

Ram Soonder Singh v. *Surbanee Dossee*.(6)

JUDGMENT.

On a subsequent day, 26th February, their Lordships judgment was delivered by

Sir BARNES PEACOCK.—This is an appeal from a judgment of the High Court at Madras in a suit instituted by the respondent to have it declared that an alleged adoption of the second defendant, by the first defendant was invalid. It appears that Dorasami, who was entitled to certain property, died many years ago, leaving Thayammal, the first defendant, his widow, and also an only son, Kuttisami, his heir-at-law, surviving him.

Kuttisami, the son, married Thangammal, and subsequently died without issue, leaving Thangammal, his widow, who, upon the death of her husband, succeeded as heir to the property.

It is alleged that, after the death of Kuttisami, the son, and during the life of Thangammal, his widow, Thayammal, with permission of sapindas, adopted the second defendant as a son of her deceased husband. Several objections have been taken to that adoption, and, among others, that the son's widow having lawfully adopted a son to him, the father's widow had no power to adopt. The adoption by the son's widow was disputed, but

(1) 5 C. 615. (2) 10 M. I. A. 279. (3) 2 M. H. C. R. 206 = 12 M. I.A. 397. (4) 3 I. A. 154. (5) 1 M. 174 = 4 I.A. 1. (6) 22 W.R. 121.

1887 FEB. 12. — PRIVY COUNCIL. — 10 M. 205 (P.C.) = 11 Ind. Jur. 271 = 14 I.A. 67 = 5 Sar. P.C.J. 10.

it was objected on behalf of the respondent that it was immaterial whether she had adopted or not, for that, even in the absence of such adoption, [209] the survival of the son's widow and the vesting of the estate in her put an end to the right of Thayammal, his mother, to adopt a son to his father.

Their Lordships are of opinion that the objection is fatal to the adoption of the second defendant. It is therefore unnecessary to express an opinion as to other objections to that adoption, or to consider whether there was or was not a valid adoption by the son's widow.

Their Lordships are of opinion that the High Court was correct in considering that the case is governed by the decision of this Committee in the case of *Padmakumari Debi* v. *The Court of Wards* (1) which was founded upon the case of *Mussumat Bhoobum Moyee Debia* v. *Ram Kishore Acharj Chowdhry*.

It was contended by the learned counsel for the appellant that all that was decided by the Judicial Committee in *Bhoobun Moyee's case* was that the son adopted by the mother could not recover the estate from the widow of the son. This appears to have been the view taken by the Lower Courts in *Padmakumari's case.* But this Committee, upon appeal, held that the case went much further. Nothing can be clearer or more explicit than the language used by the Committee in that case. They said: "The substitution of a new heir for the widow was, no doubt, the question to be decided, and such substitution might have been disallowed, the adoption being held valid for all other purposes, which is the view which the Lower Courts have taken of the judgment; but their Lordships do not think that that was intended. They consider the decision to be that, upon the vesting of the estate in the widow of Bhowani (*i.e.*, the son), the power of adoption was at an end and incapable of execution, and if the question had come before them without any previous decision upon it, they would have been of that opinion." Their Lordships entirely concur in that view, and they are of opinion that the adoption, with the permission of sapindas in the present case, could have no greater effect as regards the right to property than the adoption under the deed of permission in the cases to which reference has been made.

For the above reasons they will humbly advise Her Majesty that the judgment of the High Court ought to be affirmed. The [210] respondent not having appeared, there will be no costs of the appeal.

Appeal dismissed.

Solicitors for appellants: Messrs: *Burton*, *Yeates*, *Hart* and *Burton*.

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(1) 8 C. 302 = 8 I.A. 229.

10 M. 210.

1887 MARCH 4.

APPELLATE CIVIL.

10 M. 210.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

REFERENCE UNDER SECTION 39 OF ACT V OF 1882.*
[21st January and 4th March, 1887.]

Madras Forest Act,—Act V of 1882, Sections 14, 39—Indian Limitation Act—Act XV of 1877, Sections 5, 6—Period of limitation—Power to excuse delay.

Delay in preferring an appeal under the Madras Forest Act beyond the period prescribed by Section 14 of that Act, may be excused under Section 5 of the Indian Limitation Act. 1877.

[**Overruled**, 34 M. 505 (509)=5 Ind.Cas. 884=20 M.L.J. 283=7 M.L.T. 132 (135); **Diss.**, 18 M. 99 (112) (**F.B.**); **F.**, 12 M. 1 (5); 14 M. 401 (405); **R.**, 12 M. 168. (172) (**F.B.**); 12 M. 467 (471); 10 A.L.J. 3=16 Ind.Cas. 148 (152); 2 M.L.J. 217 (219).]

THIS case was referred by the Collector of Salem, under Madras Act V of 1882—the Madras Forest Act, Section 39.

The question referred and the circumstances under which it arose appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C. J., and PARKER, J).

Counsel were not instructed.

JUDGMENT.

The appeal as to which this reference is made is preferred under Section 14 of the Madras Forest Act V of 1882, which prescribes the term of 60 days as the period within which the appeal must be preferred.

The appeal was preferred two days out of time.

The question referred by the Collector is whether he has power to excuse the delay under paragraph 2, Section 5 of the Limitation Act of 1877, regard being had to the provisions of Section 6 of the same Act that, when a period of limitation is specially prescribed by any special or local law, nothing in that Act (*i.e.*, the general Limitation Act) shall affect or alter the period so prescribed.

The Collector has recorded his opinion that the general provisions of the Limitation Act cannot apply to a case in which the period of limitation is fixed by a special or local law, and the decision in *Thir Sing* v. *Venkataramier* (1) would at first sight **[211]** appear to support that view. But it must be noted that the decision in that case was governed by the Limitation Act of 1871, Section 6, of which differs in its wording from the corresponding section (also Section 6 of the present Act.

In the Act of 1871, the concluding words of Section 6 were "nothing herein contained *shall affect such law*," but in the present Act the words are "nothing herein contained *shall affect or alter the period so prescribed*."

It was held in *Behari Loll Mookerjee* v. *Mungolanath Mookerjee* (2) and *Golap Chand Nowlucka* v. *Krishto Chunder Doss Biswas* (3) that the object of the alteration was to give persons suing the benefit of the rules contained in the present Act for computing the period within which the suit must be brought, and in *Nijabutoolla* v. *Wazir Ali*, (4) the Judges

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* Referred Case 2 of 1886.

(1) 3 M. 92. (2) 5 C. 110. (3) 5 C. 314. (4) 8 C. 910.

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went further and held that the provisions of Section 5 were generally applicable to all suits and appeals notwithstanding anything contained in Section 6.

We think that the Collector is at liberty to excuse the delay under the second paragraph of Section 5. To do so does not alter the period prescribed by any special law, but is merely the exercise of a descretion which is not expressly prohibited and which is generally applicable.

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10 M. 211.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

MUTTIRULANDI AND OTHERS (*Defendants*) *Appellants* v. KOTTAYAN (*Plaintiff*), *Respondent.** [11th and 28th February 1887.]

Civil Procedure Code, Section 57—Plaint presented in a wrong Court.

In all cases where no option as to the selection of the Court is allowed by law to the plaintiff, a plaint presented in a wrong Court must be returned for presentation in the proper Court.

[R.. 23 B. 679 (681).]

APPEAL from the decree of A. J. Mangalam Pillai, Subordinate Judge of Madura (West), affirming the decree of P. S. Guru-[212] murthi Ayyar, District Munsif of Tirumangalam, in suit No. 673 of 1884.

This suit was brought to recover a certain manyam, situated within the limits of a zamindari village. Both the Lower Courts decreed for the plaintiff.

The defendants appealed to the High Court on the following grounds:—

1. Regulation VI of 1831 precludes Courts of Civil Judicature from taking cognizance of suits of this nature.
2. The Subordinate Judge is wrong in holding that Regulation VI of 1831 does not apply to a zamindari village, but only to ayan villages.

Bhashyam Ayyangar, for appellant.

Subramanya Ayyar, for respondents.

The arguments employed in this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.)

JUDGMENT.

It is admitted in second appeal that the Courts below had no jurisdiction, and that the suit should have been brought under Regulation VI of 1831. The only point argued was whether the plaint having been presented in a Court of Civil Jurisdiction can be returned under Section 57 of the Code of Civil Procedure for presentation in a Revenue Court.

We are of opinion that the wording of the section is imperative, and that in all cases where, as here, no option as to the selection of the Court is allowed by law, the plaint must be returned for presentation in

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* Second Appeal 743 of 1886.

the proper Court; *Prabhakarbhat* v. *Vishwambhar Pandit* (1) and *Bhadeshwar Chowdhry* v. *Gaurikant Nath.* (2)

The decrees of the lower Courts must be reversed and the plaint returned to the plaintiff. The plaintiff must bear defendants' costs throughout.

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10 M. 213.

[213] APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Parker.

PACHAMUTHU (*Defendant No. 5*), *Appellant v.* CHINNAPPAN (*Plaintiff*), *Respondent.** [22nd February and 9th March, 1887].

Indian Limitation Act—Act XV of 1877, *Schedule II, Articles* 91, 120—*Suit for declaration of title—Incidental relief—Setting aside instrument.*

The period of limitation for suits to declare title is six years from the date when the right accrued, under Indian Limitation Act, 1877, Schedule II, Article 120; and this period is not affected by Article 91, though the effect of the declaration is to set aside an instrument as against the plaintiff.

[F., 16 M. 138 (139); Appl., 14 M. 101 (102); R., 22 A. 90 (92); 16 B. 186 (189); 16 M. 294 (295); 26 M. 410 (416); 1 C.L.J. 73 (80); 4 M.L.J. 254 (255).]

APPEAL from the decree of S. Gopalachary, Acting Subordinate Judge of Madura (East), in appeal suit No. 239 of 1885, reversing the decree of T. Venkata Ramayya, District Munsif of Paramagudi, in original suit No. 523 of 1884.

This was a suit for a declaration that the plaintiff was owner of certain land.

In October 1880, the plaintiff brought an action against the defendants, Nos. 1—4, and in November 1880, the plaint land was attached before judgment. In the interval, defendant No. 1, the father of defendants Nos. 2—4, mortgaged tho plaint land to defendant No. 5 under Exhibit J. The same land was subsequently sold in execution of a decree obtained by another creditor against defendant No. 1, and in December 1882, the plaintiff became the purchaser and entered into possession under a certificate dated 26th June 1883. The plaintiff now sued for a declaration as above, alleging that the mortgage to defendant No. 5 was fraudulent and without consideration.

Defendants Nos. 1—4 did not appear.

The District Munsif dismissed the suit on the ground that it was barred under Indian Limitation Act, 1877, Schedule II, Article 91.

The Subordinate Judge reversed his decree and granted the declaration prayed for.

Defendant No. 5 appealed.

[214] *Subramanya Ayyar* and *Rangacharyar* for appellant argued that Article 91 was applicable since the plaintiff in fact sought to have the appellant's mortgage (Exhibit J) set aside.

Mr. K. Brown for respondent relied on (*inter alia*), *Uma Shankar* v. *Kalka Prasad* (I.L.R. 6 All., 75) and *Ikram Singh* v. *Intizam Ali*

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* Second Appeal 287 of 1886.

(1) 8 B. 313. (2) C. 8 835

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(I.L.R. 6, All., 260) and referred to *Raj Bahadoor Singh* v. *Achumbit Lal* (L.R. 6 I.A., 110).

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (KERNAN and PARKER JJ.)

JUDGMENT.

The appellant's principal ground of appeal is that the respondent's cause of action was, at the time of filing of this suit, the 18th of March 1884, barred by limitation.

The plaintiff prays for a declaration "that the 5th defendant has no right whatever to the plaint lands valued at Rs. 300, and that the plaintiff is the owner thereof by right of auction purchase." The appellant contends that Article 91 of the Limitation Act applies. The plaintiff contends that Article 120 applies, but that if Article 91 applied still the suit is not barred.

The facts necessary to refer to and found by the Subordinate Judge are as follows:—

The plaintiff filed a suit No. 632 of 1880 on the 8th of October 1880 against defendant No. 1, and his sons defendants Nos. 2, 3, and 4, on two hypothecation bonds for Rs. 1,040 to recover the amount due, and on the 19th October 1880 served the defendants with notice for an attachment before judgment, and on the 21st November 1880 attached the plaint lands. In the meantime defendant No. 1 executed a mortgage to the defendant No. 5 with possession for 20 years for Rs. 1,000, dated 16th October 1880, which was duly registered (Exhibit J). Suit No. 147 of 1881 was brought against defendant No. 1 by another creditor of his, and judgment having been obtained, the plaint lands were attached in that suit, and the plaintiff became the purchaser thereof on the 6th December 1882 and got a certificate dated 26th June 1883 (Exhibit E). The plaintiff obtained possession from the Court under Section 318 of the Code of Civil Procedure in August 1883 and has since been in possession. After the execution by defendant No. 1 of the mortgage to defendant No. 5 (Exhibit J), the plaintiff's son on behalf of the plaintiff and with his knowledge [215] presented a petition to the Registration officer not to register that mortgage, alleging that it was executed with fraudulent intent as suit No. 632 of 1880 was pending.

The Subordinate Judge differing from the Munsif has found that the 5th defendant's mortgage (Exhibit J) was not executed for valuable consideration and was executed to defeat and delay execution by his creditors.

It is true, as argued by the plaintiff's Vakil, that fraud must be proved not presumed. But the evidence in this case being believed by the Subordinate Judge, we cannot say that, on the facts, he was wrong in holding that fraud was proved. It has not been made ground of appeal that, if he fraud was correctly found, still the action would not lie, nor was this question raised in the Lower Courts.

It is not clear when the facts that entitled the plaintiff to sue became known to him, within the meaning of Indian Limitation Act, Schedule II, Article 91, and if we were of opinion that the case came within that section we should direct further inquiry. But we think that Article 91 does not apply as the plaintiff does not and did not seek to cancel or set aside the mortgage of the 16th of October, 1880. No doubt a declaration that defendant No. 5 has no title to the plaint land would be to that extent equiva-

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lent to setting aside that mortgage. But such declaration would still leave the deed to operate as between the parties thereto, and therefore would not amount to cancelling or setting aside that deed. Moreover the plaintiff has no title or interest to set aside the deed as between the parties thereto. Assuming that the plaintiff had a right to file a suit for the declaration prayed, is that right barred under any other provision of the Limitation Act? The only article, which it appears to us, affects plaintiff's right is Article 120 which prescribes the period of six years from the date when the right accrued. The plaintiff purchased in December 1882, and he relies on his right as a purchaser to have the declaration. No doubt the plaintiff had information before his purchase, and probably in November 1880, that the deed to the defendant No. 5 was executed without consideration and was fraudulent, and he purchased the interest of the defendant at auction, but we do not think these matters should be now considered as the plaintiff's right to maintain this suit, subject to the questions of limitation, is not [216] made a ground of appeal and as the deed of mortgage to the defendant No. 5 is found to be fraudulent.

This second appeal is dismissed with costs.

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10 M. 216 = 1 Weir 741.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

QUEEN-EMPRESS *v.* BAODUR BHAI AND OTHERS.*
[18th February and 22nd March, 1887.]

Madras District Municipalities Act—IV of 1884, *Sections* 191, 192, 193, 198—*Butcher's licenses—Private market, meaning of.*

A Municipal Council, under the Madras District Municipalities Act, refused to give licenses to certain persons keeping butchers' shops not used as slaughter-houses, except on the condition that they should remove to a fixed market:

Held, that butchers' shops are not "private markets" within the meaning of the Act, and that the action of the Municipal Council was *ultra vires*.

THIS was a petition under Sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise an order of the District Magistrate of Bellary dismissing the complaint in Case No. 43 of 1886 on the file.

The Acting Government Pleader (*Mr. E. B. Powell*), for the Crown.

The accused were not represented,

The facts and arguments sufficiently appear for the purpose of this report from the judgment of the Court (COLLINS C. J., and PARKER, J.)

JUDGMENT.

The Prosecuting Inspector to the Municipal Council of Bellary laid a complaint before the District Magistrate against four persons for failing to take out licenses for their shops, under Section 191, Clause 2 of the District Municipalities Act. The accused are keepers of butchers' shops in Cowle Bazar and have never hitherto been called on to take out licenses for their shops. They are willing to take out licenses, but the Municipal Councillors require them to remove their shops to the municipal market in

* Criminal Revision Case 456 of 1886.

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APPELLATE CRIMINAL.

10 M. 216 = 1 Weir 741.

[217] order that the District Surgeon and his assistant may be able to see daily whether they are selling good meat, such supervision being difficult if butchers' shops are scattered all over the town.

The District Magistrate held that the action of the council in declining to give licenses to existing shopkeepers, except on the condition that they should remove to a fixed market, was *ultra vires*, and dismissed the complaint. This criminal revision petition is presented by the Public Prosecutor.

The first point for determination is whether the defendants are bound to take out licenses for their shops. By Section 198, Clause I, it is provided that the owner of every *private market* for the sale or exposure for sale of animals or articles of food shall obtain from the Municipal Council a license to keep open such market, and by Clause 2, the Municipal Council is empowered to refuse such license, if, in their opinion, the market is by position, construction, or arrangement unfit for the purpose of a market and calculated to be a nuisance to the neighbourhood.

Are then these butchers' shops, private markets, for the sale of articles of food within the meaning of the Act?

The term "market" is defined in Section 3, Clause 25 of the Act as "any place ordinarily used for the sale of meat, &c., which is, at the passing of this Act, a licensed market, or which may hereafter be declared by the Municipal Council to be a market."

These shops were not licensed markets at the passing of the Act, nor have they since been declared by the Municipal Council to be markets.

It is contended, however, that in Section 191, Clause 2, it is enacted that *no place in any Municipality* shall be used as a slaughter-house or for the slaughtering of any animal intended for food *or for selling or storing the flesh thereof*, unless a license for such use thereof has been previously obtained from the Chairman.

This section, however, is one of those relating to "slaughterhouses," and the intention of the legislature in Sections 191-193 was clearly to provide for the maintenance of public or licensed slaughter-houses in places under Municipal control, in which slaughter-houses animals intended for food might be slaughtered, or the flesh thereof sold or stored for sale. It is necessary that Clauses 2 and 3 of Section 191 should be read together, and a reasonable construction put upon them. Clause 2 is wide enough in its terms to be construed into a prohibition against killing a chicken intended [218] for food in any house within the Municiplity, but that such cannot have been the intention of the legislature may be inferred from Clause 3, which expressly prohibits the slaughter of any cattle, sheep, goats or pigs within the Municipality except in a public or licensed slaughter-house.

Having regard to the subject matter of legislation (slaughter-houses) the preceding clause and the context, we think that the expression "the flesh thereof" in Clause 2 can only be taken to mean the flesh of the animal intended for food and slaughtered in the same place, otherwise there was no necessity for Clause 3 which prohibits the slaughtering of cattle, sheep, or pigs otherwise than in a public or licensed slaughter-house.

If the butchers used the premises on which their shops are situated as slaughter-houses, their action would be punishable under Section 192. This, however, is not alleged in the complaint. If they merely sold in their shops a supply of meat obtained elsewhere, which is all that is apparently alleged, they have committed no offence.

The view we have taken appears to be similar to that taken by the High Court of Bombay in *Raja Paba Khoji, in re* (1) and *Queen-Empress* v. *Magan Harjivan* (2).

On these grounds, the order dismissing the complaint was right, and we must dismiss this petition.

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APPELLATE CRIMINAL.

10 M. 216 = 1 Weir 741.

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10 M. 218 = 1 Weir 566.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

MILLARD AND ANOTHER, *in re.** [22nd March and 1st April, 1887.]

Penal Code, Sections 109 *and* 494—*Native Christian—Marriage by relapsed convert.*

A was baptized in infancy into the Roman Catholic Church, but subsequently relapsed, with the rest of her family, into Hinduism and was married to a Hindu. Her Hindu husband since discarded her, and alleged that he would not have married her if he had known that she had been baptized. A was subsequently re-admitted into the Roman Catholic Church and married by B, a priest, to a Roman Catholic during the lifetime of her Hindu husband.

[219] *Held*, that A's marriage with the Hindu was subsisting and valid at the time of her Christian marriage; that she was guilty of the offence of bigamy; and that B was guilty of abetting that offence. *Lopez* v *Lopez* (I.L.R., 12 Cal., 706) discussed.

[R., 18 C. 264 (269); 17 M. 235 (245) (F.B.); 30 M. 550 = 6 Cr. L.J. 338 = 17 M.L.J. 476 = 2 M L.T. 345; 49 P R. 1907; U.B.R. (1897—1901), Civil, p. 488 (490).]

PETITION under Sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the proceedings of J. Hope, the Sessions Judge of South Arcot in Calendar Case No. 2 of 1887, convicting the first and second accused, respectively, of the offences of marrying during the lifetime of a husband, and of abetting that offence under Sections 494 and 109 of the Indian Penal Code.

The facts of this case, which were not in dispute, were stated by the Sessions Judge as follows:

"During the famine that prevailed ten years ago the first accused Irisi, then a little girl, was taken by her parents away from their village Polakunam in the Tiruvannamalai taluk to Alladi in the Tindivanam taluk. There they, along with other people, were baptized by the Roman Catholic priest of the place. Almost immediately after, they returned to their own village and Irisi's father died. This was about 1877. In 1885 Irisi was married to the first witness Subban in accordance with the custom of the pariah caste (to which the parties belong) and with religious rites which were non-Christian. She cohabited with her husband for about a month, during which she conformed to his religion. The immediate cause of their separation does not appear. Possibly it was Subban's discovery that she had once been baptized. At any rate he now alleges he was deceived and would not have married her had he known the fact. And when the Roman Catholic priest, Mr. Millard, who is the second accused in Court, tried subsequently to effect a reconciliation between them, Subban refused to take her back on the ground of her

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* Criminal Revision Case No. 55 of 1887.

(1) 9 B. 272. (2) 11 B. 106.

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being a Christian, and even consented to pay Rs. 20 to meet the expenses of her second marriage.

"In September 1886, Irisi was married by the Reverend Mr. Millard under her Christian name of Therese to a Christian named Zachary. If her marriage to Subban was a valid marriage she must be found guilty of bigamy and the priest must be found guilty of abetting her in the commission of the offence."

Grant and *Laing* for petitioners cited (*inter alia*) ex parte **[220]** *Karaka Nachiar* (1), *Gopal Singh* v. *Dhungazee* (2), *The Government of Bombay* v. *Ganga* (3), and *Weir's Criminal Rulings*, Ed. II, page 216.

The *Government Pleader* (Mr. *Powell*) in support of the conviction cited also *Regina* v. *Sambhu Raghu* (4).

The arguments further adduced on this petition appear sufficiently, for the purpose of this report, from the judgment of the Court (COLLINS, C.J., and PARKER, J.).

JUDGMENT.

The first accused Irisi has been convicted under Section 494 of the Penal Code for marrying again during the lifetime of her husband Subban, and the second accused, a Roman Catholic priest, has been convicted for abetting her in the commission of that offence.

The facts found are that in 1877 Irisi, when a little girl, was, with her parents, baptized into the Roman Catholic Church, but that, after her father's death, the family relapsed into Hinduism; that Irisi was married in 1885, in accordance with the custom of the pariah caste, to one Subban; that, after some cohabitation, Subban made the fact of her former baptism a reason for discarding her; that she has since been re-admitted to the Roman Catholic Church by the second accused and was married by him to one Zachary, a Roman Catholic Christian, in 1886.

The Sessions Judge held that the marriage between Irisi and Subban, not having been dissolved under the Native Converts Marriage Dissolution Act XXI of 1866, was a valid subsisting marriage at the date of Irisi going through the form of a Christian marriage with Zachary, hence that both the accused were liable to conviction, but he imposed a merely nominal punishment, on the ground that they had acted under a mistaken view of the law.

The grounds on which we are asked to set aside this conviction on revision are—

(1) That the pariah marriage between Irisi and Subban was legally void.

(2) That even if valid, it was dissoluble by the Canon law of the Roman Catholic Church, and that it should be presumed it was legally dissolved.

[221] On the first ground it is contended that Irisi never reverted to Hinduism at all, and hence that her marriage with Subban was void under the Indian Christian Marriage Act (Act XV of 1872),, Section 4. But there was ample evidence on which the Judge was entitled to find that the family had relapsed into Hinduism after their return to their own village, and we must, therefore, hold that the marriage of Irisi and Subban was a valid marriage.

The second question is, whether that marriage had been legally dissolved at the date of the alleged Christian marriage. Mr. Laing contends

(1) 3 M.H.C.R. 254. (2) 3 W.R. 206. (3) 4 B. 330. (4) 1 B. 347.

that it is dissoluble by Canon law, and that, though there is no evidence on record that it was so dissolved, there is a legal presumption—the marriage having been performed—that all the necessary preliminaries were properly observed.

We are clearly of opinion that in this case there is no such presumption. The rule we are asked to apply to the facts before us is, that when once a marriage in fact has been proved, there arises a presumption, in the absence of evidence to the contrary, that there has also been a marriage in law. There can be no such presumption as to a form of marriage gone through, when a former valid subsisting marriage has been proved. In such case, the *onus* is entirely upon the defence to show that the earlier subsisting marriage has been validly dissolved.

We are then asked to admit evidence to prove (1) that the marriage between Subban and Irisi could be dissolved by Canon law, and (2) that it was in fact so dissolved; and we are referred to the case of *Lopez* v. *Lopez* (1) in support of the contention that a dispensation, according to the rule of the Church of Rome, can give validity to a marriage between persons within prohibited degrees when such parties are not governed by English statute law, but by the customary law of the class to which they belong.

The rule there laid down can have no application to such a case as the present, where one of the contracting parties, *viz.*, Subban, has never been governed by the customary law of the Roman Catholic Church. It would be irrelevant, therefore, to take evidence upon this subject, since no rules of Canon law could operate to deprive Subban of his wife.

It is then urged that the Native Converts Marriage Dissolution Act (Act XXI of 1866) does not apply to Roman Catholics and, in [222] fact, that Roman Catholics have always been exempted from the operation of the Marriage Acts passed by the Governor-General in Council. In support of this contention we are referred to Section 34 of that Act and the Indian Christian Marriage Act (Act XV of 1872), Section 65.

The object of Act XXI of 1866 was to legalize, under certain circumstances and with a certain procedure, the dissolution of marriages of native converts to Christianity who were deserted or repudiated on religious grounds by their wives or husbands, and Section 34 of the Act declared that nothing in that Act should be taken to declare invalid any marriage of a native convert to Roman Catholicism if celebrated in accordance with the rules, rites, ceremonies and customs of the Roman Catholic Church. The section does not exempt Roman Catholic converts from the procedure laid down by the Act, but merely declares that nothing in that Act shall render a Roman Catholic marriage invalid. This would certainly not render it lawful for a Roman Catholic priest to marry a woman to another man, her own husband being still living.

All that is enacted by Section 65, Act XV of 1872, is a prohibition against the solemnization of a marriage between Roman Catholic Christians under Part VI of that Act, *i.e.*, by a certificate granted by a person licensed under the Act. The effect of the change of the law was merely that Roman Catholics could only have their marriages solemnized by their own clergy according to the rites of their church, nothing being said about prohibited degrees—see *Lopez* v. *Lopez* (1)—but it certainly will not

(1) 12 C. 706.

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authorize a Roman Catholic clergyman to solemnize a marriage between a man and a woman who, by the law of the land, is still the wife of another man.

We entertain no doubt that the conviction was right and must, therefore, dismiss this petition.

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10 M. 223.

[223] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

SUBRAMANYAN AND OTHERS (*Defendants*), *Appellants v.* GOPALA AND OTHERS (*Plaintiffs*), *Respondents.** [18th October, 1886, and 14th April, 1887.]

Malabar law—Karnavan, decree against,—Female not incapable of managing the affairs of a tarwad—Res judicata.

The senior female member of a Malabar tarwad, who managed its affairs, instituted a suit on behalf of the tarwad and in the capacity of karnavan :

Held, (1) that a female is not precluded from managing the affairs of her tarwad when there is no male member in her family capable of performing the duties of a karnavan ; and

(2) that the junior members of the tarwad were, in the absence of fraud shown, constructively parties to the suit, and were accordingly bound by the decree passed in it.

[R., 15 M. 19 (22) ; 20 M. 129 (136) (F.B.).]

APPEAL against the decree of V. P. deRozario, Subordinate Judge of South Malabar in appeal No. 149 of 1885, affirming the decree of N. Sarvothama Rau, District Munsif of Palghat, in original suit No. 1038 of 1883.

This was a suit brought by the plaintiffs, who together with their mother, defendant No. 9 constitute a Malabar tarwad, to redeem a certain piece of land. The land in question was alleged to have been demised in 1838 by the then karnavan of the plaintiff's tarwad on kanam to one Annamalai, who assigned his interest to a devasom belonging to defendants Nos. 1 to 4 but under the management of defendant No. 5. Defendants Nos. 1 to 4, and defendants Nos. 6 and 7 who were tenants of the land in question, did not appear. Defendant No. 8 claimed the jenm right in the land. Defendant No. 9 had brought original suit No. 210 of 1881, against defendant No. 8, to redeem the alleged demise of 1838 made by her tarwad ; but it was dismissed, it being found that the jenm right was in defendant No. 8 and not in the tarwad of defendant No. 9. Defendant No. 8 and [224] defendant No. 5 (who claimed through him) accordingly now pleaded that the matter was *res judicata*. The plaintiff in reply alleged that defendant No. 9, being a female, was not legally competent to represent or sue on behalf of the tarwad, and that they were not affected by the decree in the former suit. Both the lower Courts decreed for the plaintiffs. Defendants Nos. 5 and 8 appealed, defendant No. 9 being joined as respondent No. 4.

This second appeal coming on for hearing on the 18th October 1886, the Court made an order directing the Subordinate Judge to try the following issues, *viz.*—

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* Second Appeal No. 940 of 1885.

1887 APRIL 14. — APPELLATE CIVIL. — 10 M. 223.

(1) Whether the respondents' tarwad was sufficiently represented in the former suit by respondent No. 4.

(2) Whether the decree in that suit against respondent No. 4 was passed against her as representing the tarwad and is binding as against the other respondents.

The Subordinate Judge returned the following finding, and decided both issues in the affirmative :—

"Fourth respondent (ninth defendant) Emuri Amma is the senior lady in her tarwad. First plaintiff is her grandson and second and third plaintiffs are her daughters. At the date of the former suit (No. 210 of 1881) brought by ninth defendant, first plaintiff, the only male member in the family, was a minor. Ninth defendant, therefore, was quite competent to sue on behalf of the tarwad. The proceedings show that she sued not on her own behalf but on account of the tarwad. The land was described in the plaint as tarwad land, and she sued to recover as the representative of her deceased karnavan. The final decree in favour of fifth and eighth defendants passed in that suit is therefore binding on the plaintiffs. It is not pretended that the decree was obtained by fraud or collusion. The record shows clearly that the former suit was prosecuted by ninth defendant with due diligence on behalf of her tarwad. Exhibits S and T and X and Y now produced by plaintiffs show that ninth defendant joined her late karnavan in demising tarwad lands and in suing for their recovery. These exhibits tend to show that ninth defendant took part in the management in the lifetime of her karnavan and was not unqualified to manage on the death of the karnavan. Exhibit VIII shows that, after the death of her karnavan, she solely demised tarwad property. In Exhibits V and W, two simple bonds executed by ninth defendant in 1051 and 1053, plaintiffs also appear as [225] executants ; but they were admittedly minors at the time, and it cannot be contended that they joined in the bonds, because they were joint managers with ninth defendant and not because the obligees required their junction.

"I find both the issues in favour of the appellants."

Bhashyam Ayyangar, for appellants.

Mr. *Wedderburn* and *Sankara Nayar*, for respondents.

The arguments adduced in this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and BRANDT, JJ.).

JUDGMENT.

It is found by the Subordinate Judge that respondent No. 4 sufficiently represented her tarwad in the former suit, and that she instituted and conducted it in her capacity as karnavan and on behalf of her tarwad. Assuming that these findings can be accepted, there can be no doubt that appellants must succeed and the suit must fail. But it is urged that, as a female, the respondent No. 4 was not lawfully entitled to the karnavanship of her family when she had a minor son. We are unable to assent to this contention. We are aware of no usage of Malabar which precludes a female from managing the affairs of her tarwad when there is no male member in her family capable of performing the duties of a karnavan.

It is next contended, with reference to the decision in *Sri Devi* v. *Kelu Eradi* (1), that it is open to the respondents to challenge the decision passed against their karnavan in original suit No. 210 of 1881. It

(1) 10 M. 79.

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must be observed that in that case, the plaintiffs in the second suit were some of the junior members of a Malabar tarwad, whilst the previous suit was instituted not by the karnavan but by a stranger claiming from the karnavan and the senior anandravan a portion of the tarwad property. Our decision therein was in accordance with the ruling of the Full Bench of this Court reported in *Ittiachan* v *Velappan* (1); but in the case before us, the former suit was instituted by the representative of the estate and on behalf of the tarwad; and, unless fraud is shown, we must take it that respondents Nos. 1 to 3 were constructively parties to that suit.

We reverse the decrees of the Courts below and direct that the suit be dismissed with costs throughout.

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10 M. 226 = 11 Ind. Jur. 332.

[226] APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Parker.

CHANDRAMMA (*Defendant* No. 1), *Appellant v.* VENKATRAJU (*Plaintiff*) *Respondent.** [22nd February and 19th April, 1887.]

Regulation XXIX of 1802, *Section 7—Office of karnam in a zamindari village—Succession to—Female claimant—Incapacity of next heir.*

The karnam of a zamindari village having died, leaving a widow his heir, the zamindar appointed her to the office of karnam. The nearest male sapinda of the deceased karnam (from whom he was divided) sued to establish his right to the office of karnam :

Held, (1) that a woman cannot hold the office of karnam ;

(2) that when the immediate heir is incapacitated, the nearest male sapinda of the deceased karnam is entitled to succeed to the office.

[R., 12 M. 188 (191).]

APPEAL from the decree of T. Ramasami Ayyangar, Subordinate Judge at Cocanada, in appeal suit No. 38 of 1885, reversing the decree of T. R. Malhari Rau, District Munsif of Peddapuram, in original suit No. 128 of 1884.

The plaintiff sued for a declaration of his right to the office of karnam in a zamindari village and to have the appointment of defendant No. 1 set aside.

On the death of the karnam of the zamindari village of Kandregula, the zamindar, defendant No 2, appointed defendant No. 1 to succeed him. Defendant No. 1 was the widow and heir of the deceased karnam, and was a minor at the time of her appointment. The plaintiff was the nearest male sapinda of the deceased karnam, from whom, however, he had been divided; he claimed the office on the ground that defendant No. 1, being a female, was incapacitated to fill the office.

The District Munsif dismissed the suit on the ground that the plaintiff, being divided from the late karnam, had no title to maintain it.

His decree was reversed by the Subordinate Judge, against whose decree defendant No. 1 preferred this second appeal.

[227] *Subba Rau*, for appellant.

Bhashyam Ayyangar, for respondent.

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* Second Appeal No. 336 of 1886.

(1) 8 M. 484.

1887 APRIL 19.

APPELLATE CIVIL.

10 M. 226 = 11 Ind. Jur 332.

The arguments adduced in this second appeal appear sufficiently, for the purpose of this report, from the judgments of the Court (KERNAN and PARKER, JJ.).

JUDGMENTS.

KERNAN, J.—It has been found that the plaintiff was divided from the late karnam of Kandregula village, the husband of the appellant (defendant No. 1), who is the heir of her husband, after whose death she was appointed karnam by defendant No. 2. The plaintiff is karnam of another village called Kanapur and seeks, in this suit, to cancel the appointment by defendant No. 2, and to have a decree declaring him karnam, and to gain possession of mirasi lands attached to the office. The plaintiff is a sapinda of the late karnam and puts forward his claim on the ground that defendant No. 1, being a female, is incapacitated to fill the office.

Regulation XXIX of 1802, Section 7, directs that in filling vacancies in the office of karnam the heir of the preceding karnam shall be chosen by the landholders concerned, except in cases of incapacity, on proof of which the landholders shall be free to exercise their discretion in the nomination of persons to fill vacancies. The plaintiff contends that, by reason of her sex, defendant No. 1 is incapacitated to fill the office. No doubt it has been so decided in this Court (see the cases collected in *Venkata* v. *Rama*) (1). In those cases, the plaintiff, a female, sued the zamindar to be declared karnam as heir of the deceased karnam. The zamindar, it was held, was entitled to resist the claim. In this case the female is not plaintiff and the zamindar has appointed her. However, looking to the duties to be performed by karnam as specified in the regulation, many of which are for public purposes, I am not able to see that the special facts of this case justify the zamindar in making the appointment, or relieve the appellant, defendant No. 1, from the incapacity arising from her sex.

But the question now is whether the plaintiff, respondent, had title to maintain this suit. He is not the heir of the deceased karnam, and though the heir may be incapacitated, and though the plaintiff is a sapinda of the deceased karnam, is he entitled to the office against the will of the zamindar? Section 7 of the Regulation provides that in filling vacancies in the office of karnam, the [228] heirs of the preceding karnam shall be chosen by the landholder, except, in case of incapacity, the landholder shall be free to exercise his discretion in the nomination of the person to fill the vacancy.

The zamindar has not nominated the plaintiff to the office. Therefore, he has no title to maintain this suit, unless the true construction of the regulation is that when the immediate heir is incapacitated, a sapinda of the deceased karnam, who is not his heir, is entitled to succeed to the office. There is no such provision in the regulation. This case is an illustration of the inconveniences of such construction; as here the plaintiff is divided from the family of the deceased karnam and is already a karnam in another village. I am not aware that the exact point has yet been raised and decided. But many cases appear to have been decided adopting such construction—see *Venkayya* v. *Subbarayudu* (2). I think, therefore, the appeal must be dismissed with costs.

PARKER, J.—The karnam of Kandregula having died, the zamindar, defendant No. 2, appointed his widow, defendant No. 1, to the office. She

(1) 8 M. 249 (257). (2) 9. M. 283.

1887 APRIL 19. — APPELLATE CIVIL. — 10 M. 226 = 11 Ind. Jur. 332.

was no doubt the nearest heir to the deceased, but was incapacitated, by her sex, from holding the office of karnam—*Venkataratanamma* v. *Ramanujasami* (1).

The plaintiff, the present claimant, is found to be the nearest male sapinda of the deceased, and the question is whether he has a right to sue, though not the nearest heir.

The tendency of the decisions has been that under Regulation XXIX of 1802, Section 7, the zamindar is bound to appoint from among the heirs of the deceased karnam, in order that the office may remain hereditary in the family, but passing over the nearest heir in case of personal incapacity—*Venkatanarayana* v. *Subbárayudu* (2) and *Venkayya* v. *Subbarayudu* (3). If the incapacity arise from minority, and another member of the family be appointed, he cannot be displaced on the nearer heir attaining majority—*Venkatanarayana* v. *Subbarayudu.*

We were referred to the judgment of this Court in second appeal No. 735 of 1882 (unreported). That was a case in which a minor had been appointed karnam and sued for the emoluments of the office, and all that the Court held was that he was entitled to the emoluments until the appointment was regularly set aside.

[229] That case has, therefore, no bearing upon the present, which is a suit to set aside an appointment.

Under the circumstances the decree passed by the Subordinate Judge was right and the second appeal must be dismissed with costs.

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10 M. 229 = 11 Ind. Jur. 331.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

RAMACHANDRA (*Plaintiff*), *Appellant v.* NARAYANASAMI (*Defendant*), *Respondent.** [16th November, 1886, and 30th March, 1887.]

Rent Recovery Act (Madras Act VIII of 1865), *Section* 13—*Who entitled to proceed under —Attachment held good as to part.*

A granted two villages in perpetuity to B under a deed, reserving a certain rent to himself which was to be recovered "according to the Act" if it fell into arrear. The rent remained unpaid for two years, and A obtained an attachment for the whole arrear under the Madras Rent Recovery Act:

Held, (1) that A was entitled to proceed as landlord under the Madras Rent Recovery Act;

(2) that the attachment held good for such amount of rent as was recoverable under that Act—*Ramasami* v. *The Collector of Madura* (4) discussed.

[Diss., 27 M. 465 (470) = 14 M.L.J. 81 (F.B.); N F., 29 M. 75 (76); F., 31 M. 22 (23) = 17 M.L.J. 479 = 3 M.L.T. 29; R., 35 M. 139 (140) = 9 Ind. Cas. 738 = 21 M.L.J. 570 (572) = 9 M.L.T. 231 = (1911) 1 M.W.N. 139 (140); D., 26 M. 260 (262).]

APPEAL against the decree of H. T. Knox, Acting District Judge of North Arcot, reversing the decree of G. W. Fawcet, Acting Sub-Collector of North Aroct.

This was a summary suit brought under Act VIII of 1865 against the manager of the Kangundi Zamindari under the Court of Wards to procure

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* Second Appeal No. 963 of 1885.

(1) 2 M. 312. (2) 9 M. 214. (3) 9 M. 283. (4) 2 M. 67.

the release of property alleged to have been illegally distrained and to recover damages. 1887 MARCH 30.

The plaintiff held under a deed of grant from the Kangundi Zamindar, (Exhibit A) dated 22nd October 1875, therein described as a "permanent patta" of certain villages, reserving a rent of Rs 350 "payable according to the kistbunds of each year," with regard to which it contained the following term:— APPELLATE CIVIL.

[230] "If it is allowed to fall into arrears without being paid in the said manner, the same will be recovered according to the Act with interest and batta for establishment." 10 M. 229 = 11 Ind. Jur. 331.

The rent having fallen into arrear for two Faslies, the defendant distrained for the whole arrear under Act VIII of 1865. The Sub-Collector held that the plaintiff was not a tenant of the defendant within the meaning of Act VIII of 1865, and that in itself the distraint was illegal "inasmuch as it purported to be on account of arrears due for more than a year," and passed a decree for the release of the property and for damages. The District Judge reversed this decree, and, with reference to an objection as to stamp duty (alluded to in the judgment of the High Court), observed in paragraph 5 of his judgment:—

"The appellant did not pay the stamp duty necessary to cover a claim to recover the property released from attachment, and, as the property is in the hands of the plaintiff, and he will in any case have to proceed against him in a regular suit, does not press his claim."

The plaintiff appealed.

Ramachandra Rau Saheb, for appellant.

Ananda Charlu, for respondent.

Besides the authorities discussed in the judgment *Zinulabdin Rowten* v. *Vijien Virapatren* (1) was cited for the appellant.

The arguments further adduced in this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and PARKER, J.).

JUDGMENT.

The plaintiff holds two villages under a permanent lease and the defendant has attached certain properties under the Rent Recovery Act for arrears said to be due for Faslies 1292 and 1293. The suit is to set aside the attachment and for damages for illegal distraint.

The Sub-Collector decreed for the plaintiff and awarded Rs. 35 as damages, but the District Judge reversed the decision on appeal and dismissed the suit with costs.

Three points were argued on second appeal:—

(1) That the distraint was illegal, as the defendant had no right to proceed under the Rent Recovery Act.

[231] (2) That (granting the defendant had such right) the distraint was illegal, as process must be taken within one year and defendant had distrained for kists of Fasli 1292 more than one year due.

(3) That the Court had given a relief not asked for, inasmuch as the property had been returned to plaintiff.

With regard to this last point, there was no necessity for the defendant to pay stamp duty for the recovery of the property which had been restored to plaintiff's possession. The effect of this reversal

(1) 1 M. 49.

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of the Sub-Collector's decision was to restore the attachment, and the fifth paragraph of the District Judge's decision is based on a misapprehension.

With regard to the second objection there is no reason why the attachment should not hold good for the amount of such kists as may be recoverable under the Act.

The first ground of appeal is the most important, *viz.*, whether defendant is entitled to proceed under the Act at all. The wording of Exhibit A shows that the parties regarded the Act as applicable to them, but they would not be competent to legislate for themselves, and could not by mutual agreement give the Revenue Courts jurisdiction.

It is admitted that under the decisions in *Appasami* v. *Rama Subba* (1), and *Subbaraya* v. *Srinivasa* (2) the plaintiff would be a "tenant" within the meaning of the Rent Recovery Act, but it is contended that in passing these decisions the learned Judges overlooked the decision of the Privy Council in *Ramasami* v. *The Collector of Madura* (3), in which it was held that the interchange of pattas and muchalkas contemplated by the Act and the remedies provided in Sections 8 and 9 would only be available between landlords and tenants engaged in actual cultivation of the lands. This decision has been followed in *Rama* v. *Venkatachalam* (4).

We are not able to see that there is any irreconcilable conflict in the decisions. It may be that the defendant and plaintiff, though not landlord and cultivating tenant between whom pattas and muchalkas must be interchanged, or who must have agreed to dispense with pattas and muchalkas, are yet landlord and tenant authorized under Section 13 of the Act to have recourse to the [232] remedies provided therein. Exhibit A shows that such agreement in writing existed, and that it was understood by the parties that they stood to each other in a relation to which the provisions of the Act would apply. This view is consistent with that taken by Morgan, C.J., in *Gopalasawmy Mudelly* v. *Makkee Gopalier* (5).

The decision of the District Judge appears to us to be correct, and we dismiss the second appeal with costs.

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10 M. 232 (F.B.) = 2 Weir 181.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Brandt, and Mr. Justice Parker.

QUEEN-EMPRESS *v.* SHEIK BEARI AND OTHERS.*
[13th October, 1886 and 29th April, 1887.]

Criminal Procedure Code, Section 195—Sanction to prosecute—Notice to accused.

A conviction for preferring a false complaint is not illegal only by reason of the prosecution having been sanctioned without notice previously given to the accused.

Sanctioning a prosecution for an offence is a judicial act, and the party to whose prejudice it is done must be previously heard and a judgment formed upon legal evidence. In cases in which the Magistrate dismisses the original complaint upon a report from the police, there is no legal evidence before him on which to

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* Criminal Revision Cases Nos. 226, 234 and 242 of 1886.

(1) 7 M. 262. (2) 7 M. 580. (3) 2 M. 67.
(4) 8 M. 576. (5) 7 M.H.C.R. 312.

form his judgment. In cases, however, in which the Magistrate examines the complainant and hears the evidence and acquits or discharges the accused, and then, without notice to the complainant, sanctions his prosecution for preferring a false charge, sanction cannot be said to be improperly given.

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[F., 13 Ind. Cas. 111 (112); R., 37 C. 250 (256) = 10 C.L.J. 564 = 11 Cr.L J. 37 (39) = 14 C. W. N. 330 = 4 Ind. Cas. 710; 23 M. 210 (212) = 1 Weir 187; 12 Bom. L. R. 229 = 11 Cr.L.J. 338 (339) = 5 Ind. Cas. 971; 11 Cr.L.J. 527 (529) = 7 Ind. Cas. 743; 8 M.L.T. 205 (207); (1912) M.W.N. 499 (F.B.) = 14 Ind. Cas. 305 = 11 M.L.T. 367 = 22 M.L.J. 419 = 13 Cr.L J. 209; 2 S.L.R. 11 (Cr.) = 10 Cr L.J. 225; D., 11 M. 500; 27 M. 54 (57).]

CRIMINAL Revision Cases Nos. 226 and 234 of 1886 were cases taken up by the High Court in the exercise of its powers of revision under Sections 435 and 439 of the Code of Criminal Procedure.

In criminal revision case No. 226 of 1886 the District Magistrate of South Canara had dismissed the charge of preferring a false charge in Calendar case No. 12 of 1886, on the ground that the prosecution of the accused had been sanctioned by the Deputy Magistrate of South Canara on the report of the police without an opportunity of proving his case having been given to the accused.

[233] In criminal revision case No. 234 of 1886 J. D. Goldingham, Sessions Judge of Bellary, had acquitted the accused charged with preferring a false charge, on the ground that the prosecution had not been legally sanctioned. The circumstances were stated as follows :—

"Prisoner is charged with preferring a false charge before the Village Magistrate of Harikbavi and before the Second-class Magistrate of Kudlighi, charging one Madhava Rau and others with having broken open her house and stolen certain property therefrom. On the 24th September the accused preferred the charge in question before her Village Magistrate. He sent it on to the Taluk Magistrate and the Taluk Magistrate referred it to the police. On the 18th October the police sent to the Magistrate a referred charge sheet stating the case was false and asking for sanction to prosecute the complainant. After waiting until another and a different case was disposed of, in which Madhava Rau charged complainant and her son and brother with assault, the Magistrate took a statement from the accused on the 5th November, and on 8th November recorded a proceeding under Section 195 of the Code of Criminal Procedure, giving his sanction to prosecute her for preferring a false charge under Section 211 of the Indian Penal Code."

The Sessions Judge cited and discussed in his judgment *Government* v. *Karimdad* (1), *Empress* v. *Salik Roy* (2), *Empress* v. *Bhawani Prasad* (3), *Ramasami* v. *Queen-Empress* (4), and *Queen-Empress* v. *Ganga Ram* (5).

Criminal revision case No. 242 of 1886 was referred for the orders of the High Court under Section 438 of the Code of Criminal Procedure by J. B. Pennington, District Magistrate of Tanjore.

The case was stated as follows:

"One Venkatachala Tevan, of Unjiaviduthi, in Patukota taluk, charged Viran, of Kaliranviduthi, and six others on the 15 January 1885 before the station-house officer of Tiruvonam with having committed the offences of house-breaking and theft under Sections 457 and 380 of the Indian Penal Code. The station-house officer, after inquiry, referred the case, on the 3rd February 1885, to the Second-class Magistrate of Patukota taluk as false, and **[234]** prayed for sanction for prosecuting the complainant for having preferred a false charge. The Magistrate, after examining the

(1) 6 C. 496. (2) 6 C. 582. (3) 4 A. 182. (4) 7 M. 292. (5) 8 A. 38.

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complainant on the 21st February 1885, distrusted the truth of the complaint and dismissed it on the same date under Section 203 of the Code of Criminal Procedure without passing any orders on the request for sanction to prosecute the complainant. On the 17th February 1885, Viran, one of the accused in the case before the Taluq Magistrate, preferred a complaint before the Sub-Divisional Magistrate of Patukota division charging Venkatachala Tevan and some others with the offences of wrongful confinement and making a false charge before the station-house officer of Tiruvonam, against Venkatachala Tevan, and some others. The Sub-Divisional Magistrate inquired into the complaint, heard the evidence of witnesses, framed a charge of wrongful confinement and of preferring a false complaint under Sections 342 and 211 of the Indian Penal Code, and proceeded to enter upon the defence. He then reverted to another appointment, and Mr. Shipley, Assistant Magistrate, who took his place, threw out the case on the 15th October 1885, on the ground that previous sanction had not been obtained under Section 195 of the Code of Criminal Procedure. I then obtained the record of the case and passed proceedings on the 14th November 1885, ordering further inquiry into the case for the reasons stated therein. These proceedings were passed, of course, before I had seen the ruling in *Queen-Empress* v. *Ganga Ram*(1). On the 3rd December 1885 the Second-class Magistrate of Patukota taluk refused to sanction the prosecution, on the ground that the original complainant had not been given an opportunity of establishing the charge he had preferred. On the 29th January 1886, the Assistant Magistrate reported to me that the Second-class Magistrate had refused sanction, and, referring to the ruling in *Queen-Empress* v. *Ganga Ram*, requested to be informed whether the Sub-Magistrate should apply to the District Magistrate to have the original case re-opened, or whether the defendant in the original case might be told to make the application. I thought that the case having been formally dismissed, I should not be justified in ordering a further inquiry, unless it appeared that there were some valid grounds for proceeding with the case, and called for the entire records of the case and all connected cases on the 6th February 1886. The Assistant Magistrate, perhaps **[235]** before the receipt of this call for the records, dismissed the case for want of sanction on the 10th February 1886, referring to the above ruling of the Allahabad High Court; and having already (on the 2nd and 9th February 1886) made an inquiry into the original complaint and examined the complainants' witnesses (though without an order from the District Magistrate under Section 437 of the Code of the Criminal Procedure) sanctioned the prosecution of the original complainant and certain others."

The Government Pleader (Mr. *Shephard*) for the Crown cited (besides the cases referred to in the following judgments) *Gour Mohun Singh* re (2), *Ashroff Ali* re (3), *Chakradar Potti* re (4), *Abul Hasan* re (5), *Empress* v. *Bhawani Prasad* (6).

MUTTUSAMI AYYAR, J.—The question referred to us for decision in these cases is whether a Magistrate is at liberty to sanction prosecution for an offence mentioned in Section 195 of the Code of Criminal Procedure without previous notice to the accused. There can be no doubt that sanctioning a prosecution for an offence is a judicial act and the proceeding held

(1) 8 A. 38. (2) 16 W. R. 44. (3) 5 C. 281.
(4) 8 C.L.R. 289. (5) 1 A. 497. (6) 4 A. 182.

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in connection with it is a judicial proceeding. It is declared that any sanction given or refused under Section 195 may be revoked or granted by any authority to which the authority giving or refusing it is subordinate. An appeal is, therefore, allowed from the order of the Magistrate, and it presupposes the existence of judicial evidence on which an opinion can be judicially formed. Again, no act can be said to be judicial unless the party, to whose prejudice it is done, is previously heard and a judgment is formed upon legal evidence. As observed in *Gyan Chunder Roy* v. *Protap Chunder Dass* (1), and *Giridhari Mondul*, in re (2), the intention of the Legislature in requiring that prosecution by a private party must be sanctioned is to enable the Magistrate to see whether there is good ground for the application made to him, or whether it is made solely for the purpose of harassing the accused or preventing any further legal proceedings which he may be entitled to take, and effect cannot satisfactorily be given to that intention unless the party concerned is previously heard. It seems to me, from the very nature of the case, that an opinion must be formed as to whether sanction should be given or refused upon legal evidence and after the party concerned has had [236] an opportunity of being heard. In cases in which the Magistrate examines the complainant and hears the evidence and either acquits or discharges the accused, there is ground for the contention that the conditions mentioned above are substantially complied with, and though no previous notice is issued after sanction is applied for, sanction cannot be said to be improperly given; even in that case, it would not be inappropriate to give notice to the opposite party to show cause why sanction should not be given as applied for, and to decide after hearing any argument which may be urged on his behalf whether sanction should be given or refused.

But in cases in which the Magistrate dismisses the original complaint upon a report from the police, there is no legal evidence before him upon which he is in a position to frame his opinion. It is irregular to substitute the opinion of the police officer who made the report for that of the Magistrate, and notice must be issued to the party concerned to show cause why his prosecution should not be sanctioned, and the Magistrate should hear evidence, if necessary, in support of the cause shown. The omission to do so would invalidate the sanction, unless the superior Court is in a position to say, with reference to the provisions of Section 537, that it has occasioned no failure of justice. It is said that no previous notice is expressly required to be given by Section 195, but it must be remembered that the proceeding held under that section is a judicial proceeding, in which it may be presumed that it was intended that the accused should have an opportunity to be heard if he has not already had that opportunity in the course of a trial or inquiry held before a Magistrate. The section seems to presuppose that sanction is given or refused with reference to the trial or inquiry held before the Magistrate resulting in the dismissal of the complaint.

THE CHIEF JUSTICE.—I concur.

PARKER, J.—I concur.

KERNAN, J.—From the Sessions Judge's judgment (in criminal revision case No. 234) it appears that the accused made a complaint of false charge, against Madhava Rau, 1st, before the Village Magistrate—2nd before the police—and 3rd before the Second-class Magistrate, who referred the complaint to the police for report. It is not stated that he

(1) 7 C. 208. (2) 8 C. 435.

1887 APRIL 29. — FULL BENCH. — 10 M. 232 (F.B.)= 2 Weir 181.

examined the complainant before referring it. The police, on the 1st of October, reported to him that the case was false, and asked for sanction to prosecute. [237] After that, and before giving order for sanction, the Magistrate heard a case (No. 102 of 1885), in which Madhava Rau charged the accused in this case and his son with assault. On the 5th of November the Magistrate took a statement from the accused (complainant), and on the 6th of November gave order for sanction under Section 195 to prosecute accused for false charge. The accused was committed to Sessions. The Sessions Judge held that the order for sanction was void, as the order was made on the police report without further inquiry and acquitted the accused.

The case came before this Court in revision. What the details of the statement of the accused to the Magistrate made on the 5th of November were, does not appear. But I do not doubt that the Magistrate made such investigation as he thought the circumstances required to satisfy himself whether an offence of false complaint was committed, and whether sanction ought to be granted before he made the order for sanction. He did not act merely on the report of the police. If he had done so, his order made merely on the police report should be held to be illegal. I quite agree in the principle of the decision in *Government* v. *Karimdad* (1), and *Gopal Dhanuk*, in re (2), approved of in *Ramasami* v. *Queen-Emperss* (3).

It appears to me that sanction granted by a Magistrate merely on the report of the police is not the sanction required by law. The law requires the Magistrate to exercise his own judgment on the facts proved before him and decide whether the case is one in which sanction should be accorded. When a Magistrate hears a case and disposes of it, having heard the statement of the person (complainant) against whom an order for sanction may afterwards be given, I would not think it necessary that in such case any notice need be given by the Magistrate to the party before making an order for sanction. This is the view which I understand the Full Bench of Calcutta held in *Krishnanund Das* v. *Hari Bera* (4), and it is not in conflict with the other cases above referred to.

BRANDT, J.—There is, no doubt, a conflict in the decisions. In addition to the cases cited (in criminal revision case No. 234) by the Sessions Judge, in *Abbilakh Singh* v. *Khub Lall* decided by a Divisional Bench of the Calcutta High Court in 1884, it was held that sanction to prosecute, when applied for after the termination of the proceedings in which the offence is alleged to have [238] been committed, ought not to be granted without notice. But a Full Bench of the same Court, in 1885, unanimously declined to follow that decision in reference to sanction given by a Court before which an alleged offence has been committed—*Krishnanund Das* v. *Hari Bera* (4), *Giridhari Mondul* re (5), it is observed that it is not a fair course to pursue towards a prosecutor to direct him to be placed on his trial without first giving him an opportunity of having a judicial inquiry into the charge originally preferred; and that the sanction was given without the exercise of proper discretion.

The question, however, before us is not whether or not a Court would not, in most, if not in all, cases exercise a proper discretion in giving a person for whose prosecution sanction is asked an opportunity of showing

(1) 6 C. 496. (2) 7 C. 96. (3) 7 M. 292.
(4) 12 C. 58. (5) 8 C. 435.

cause why it should not be given, but whether a conviction or commitment is illegal by reason of this not having been done.

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This question should not be determined without due consideration given to the fact that in some instances express provision is made in the Code of Criminal Procedure where notice is required (see Sections 436 (*a*) and 439).

But, subject to the limitations expressed, I am not unwilling that the question should be decided upon the principles on which the judgments of Kernan and Muttusami Ayyar, JJ., are based. It is obvious that in some cases great injustice might be done if notice were not given; in other cases in which the Court giving this sanction has before it material on which a judicial determination may be arrived at, it is not essential that there should be further inquiry on notice given, and it appears to me that we are not precluded from deciding the point upon general principles. In accordance with those principles, the test will be whether or not the Court giving or refusing the sanction had before it legal evidence upon which to form a decision;—as I concur with the Calcutta High Court in considering there would be in cases of the nature under consideration in *Krishnanund Das* v. *Hari Bera*, and on the other hand that there cannot be said to be legal grounds for a decision as to whether sanction should be accorded or refused, where the original complaint is dismissed upon a reference to, and report made by, a police officer alone.

[239] The Court then made the following

ORDER.

In criminal revision case No. 234 of 1886, the Sessions Judge passed an order purporting to acquit the accused without trial on the ground stated in *Karimdad's case* (1).

Assuming that the Court was debarred from taking cognizance of the offence, with which the accused was charged, by reason of no sanction having been given, or by reason of the sanction given being invalid, Section 215, Criminal Procedure Code, provides that a commitment once made under Section 213 or 214 by a competent Magistrate can be quashed only by the High Court, and only on a point of law (except in the case of an irregular commitment provided for by Section 532, which does not apply here) and the Sessions Judge should have referred the commitment for the orders of this Court on the grounds stated by him for acquitting the accused.

The facts of this case as appearing from the record are as follows:—

One Basavva was committed to the Sessions Court, Bellary, charged with having preferred a false charge against a head constable and others. The original charge in which the accused imputed to the said head constable and others that they had broken into her house and stolen certain property therefrom, is decided by the Sessions Judge as having been made 'before the Village Magistrate of Harikbavi, before the Inspector of Police, Kudlighi, and before the Second-class Magistrate of Kudlighi.' When and how the charge was made to the Police Inspector does not appear, and is immaterial; as further explained, it seems that the charge was preferred or information given to the Village Magistrate, who submitted it to the Taluk Magistrate, and the latter referred it to the police. The police submitted a referred charge sheet stating that the charge was false and suggesting that the complainant should be prosecuted; and sanction for her prosecution was given, but not before the Magistrate had disposed of a case in which the head constable was charged with assault by the

(1) 6 C. 496.

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complainant and her son and brother, and in which, after trial, the accused were acquitted, and after a further statement had been taken from the woman Basavva. In these circumstances the sanction given for the prosecution of Basavva was not illegal.

[240] The order of acquittal by the Sessions Judge must be set aside, but considering the length of time which has elapsed since that order was made, and seeing that other proceedings may in the meanwhile have been taken, we think we should not direct a re-trial.

In criminal revision case No. 226 of 1886, the order of the District Magistrate refusing to sanction the prosecution is in accordance with the principles held by us to be applicable, and no interference is called for.

In criminal revision case No. 242 of 1886, the Second-class Magistrate dismissed the charge against Viran of house-breaking, but did not grant sanction to prosecute complainant. Viran complained to a Sub-Divisional Magistrate against the former complainant charging him with the offences of wrongful confinement and making a false charge, and that Magistrate framed a charge against Viran for having made a false charge, without sanction. The Magistrate was removed and a succeeding Magistrate dismissed the charge against Viran for want of sanction. The District Magistrate ordered on the 14th November 1885 full inquiry by the Assistant Magistrate, but subsequently saw reason to think he ought not to have ordered the inquiry, and for the reasons he gives he was right. In January 1886 the Assistant Magistrate reported to the District Magistrate that the Second-class Magistrate had refused sanction. While the District Magistrate was considering the matter, the Assistant Magistrate dismissed the case against Viran for having made a false charge, on the ground that no sanction had been given, but he inquired into the original case without any orders from the District Magistrate under Section 437, and having examined complainant's witnesses sanctioned the prosecution of the complainant. It is quite clear that the direction of the District Magistrate for further inquiry was, for the reasons he gives, illegal. Therefore the inquiry of the Assistant Magistrate and his order for sanction were without authority and illegal. No other sanction had been given and the sanction granted by the order of the Assistant Magistrate of the 10th of February 1886 must be set aside. We do not think we should make further order in the matter.

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PRIVY COUNCIL.

PRESENT:

Lord Watson, Lord Fitzgerald and Sir Barnes Peacock.

[*On appeal from the High Court at Madras.*]

PETTACHI CHETTIAR AND OTHERS (*Plaintiffs*) v. SANGILI VIRA PANDIA CHINNATAMBIAR (*Defendant*).*
[8th, 9th and 10th March, 1887.]

Civil Procedure Code, Act VIII of 1859, *Section* 264—*Execution of decree against a member of an undivided family by sale of his personal interest in the family estate, which was an impartible zamindari ; such interest, by reason of his death before the sale, consisting only of the rents and profits then uncollected.*

On a sale of the right, title, and interest in an impartible zamindari in execution of decrees against the zamindar, the head of an undivided family, the question was whether (*a*) only his own personal interest, or (*b*) the whole title to the zamindari, including the interest of a son and successor, passed to the purchaser. The proclamation of sale purported to relate to (*a*) only ; and between the dates of proclamation and the auction sale, the zamindar died.

On the argument that, this having given rise to an ambiguity, the Court must be understood to have sold all that it could sell, and that under the circumstances it could sell, and was bound to sell (*b*) ; because, the debts, the subject of the decrees under execution, not having been incurred by the late zamindar for any immoral purpose, the entire zamindari formed assets for their payment in the hands of his son :

Held, that the question of what the Court could, or should, have sold had not arisen. All that required decision was what the Court had sold. If (*a*) only was put up for sale, then that interest only could have been purchased. Two Courts having concurred in finding that (*a*) only was sold, in which also their Lordships agreed, only that interest passed to the purchaser.

[F., 22 M. 110; 8 A.W.N. (1888) 191 ; R., 12 A. 99 ; 27 A. 97 (123)=1 A.L.J. 435=24 A.W.N. (1904) 174 ; 12 B. 625 (631) ; 27 M. 131 (142) (P.C.)=6 Bom. L.R. 7=8 C. W.N. 186=31 I.A. 1=8 Sar. P.C.J. 568 ; Cons., 34 M. 188 (202)=8 Ind. Cas. 1072 (1080)=21 M.L.J. 320 (336)=9 M.L.T. 235=(1910) M.W.N. 799.]

APPEAL from a decree (17th January 1882) of the High Court, affirming a decree (18th March 1880) of the District Judge of Tinnevelly.

The question on this appeal related to a sale of the right, title, and interest in an impartible zamindari in execution of decrees against the late zamindar, deceased at the time of the sale. The late zamindar was the head of an undivided family, and the question was whether the interest, sold as his, and acquired by the purchaser at the sale, consisted only of his personal interest, or included the interest of his son, and successor in the zamindari, as forming part of the right, title, and interest sold. If only the life-[242]interest was sold, it was no more than the right to the rents and profits uncollected and due at the death of the late zamindar, amounting to Rs. 39,000 ; and this was all that the Courts below held to have passed by the sale.

The suit giving rise to this appeal was brought by twelve plaintiffs, who held decrees against the late zamindar, to obtain possession of the Sivagiri zamindari, consisting of twenty-three villages in the Tinnevelly district. The zamindari having been attached in the lifetime of the father, the sale in execution took place after his death, and after the son had obtained possession. The price paid by Subramania Moodelly, the purchaser, was Rs. 12,600. He was in the employment of one of the decree-holders, and to them he immediately transferred his purchase.

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The zamindari of Sivagiri was an impartible zamindari formed out of an ancient hereditary polliem at the permanent settlement. On the death in 1819 of the zamindar, who in 1802 had received the first sanad-i-milkiyat-i-istimrar, his daughter, Viramamlal Nachiar, succeeded him. On her death in 1835 she was succeeded by the elder of her two sons, Varaguna Rama Pandia Chinnatambiar, referred to in this report as the late zamindar, whose transactions gave rise to this litigation. He contracted many debts; and decrees were passed against him, both for money, and upon hypothecations of parts of the zamindari.

In 1871 the whole estate was attached by a creditor, and a receiver was appointed. This continued till 1874, and the creditors, having issued their attachments, received rateable distribution to about 34 per cent. of their debts. In 1872, the present respondent, as son, obtained a declaratory decree that the life-estate of his father was alone affected by the incumbrances. Pending an appeal, however, by the creditors, who set up that the zamindari was not ancestral estate of such a character that the son took a vested interest in it, the late zamindar died, on the 20th September 1873. The above declaration being then no longer necessary, the suit for the declaratory decree was dismissed (25th November 1873).

Application for sale of the zamindari had in the meantime been made (18th November 1872), the present respondent objecting; and a proclamation of sale was issued, relating only to the right, title, and interest of the late zamindar during his life. It stated that he was then in his fifty-fifth year. Before the sale took **[243]** place he died, as above mentioned. The present respondent, as his son and successor, then obtained an order that the zamindari be made over to him, stating also that he was not entitled to the rents due at the death of the late zamindar.

On the application of two decree-holders for a sale of the property attached, the Court (19th December 1873) again ordered issue of proclamation for the sale of the right, title and interest of the late zamindar. It was notified that the zamindari of Sivagiri, the estate of the late zamindar, would be sold, and that the sale would extend "only to the right, title, and interest of the said deceased defendant, in the estate."

On the 5th February 1874 the respondent filed a petition against the sale, stating that he was in possession, and that the estate was not answerable for his father's debts. This petition was dismissed, and the sale took place on 25th February following, the zamindari being said to be subject to other incumbrances, amounting to Rs. 1,40,000.

The sale-certificate (18th April 1874) was as follows: "We do hereby declare that in the public auction held before the Court on the 25th February 1874 for the amounts, &c., of the decrees in the said suits, Subramania Moodelly purchased for Rs. 12,600 the right, title, and interest of the judgment-debtor, the said defendant, deceased, in the properties hereunder mentioned." Then followed particulars of the twenty-three vanithamas making up the entire zamindari and a note "The hills in the said villages also are included in the sale of the said villages."

The present respondent on the 24th April 1874 petitioned that all proceedings taken in execution of the decrees without giving notices to him, should be cancelled; but this was rejected, on the ground that the execution was not against the petitioner as the legal representative of the deceased, but against such right, title, and interest as the late zamindar had in the estate.

The auction-purchaser having applied (4th September 1874) for delivery of possession of the estate purchased by him, a warrant for delivery

by proclamation was issued under Section 264 of the Code of Civil Procedure (Act VIII of 1859). He having also issued notices to the karnam and raiyats that rents should be paid to him, the respondent instituted a suit against him for an injunction to restrain him from interfering with the estate as he had [244] only acquired the right to the rents due down to the death of the late zamindar.

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The appellants (having bought the purchaser's rights for Rs. 13,600) were then made defendants in the above suit. Of these four were so made, on their own petition of 13th April 1875. But the respondent, as he was in possession, was considered not to be entitled to a declaratory decree. Meanwhile some of the decree-holders, whose decrees had proceeded upon hypothecation of parts of the zamindari, contested orders made by the Court refusing to declare the sale subject to their liens. In the course of the litigation that took place in reference to these last matters, the High Court in *Muttayan Chetti* v. *Sangili Vira Pandia Chinnatambiar* (1) decided that the zamindari was not, as the creditors had attempted to make out that it was, the "self-acquired" property of the late zamindar in consequence of its having been inherited through a maternal ancestor: a decision which on this point was supportd by the Judicial Committee (which, however, would not express any opinion about the rights of a son upon birth in property so inherited), holding that the property, at all events, was liable to be attached and sold for the father's debt (2).

The creditors now sued (3rd November 1877) for possession of the zamindari, and for mesne profits from November 1874, making title through the purchaser. The plaint, among other things, alleged that the late zamindar having succeeded to the inheritance as a daughter's son, had full power to dispose of the estate. The defence was that the defendant held the zamindari by hereditary right as ancestral property, and that the purchaser acquired only the arrears of rent due at the death of the late zamindar.

The District Judge dismissed the suit, being of opinion that the auction sale only conferred a right to the rent in arrear at the date of the death of the late zamindar. On 31st January 1879 the High Court reversed that decree, remanding the suit for decision. The result was another judgment to the same effect upon issues, for the settling of which the remand had been made; and the principal of these related to the nature of the right, title, and interest acquired under the sale-certificate.

An appeal to the High Court was dismissed by a divisional bench (Turner, C.J., and Muttusami Ayyar, J.). On the incidental [245] question, relating to the descent of the zamindari from Viramamlal's father, the Judges observed that until the effect of the descent of an estate from a maternal grandfather, as distinct from its descent in the male line, had been recently decided in another suit connected with the same estate, it was regarded as a controverted point whether a son's right, acquired upon birth, extended to such property; but that it was not necessary to enter upon the subject. They would dispose of the case in reference to the main question. Their judgment continued as follows :—

"The main question is, as the Judge has rightly apprehended, what was the nature of the right of the judgment-debtor of which the sale was ordered and effected. Where the language of the orders passed in execution of decree respecting the attachment and sale of property is ambiguous, it

1) 3 M. 370. (2) 6 M. 1 = 9 I.A. 128.

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is no doubt pertinent to the determination of that issue to consider what interest the Court was competent to sell. But where the orders of the Court afford a sufficiently clear indication of the nature of the interest the Court intends to sell, it is immaterial that the Court was competent to have sold a larger interest than it has actually sold, since the purchaser would not be entitled to take advantage of the circumstance and claim a larger interest than it is apparent from the orders of the Court it was the intention of the Court to sell. If a Court directs the sale of an interest less than that of which the decree-holder is entitled to demand the sale, the remedy lies in an appeal by the decree-holder before the sale takes place.

"Assuming then for our present purpose that the Court executing the decrees was competent to order the sale of the zamindari so as to bind the interest of the respondent, it must be determined whether the entire estate was in fact sold or no more than the right alleged by the respondent. We allow that the appellants cannot be affected by the report made by the Judge to the High Court subsequently to the sale, and that it would be unsafe to deduce any inference from the action of those of the decree-holders who held mortgages. The inadequacy of price too is a circumstance not unimportant in determining whether the bidders were aware of the character of the rights offered for sale. It may well be, as has been suggested on the part of the appellants, that the apprehension of claims of incumbrancers would have greatly affected the prices bid, if the entire zamindari had been offered for sale. To ascertain what was sold, we must look to the [246] proceedings which preceded and resulted in the sale, and of which intending purchasers were bound to inform themselves."

The judgment then referred to the proceedings, of which the principal are mentioned above, and continued thus :—

"These references to the death of the judgment-debtor and the restriction of the sale to the right of the deceased only point to an estate distinct from the interests of which the living zamindar was then in possession.

"It is to be noticed that at the time the order for the second sale was obtained, no steps had been taken to make a representative of the deceased judgment-debtor a party to the proceedings in any of the suits under execution, and the earliest orders passed for this purpose, which have been put in evidence, are the orders of the 19th January unserved before 1st February, whereby the respondent was not, as the Code requires, called on to show cause, but informed he had been admitted as representative of the judgment-debtor.

"The respondent at once took exception to the terms of the sale proclamation, which was certainly ambiguous and inappropriate if the Judge intended to sell no more than he had declared available for sale. Unfortunately, advantage was not taken of the occasion to correct the notification.

"The grounds of the objection were not disallowed, but the Judge on dismissing the application gave as his reason that the right, title, and interest of the judgment-debtor was attached, was still under attachment, and would be sold. Construing this declaration in the light of his previous orders, it is plain he considered the right, title, and interest of the judgment-debtor was the right, title, and interest which alone the Judge believed the judgment-debtor possessed, and which was defined in the first proclamation. The receiver's accounts were made up, and before the

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sale the purchasers had the means of knowing the amount undistributed, and approximately the amount of arrears. The respondent produced no evidence to show what took place at the sale, but one of the witnesses for the appellants, himself a decree-holder, had sworn that he heard it given out at the time of the sale that the interest of the late zamindar alone was sold, and that he heard it stated the profit due to the late zamindar was alone being sold. What took place subsequently to the sale has no material bearing on the main issue. The appellants, it is true, obtained an order [247] for the delivery of possession of land in the possession of raiyats. It may be that this order was considered not inappropriate, seeing that there were rents outstanding due to the interest sold—the estate of the deceased judgment-debtor—and it is noticeable that the application for such an order as would be made when the judgment-debtor or his representative is himself in possession, was not persisted in. We are unable to say that the Judge was in error in finding that all that was offered for sale and bought was the arrears of rent due up to the date of the decease of the third zamindar."

The plaintiffs appealed.

Mr. *J. D. Mayne*, and Mr. *H. H. Shephard*, for the appellants, argued that the decree-holders were entitled under the purchase by their assignor at the auction-sale to the whole estate, including the interest of the respondent. If when the proclamation of sale, dated 26th April 1873, was made, the Court held the erroneous opinion that the impending sale would not affect the interest of the zamindar's successor, the intention of the creditors was to sell all that they could attach during the zamindar's life; and it was the law that the sale of the son's interest, as well as that of the indebted father, was authorized in order to satisfy the debts of the latter. Inasmuch as the debts, the subject of the decrees under execution had not been incurred for any immoral purpose, the entire estate was, in the hands of the son of the late zamindar, assets for their discharge. The entire estate was, in fact, attached, and in offering for sale the right, title, and interest of the late zamindar, the Court offered what was legally available for sale; and it was bound to sell every interest which was capable of being sold, to satisfy the creditors. The amount of interest which passed by the sale could not be affected by any error on the part of the Judge as to the legal result of that sale. Moreover, the wording of the second proclamation was consistent with the sale of every interest which could be disposed of in satisfaction of the judgment-debts. The legal operation of an execution sale so conducted did not depend upon the view taken of it by the Court, which view moreover was not shared by those who really brought the zamindari to sale, *viz.*, the creditors whose rights rested upon the law as declared in *Girdharee Lall* v. *Kantoo Lall* (1).

[248] (LORD WATSON.—The questions were—What did the Court intend to sell; and what did the purchaser understand that he bought?)

If these were the only questions, they were inseparable from a prior one, *viz.*, what estate had the Court the power to sell, and what was it bound to sell? The purchaser could not be prejudiced by any mistake on the part of the Court as to what interest it could sell, when the language of the proceedings was sufficient to comprise all that it was empowered to sell.

(1) 1 I. A. 321 = 14 B.L.R. 187.

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Reference was made to *Suraj Bunsi Koer* v. *Sheopersad Singh* (1), *Pitam Singh* v. *Ujagar Singh* (2), *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (3).

Besides the above reasons, it was suggested that the entire estate in the zamindari passed at the sale, because the son had not obtained an interest at his birth, on account of the zamindari not having descended from a line of fathers, but from a mother's father, to the late zamindar. As to this, however, it was observed that there having been a brother of the late zamindar, it was not only the interest of a son that might be brought in question in regard to what was sold, but also that of another member of the family.

Mr. *J. Graham*, Q.C., and Mr. *G. P. Johnstone*, for the respondent, were not called upon.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR BARNES PEACOCK.—This is an appeal from a decision of the High Court at Madras affirming the decison of the Lower Court upon the first issue in the suit. That issue was—" What is the nature of the right, title, and interest acquired under the sale-certificate issued by this Court to the purchaser ? "

The first Court, after considering all the facts and the evidence in the case, came to the conclusion that all that was offered for sale, and all that was purchased under the sale, was the interest which the father of the defendant had at the time of his death.

The High Court stated the facts very fully, they considered them very maturely, and they reviewed them very carefully; and they came to the conclusion that the decision of the Judge of the first Court was correct.

[249] There were two concurrent findings of the Courts. It may be said that they were not upon a mere question of fact, but on a question of mixed law and fact. As regards the fact, both Courts came to the conclusion that what was offered for sale, and what was intended by the purchaser to be purchased, was the right and interest which the father had at the time of his death.

There is no doubt that when the execution was issued, and the attachment made, in the time of the father, the proclamation expressly stated that all that was to be sold was the life-interest of the father. At page 220 of the Record it will be found that a petition was put in by the creditor in one of the suits, praying that that notification might be altered. He said: " I pray therefore that in conformity with the above sections of Civil Procedure Code, a fresh advertisement may be made expunging the words 'during his lifetime.' " Those words having been put into the proclamation that nothing was to be sold except the interest which the father had in his lifetime, one of the creditors asked to have those words expunged. But the Court made this order (page 221): " The advertisement is that the right, title, and interest of the said defendant in the estate during the term of his life be sold, the judgment having distinctly declared that only such is liable for this decree debt. This prayer cannot therefore be granted." At that time, in the father's lifetime, it was expressly decided by the Judge that what was intended by the decree to be sold, and what could be sold under the decree, was only the interest of the father

(1) 5 C. 148 = 6 I.A. 88. (2) 1 A. 651.
(3) 3 M. 370; and on appeal to P.C. 6 M. 1 = 9 I.A. 128.

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during his lifetime. The sale was postponed at the instance of the creditors, in consequence of the father's illness. They said: "As the estate is to be sold only for the father's interest during his lifetime, the sale will not fetch so much during his illness as it would if he were in a better state of health," and therefore they asked to have the sale postponed in consequence of the illness of the father. The sale was postponed. If it had taken place during the lifetime of the father, the purchaser would have obtained all that the father was entitled to during his life, and that only, and he would have been entitled to possession of the estate during the father's lifetime, and to receive the rents which were then in arrear.

The father died. No fresh attachment was made. The sale was to take place after the father's death upon the attachment which had been made during his lifetime. The proclamation [250] stated that the property was to be sold only for the interest of the father; but after the father's death, as it appears, the Court allowed the son, notwithstanding the attachment (because it was only for the life-interest of the father) to take possession of the estate, stating that all that was to be sold was the life-interest of the father, *viz.*, not then the right to the possession of the estate, but the right to receive the rents in arrear.

The property was put up for sale, and it is said that the proclamation was ambiguous, that it did not state that the sale was merely for the life-interest of the father, but that it was a sale of only the interest of the father. And it is contended on behalf of the appellants that by the change of the terms the purchasers necessarily thought that they purchased the whole interest in the estate. But, even if the fresh proclamation was ambiguous, the purchasers, if they had made the ordinary inquiry which they ought to have made, would have discovered that all that was intended in the first proclamation was the life-interest of the father in the property which had been attached, and that the same interest was intended to be sold under the second proclamation.

The purchaser purchased for a small sum, about Rs. 12,000, but he had not the money to pay. He paid merely a deposit. He subsequently conveyed to the creditors themselves. There can be no doubt, in their Lordships' minds, that when he purchased he was purchasing benamee for those creditors, and although they might have purchased in their own names, they did not do so, because, if they had done so, they would have purchased having themselves the knowledge of all that had previously taken place. They therefore allowed the property to be purchased in the name of a clerk of one of the execution creditors in order that it might appear that it was purchased by a man who had no notice of what had taken place previously.

It is unnecessary to go into the question whether the estate came from the paternal ancestors, or, in other words, whether it was ancestral estate or not. The learned counsel, in a very ingenious argument, endeavoured to show that a difference existed in consequence of its being an estate which came from the maternal and not from the paternal grandfather, and consequently that it was not ancestral estate. But that makes no difference in the persent case. If the whole estate could have been put up for sale it was not put up. It is not a question of what the Court could have done, [251] or what they ought to have done, but they did, what was put up for sale, and what was purchased. If what was put for sale was merely the estate which the father had in his lifetime, then what the purchaser purchased was only that interest.

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The High Court having carefully reviewed the whole of the evidence, and the whole of the documents, came to the conclusion that the first Court was right in finding that all that was intended to be sold, and all that was sold was the life-interest of the father, and not the whole interest in the zamindari.

Their Lordships entirely agree with the conclusion at which the High Court has arrived, and they will therefore humbly advise Her Majesty to affirm the decree of the High Court, and the appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants: *Messrs. Burton, Yeales, Hart, and Burton.*

Solicitors for the respondent: *Messrs. Lawford, Waterhouse, and Lawford.*

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10 M. 251.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

SUBBAYYA (*Plaintiff*), *Appellant v.* SURAYYA AND OTHERS (*Defendants,*) *Respondents.** [27th July, 1886, and 22nd March, 1887.]

Hindu Law—Self-acquired immoveable property—Nuncupative will—Disinherison of an undivided son.

Under Hindu law, a father has power by a nuncupative will to dispose of self-acquired immoveable property as he pleases and to the complete disinheriting of an undivided son.

A, a Hindu, took up some abandoned waste land and brought it into cultivation:

Held, that the true test as to whether the land is his self-acquired property or not, is whether it was brought under cultivation by family or self-acquired funds, and the *onus probandi* lies upon those who alleged the latter.

APPEAL against the decree of T. Ramasami Ayyangar, Subordinate Judge of Cocanada, in Appeal Suit No. 87 of 1884, confirm-[252]ing the decree of A. F. Elliot, District Munsif of Cocanada, in Original Suit No. 188 of 1883.

This was a suit for a declaration of the plaintiff's title to certain land, and, to set aside a lease, by which part of it was demised for three years to plaintiff by defendant No. 3. Defendants Nos. 1 and 2 were the sons of one Chowdry, deceased, and defendant No. 3 was his widow. The land in question was found to have been the self-acquired property of Chowdry, being waste land brought under cultivation by self-acquired funds, and the evidence showed that the day before his death he told defendant No. 1 that he should divide the land with defendant No. 3 in equal portions. The land was divided shortly afterwards, and by the lease sought to be set aside, part of it was demised by defendant No. 3 to the plaintiff for three years. Defendant No. 2, who had been disinherited, objected to the plaintiff's taking possession, but he subsequently executed a sale-deed to the plaintiff of the whole of the land, under which the plaintiff now sought to have his title declared.

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* Second Appeal No. 703 of 1885.

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This suit was dismissed in both the lower Courts, and the plaintiff appealed.

Mr. *Norton*, for appellant, argued that the father of defendant No. 2 had no right to dispose of the whole of the family property, even if it were his self-acquisition, without making any provision for his son, and that a mere expression of intention on the part of Chowdry to divide the property between defendants Nos. 1 and 3 could not deprive defendant No. 2 of his rights over it.

Mr. *Michell*, for respondents.

The further arguments adduced on this Second Appeal appear sufficiently for the purpose of this report from the order of the Court (COLLINS, C.J., and PARKER, J.).

"ORDER.—The plaint land appears to have been taken up by Chowdry at the request of the Tahsildar when it was waste, and had been abandoned by other cultivators. We cannot infer from that fact alone that it is necessarily to be regarded as self-acquired property. The ordinary presumption would be that Chowdry acquired it for the benefit of his family and brought it under cultivation by the aid of family funds, in the absence of evidence that he had self-acquired funds which he utilized for that purpose. The District Munsif says that Chowdry *acquired the land* without the use of any patrimony, and he might have said, without the expen- **[253]** diture of any funds at all, since the land was taken up from the Revenue authorities when it was waste. The true test is whether it was brought under cultivation by family or self-acquired funds, and the *onus probandi* lies upon those who alleged the latter. The Subordinate Judge has clearly put the issue upon the wrong side.

"We must ask the Subordinate Judge to re-try this issue upon the evidence on record and upon any further evidence which the parties may adduce and in the event of his again finding that the land was the self-acquired property of Chowdry he will proceed to try the further issue whether according to Hindu law a father has power by a nuncupative will to dispose of self-acquired immoveable property as he pleases and to the complete disinheriting of an undivided son.

"We are clearly of opinion that the evidence as to what took place the day before Chowdry died—if it is true—would establish a bequest to take effect after the death of the testator and not a gift, *inter vivos*."

The Subordinate Judge having found the above issues in the affirmative, the Court delivered the following

JUDGMENT.

We must accept the finding of the lower Court that the land is the self-acquisition of Chowdry, and we have already expressed our opinion that the evidence of what took place the day before Chowdry's death would establish a bequest to take effect after the death of the testator and not a gift, *inter vivos*.

The power of a Hindu governed by the law of the Mitakshara to make a testamentary disposition is unquestioned, as also his power to make it by nuncupative will—*Vallinayagam Pillai* v. *Pachche* (1), *Crinivasammal* v. *Vijayammal* (2), *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (3). The only contested question is as to his power to make such a testamentary disposition to the complete disinheriting of any one of his male descendants.

(1) 1 M.H.C.R. 326. (2) 2 M.H.C.R. 37. (3) 12 M.I.A. 1.

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We can see no reason to differ from the view expressed by the late Chief Justice of this Court in *Ponnappa Pillai* v. *Pappuvayyangar* (1), that the power of the father to deal with self-acquired immoveable property at his pleasure is unfettered by legal obligation, though the exercise of the power to the extent of depriving his family of the means of support would still be considered as [254] contravening a moral duty. These observations were concurred in by our learned colleague Muttusami Ayyar, J.

The same rule was followed in *Baba* v. *Timma* (2) as far as self-acquired property was concerned ; and the Allahabad High Court in a case precisely similar to the present, *Sital* v. *Madho* (3), which was also a case under Mitakshara law, has taken the same view as to the validity of an exclusive gift to one son of self-acquired property. It is admitted that in Bengal a father has such powers.

It is urged that the Privy Council in *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (4) have thrown out doubts upon the former Madras rulings, but that decision was anterior to the Full Bench case—*Ponnappa Pillai* v. *Pappuvayyangar* and the doubts expressed were as regards ancestral and not self-acquired property.

We may refer also to the remarks of this Court in the *Sivagiri case* (5) on the distinction between ancestral and self-acquired property. But in Chapter 1, Section V, Clause 9, the author of the Mitakshara says: " The grandson has a right of prohibition, if his unseparated father is making a donation or sale of effects inherited from the grandfather, but he has no right of interference if the effects were *acquired* by the father. On the contrary, he must acquiesce, because he is dependant." In Clause 10 he states: " Consequently the difference is this ; although he have a right by birth in his father's and his grandfather's property, still he is dependant on his father in regard to the paternal estate, and since the father has a predominant interest *as it was acquired by himself*, the son must acquiesce in the father's disposal of his own acquired property; but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction (if the father be dissipating it)." According to Vignyanesvara Yogi, the author of the Mitakshara, the son's ownership in ancestral estate is not subordinate but co-ordinate, and it is dependent only when the father himself acquires the property.

That decision was subsequently varied by the Privy Council—*Muttayan Chetti* v. *Sangili Vira Pandia Chinnatambiar* (6), on the ground that the Court should have followed the rule laid down in *Girdharee Lall* v. *Kantoo Lall* (7), and that the whole interest in the zamindari, which defendant had taken by heritage from [255] his father, was liable as assets by descent for the payment of his father's debts. That, however, does not detract from the weight of the remarks distinguishing between the son's rights in ancestral and paternal self-acquired property.

On these grounds, we are of opinion that the finding of the Subordinate Judge was correct, and we dismiss this Second Appeal with costs.

(1) 4 M. 1 (42). (2) 7 M. 357. (3) 1 A. 394. (4) 7 I. A. 181.
(5) 3 M. 370. (6) 9 I A, 128. (7) 1 I A, 321.

10 M. 255=1 Weir 413.

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APPELLATE CRIMINAL.

10 M. 255= 1 Weir 413.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan and Mr. Justice Brandt.

QUEEN-EMPRESS *v.* KOTAYYA AND ANOTHER.*
[22nd February and 18th March, 1887.]

Penal Code, Sections 22, 378, 379 —*Theft —Moveable property.*

A dug up and immediately carried away, without any authority or right, several cart-loads of earth, part of unassessed lands of a village :

Held, that A was not guilty of theft.

[Overruled, 27 M. 531=14 M.L.J. 155 (158)=1 Weir 417 ; **Diss.**, 15 B. 702 (703).**]**

THIS was a case referred for the orders of the High Court, under Section 438 of the Code of Criminal Procedure, by W. R. Weld, Acting District Magistrate of Kistna.

The case was stated as follows :—

"The two accused in this case have been convicted of theft punishable under Section 379 of the Indian Penal Code for taking some cart-loads of earth from a piece of poramboke land."

The accused did not appear.

The Government Pleader (Mr. *Powell*), for the Crown.

The arguments adduced in the support of the conviction appear sufficiently for the purpose of this report from the judgment.

The Court (COLLINS, C.J., and BRANDT, J.) being equally divided in opinion recorded the following opinions, under Section 429 of the Code of Criminal Procedure :

OPINIONS.

COLLINS, C.J.—The defendants have been convicted of theft under Section 379, Indian Penal Code, and fined 5 rupees each.

[256] The facts are as follows :—

On the outskirts of the village of Amaravaram there is some unassessed waste land. The defendants removed a portion of this land and carted away some cart-loads of the earth. Section 378 enacts—Whoever intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft. Explanation 1 to that section says, a thing so long as it is attached to the earth not being moveable property is not the subject of theft ; but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Section 22, Indian Penal Code, defines moveable property as intended to include corporeal property of every description except land and things attached to the earth or permanently fastened to anything which is attached to the earth.

The defendants were convicted not of stealing any "thing" severed from the earth, but the earth or land itself. The case of *The Queen* v. *Tamma Ghantaya* (1) is undoubtedly good law, but the point there decided is a very different one from this.

I am of opinion that the charge of theft cannot be sustained and that the conviction must be reversed and the fine returned to the defendants.

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* Criminal Revision Case No. 340 of 1886.

(1) 4 M. 228.

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BRANDT, J.—The accused dug out and removed some cart-loads of soil from a piece of waste land belonging to Government; the accused had no right to take the soil, and it is found that they took it dishonestly, for their own private use, for gain to themselves by unlawful means, they not being entitled to the property taken.

The rule that by Common Law larceny cannot be committed of things which savour of the realty and are part of the freehold, does not apply in respect of theft as defined by the Indian Penal Code; see Explanations to Section 378; (see also 5 M. H. C. R. App. XXXVI) I also accept the exposition of the law on this subject contained in *The Queen* v. *Thamma Ghantaya*(1) that the rule as to things immoveable becoming moveable by severance, applies in the case of "stones quarried, minerals, iron or salt collected, as well as to timber which has grown or edifices which have been raised on the land;" and I am unable to draw any distinction between [257] such material objects and gravel, soil or earth excavated and reduced into possession after severance from the land or earth in which it was embedded or to which it was before 'permanently attached.' Nor is it material, as it seems to me, that there was no interval between the severing and the taking.

"Moveable property" is defined in Section 22, Indian Penal Code, as including "corporeal property of every description except land and things attached to the earth or permanently fastened to anything attached to the earth," but under the Explanation to Section 378, the very things which so long as they are attached to the earth are not the subject of theft, become so by severance.

Soil before it is removed from the earth or land of which it is a part, might be described as 'land;' but the theft is not of 'land' but of soil or earth severed from the land, and I am not prepared to hold that the conviction is bad in law. Stating the proposition conversely, I hold that, under the Code, theft may be committed in respect of soil removed from land in which before severance it was embedded or to which it was 'permanently attached.' And I would refuse to interfere in revision.

This case, with the above opinions, was laid under Section 439 of the Code of Criminal Procedure before Kernan, J., who delivered the following

JUDGMENT.

The accused dug up and immediately carried away, without any authority or right, several cart-loads of earth, part of unassessed lands of a village. He was convicted under Section 378 and sentenced under Section 379, Indian Penal Code.

I think the facts do not bring the offence within Section 378, Indian Penal Code, inasmuch as the property taken was not "moveable property" within Sections 22 and 378 of the Code. Section 22 of the Code states "the words 'moveable property' are intended to include corporeal property of every description, *except* land and things attached to the earth or permanently fastened to anything which is attached to the land."

Section 378 provides that dishonest taking of *moveable* property is theft. Explanation 1 to Section 378 states that a thing which is *attached* to the earth not being moveable property, is not the subject of theft, but is capable of being subject of theft, as soon as it is severed from the earth.

The illustration "*a*" to Section 378 gives the case of a tree growing, which A severs with dishonest intention of taking it, and [258] states that as soon as he severs it, he has committed theft. It will be observed

(1) 4 M. 228.

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that in Sections 22 and 378, Indian Penal Code, and in the Explanation No. 1 to Section 378, certain property mentioned as being a possible subject of theft is property "*attached*" to the earth. The illustration "*a*," though not exhaustive, clearly explains that the property that may be so subject, means property different and distinguished from the earth itself. In this case, the accused severed and took (not what was attached to the earth but) what was itself part of the earth.

Section 22 and Section 378, are framed on the lines of the Common Law of England as to larceny, with some of the modifications introduced by statute.

At Common Law, larceny could only be committed in respect of "mere personal goods." But of personal goods which savoured of the realty, no larceny could be committed such as corn and grass growing on the ground, or fruit upon trees or wood growing, but if the owner cut any of them, then larceny might be committed of the thing cut (1).

Several statutes provided that if any one stole or severed with intent to steal such things, he might be convicted of larceny (2).

The case in 5 M.H.C.R. App. XXXVI was theft of a tree, and was clearly within Section 378.

In *The Queen* v. *Tamma Ghantaya* (3), the point referred was, whether on the facts found, the Government were in legal possession of the salt which it was stated in the reference that the accused took.

The salt was a natural produce of the earth, being an efflorescence from it on the surface of it and was attached to the earth. The Court so treated the salt in that case and thus the taking of it was held to be as much within Sections 22 and 378 as the taking of grass growing on the ground, corn, fruit and trees attached to the earth. That case is not an authority for the proposition, that if a person quarried stone or minerals, or dug up and severed part of the earth from the rest of the earth, the material so quarried or severed became changed from being part of the earth and as such, not moveable property, to the condition of being "moveable property" within Sections 22 and 378, Indian Penal Code.

[259] The owner of land could alter the character of any part of the land or of things attached to the land by severance and then the things severed became personal goods. Stone and minerals quarried by the owner and trees or other produce of the earth severed from it by the owner, were always treated as personal goods; and I see no reason why clay (part of the earth) dug up by the owner and set apart for removal and use, in a loose state, should not also be considered as moveable property.

But if a person severed things attached to the earth and if he *immediately* took them away, such taking was not, at Common Law, considered larceny (1).

However, Explanation 2 to Section 378 meets this point as regards things *attached* to land, by providing that a moving effected by the same act which effects the severance, may be theft.

But the case where a thief quarries stone or minerals or digs up part of the earth is not provided for by Section 378.

In my judgment, the conviction for theft should be set aside and I order accordingly. The fine, if paid, to be refunded.

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(1) 3 Co. Inst., 109.
(2) 3 Will. and M. c. 9; 7 and 8 Geo. 4, c. 29; 24 and 25 Vic., c. 96.
(3) 4 M. 228.

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LATE
CIVIL.

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APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

SITAYYA (*Plaintiff*), *Appellant v.* RANGAREDDI AND OTHERS (*Defendants*), *Respondents.** [22nd March and 20th April, 1887.]

Indian Limitation Act—Act XV of 1877, *Section* 19, *Schedule II, Article* 85—*Acknowledgment—Mutual open and current accounts.*

A acted as commission agent for B and C. A furnished a debit and credit account in February 1878. The account was disputed and the matter was referred to arbitration: for which purpose in March 1880 a "Memorandum of items to be settled" was drawn up and signed by B and C, in which they denied that any balance would be found due to A, but admitted that accounts must be taken and that they would be liable if any balance were found due to A. In June 1880 B signed and supplied to the arbitrator an account on behalf of himself and C, which contained a similar admission. The arbitrator made an award which was set aside. A filed a suit against B and C in September 1882 for a balance due to him:

[260] *Held*, that the accounts were mutual open and current accounts; that B and C had made an acknowledgment of their debt to A; and that the suit was not barred by limitation.

[**F.**, 2 Ind. Cas. 370=3 S.L.R. 53; **Appr.**, 33 C. 1047 (1060) (P.C.)=3 A.L.J. 525=8 Bom.L.R. 501=4 C.L J. 94=10 C.W.N. 874=33 I.A. 165=16 M.L.J. 300=1 M.L.T. 199=2 N.L.R. 130; **R.**, 22 B. 606 (610); 36 M. 69 (70)=21 M.L J. 1024=10 M.L.T. 251=(1911) 2 M.W.N. 225; 6 Ind. Cas. 948=55 P.R. 1910=136 P.L.R. 1910.]

APPEAL against the decree of L.A. Campbell, District Judge of Kistna, in Original Suit No. 7 of 1883.

This was a suit to recover the sum due on an account stated between the plaintiff and defendants Nos. 1 and 4. Defendants Nos. 2 and 3 were merely made parties to have the accounts taken in their presence.

The plaintiff acted as commission agent for the defendants Nos. 1 and 4, and bought and sold goods on their account and occasionally received goods from them on his own account.

In February 1878, the plaintiff furnished them with an account up to 20th January 1878, showing a sum due to him. The defendants paid a certain sum on account, but said the accounts were incorrect. On the 25th September 1878, defendant No. 4 wrote a letter to the plaintiff (filed as Exhibit B), in which the following passage occurred:—

"Had you come with him (meaning the plaintiff's brother) the accounts could have been looked into in our presence, and it would have been convenient to settle all disputes personally. Though R wrote to you to come in that manner, you did not do so. Therefore the following discrepancies have been found on comparing with the telegrams and your letters which are here."

It was subsequently agreed to submit the disputes to arbitration, and on 31st March 1880, defendants Nos. 1 and 4 signed a document (filed as Exhibit A) headed "Memorandum of items to be settled" between them and the plaintiff, as to the contents of which, see the judgment of the Court, *infra*, p. 262.

On the 14th June 1880, defendant No. 4 by the direction of the arbitrator made out an account (filed as Exhibit RR) on behalf of himself and defendant No. 1, giving a list of shipments and prices of goods sent by and to the plaintiff, and alleging that a balance would ultimately be

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* Appeal No. 111 of 1885.

found due from the plaintiff. The arbitrator made an award which was subsequently set aside by the Court. 1887 APRIL 20.

The plaint was filed on the 5th September 1882. The District Judge dismissed the suit on the ground that it was barred by limitation, holding that the accounts between the parties were not mutual accounts within the meaning of the Indian Limitation Act, [261] Schedule II, Article 85; that the defendants never admitted indebtedness to the plaintiff; and that consequently there was no acknowledgment of the debt by the defendants.

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The plaintiff appealed.

Bhashyam Ayyangar and *Desikacharyar*, for appellant.

Rama Rau, for respondents.

The arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (KERNAN and MUTTUSAMI AYYAR, JJ.).

JUDGMENT.

The plaintiff sues to recover a balance of Rupees 22,751-15-4 alleged to be due by the defendants Nos. 1 and 4 to the plaintiff on account of mutual dealings between them. The District Judge dismissed the suit as being barred by limitation.

The facts are—

The plaintiff who lives at Masulipatam agreed in 1876 with the defendants Nos. 1 and 4 who live at Nellore to buy grain, oilseeds, &c., and to forward the goods to the defendants, and the defendants agreed to pay the plaintiff therefor by remittances in cash or in hundies or drafts, and to pay him commission on the amount of such goods.

The plaintiff, during the year 1877, forwarded to the defendants Nos. 1 and 4 large quantities of grain and other goods, and received from time to time large remittances from the same defendants. In the month of December 1877, the defendants Nos. 1 and 4 forwarded to the plaintiff a quantity of "horns" at a price of Rupees 1,734-9-4 purchased by the defendants at the plaintiff's request to be paid for by the plaintiff. In the month of December 1877, the defendants Nos. 1 and 4 forwarded to the plaintiff 3,000 gunny bags to be sold for the account of the defendants.

In January 1878, the plaintiff sold on account of the defendants 1,508 gunny bags at, it is said, Rupees 227.

In February 1878, the plaintiff furnished to the defendants an account, up to the 26th January 1878, of the goods sent by him to the defendants, and of moneys received therefor, and of the sale of the 1,508 gunny bags, showing an alleged balance, on the accounts due to the plaintiff, of Rupees 19,915-6-10.

That account did not debit the plaintiff or credit the defendants with the residue of the 3,000 gunny bags, nor did it debit the plaintiff or credit the defendants with the price of the horns sent by the defendants to the plaintiff at his request. In 1878, plaintiff's brother [262] went to Nellore in reference to the plaintiff's account so furnished, and received about Rupees 4,000 from the defendants, but the defendants objected to the account. In a letter dated the 25th September 1878 (Exhibit B) to the plaintiff from defendant No. 4, the latter refers to the account sent by plaintiff and to the absence of the defendant No. 1 at Madras and to the fact that the plaintiff's brother and gumasta had not the plaintiff's vouchers, and says that the accounts could not then be settled. He says, "Had you come with him (the plaintiff's brother) the accounts could have been looked

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into in our presence, and it would be convenient to settle all disputes personally." He then points out many objections made by the defendants to the plaintiff's accounts, and amongst others the omission to introduce into the account to the debit of the plaintiff the price of the horns supplied.

The difference between the plaintiff and the defendants related to large sums, and it was agreed in 1880 that accounts between the parties should be, and they were, referred to Koka Alasangari Naidu as mediator. On the 31st of March 1880, the defendants Nos. 1 and 4 signed the Exhibit A, which is headed "Memorandum of items to be settled between Sitayya (the plaintiff) and the defendants Nos. 1 and 4, presented to K. Alasangari Naidu (mediator) residing in Nellore, by Burla Ranga Reddi and Muttarazu Venkata Row (defendants)." This document refers to the letter of the 25th September 1878 already mentioned, and states that the plaintiff did not reply, and that the items specified in that letter should be recovered. It concludes that "according to what Sitayya (plaintiff) has mentioned in the cash account, proper vouchers have to be looked into in person. As it is not convenient to mention all those items in this memorandum, we will look into and settle the same on the day which may be appointed by you in respect of this. You should receive proper vouchers from us and Sitayya (plaintiff) in respect of the items of difference of prices mentioned above and in respect of all the items which should be allowed and is due, and settle the same."

That memorandum was delivered by the defendants Nos. 1 and 4 to the mediator; and the parties on the 11th of November 1881 proceeded to have their mutual accounts examined by the mediator. The mediator made an award which was set aside by the District Court, and afterwards by High Court.

This suit was filed on the 5th of September 1882, stating the [263] substance of the matter above stated, but alleging that an account was furnished by him to the defendants down to the 25th January 1878, and another account to the 23rd of March 1881, taking up the prior account and crediting in 1879 and in 1881 certain sums received by plaintiff on the sale by him of the residue of the gunny bags and other items and showing a balance of Rupees 19,820-11-7 due to plaintiff. In the plaint, the letter of the 25th September 1878 and the memorandum of the 31st of March 1880 are stated, and the plaintiff prayed for a decree that the sum claimed, amounting to Rupees 22,751-15-4 and costs, should be paid to him. The defendants pleaded that the suit was barred by limitation; that there were no mutual accounts between plaintiff and defendants. At the trial, the plaintiff proved amongst other things the furnishing of the accounts to the defendant in February, 1878 and in March 1881, and the letter of the 25th September 1878 and memorandum of the 31st of March 1880, and also an account (Exhibit RR) made out on behalf of the defendants Nos. 1 and 4 by the defendant No. 4 by direction of the mediator, signed the 14th of June 1880. In this account (Exhibit RR), the defendants gave a list of the shipments of grain, seed, &c., and the value and expenses and remittances, and also of the money received by plaintiff, Rupees 231. for gunnies sold in 1878, and of Rupees 1,734-9-4, the price of the horns supplied to the plaintiff by the defendants. In a note to that Exhibit RR., defendant No. 4 remarks that it is not convenient to make any kind of entry in the head "balance of accounts" and disputes the correctness of the plaintiff's allegation and alleges that there will not be under any circumstances any thing found due by them, but there will be a balance found due to them

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by the plaintiff. To that list is added an explanation as to very many items, supporting the contention of defendants and showing a balance of Rupees 13,946-7-4 due to defendants.

The third issue framed was, "Is the plaintiff's suit barred by limitation?" On this issue, the plaintiff put forward two answers—

First, that the dealings between the plaintiff and defendants were mutual accounts under Schedule II, Article 85 of the Limitation Act, 1877; and the last item admitted or proved in that account was in 1879 and 1881, and therefore the suit is not barred.

Second, that there was an acknowledgment under Section 19 of the Limitation Act, 1877, by the defendants Nos. 1 and 4 in 1880, of [264] liability by them in respect of plaintiff's right to have any balance due to him paid.

The District Judge held that the accounts between the parties were not mutual accounts within Article 85. In this he is clearly wrong (1). Plaintiff had a claim against the defendants for the value of the goods bought by him and shipped to the defendants, and pending that account, the defendants had a claim against the plaintiff for the value of horns supplied to plaintiff at his request, and for the price of gunny bags consigned by the defendants to plaintiff for sale. The account never was settled between the parties, and it was open and current, and there were reciprocal demands between the parties. But the Judge did not credit the plaintiff's allegation that the last item in the account either admitted or proved was in January 1879 or March 1881, and he held the plaintiff's suit was barred. On the evidence before the Judge, we cannot say he was wrong as to the facts. This subject will be referred to hereafter.

As to the acknowledgment. The District Judge observed that the letter of the 25th September 1878 (Exhibit B) and the memorandum signed by the defendants on the 31st of March 1880 (Exhibit A) pointed out that the accounts furnished by the plaintiff were incorrect and that many discrepancies existed between his telegrams and letters, and that the accounts had to be settled between the parties in person. He held that there was no acknowledgment in Exhibit A or admission that anything "is due" to the plaintiff. He says that it renewed Exhibit B and the defendants' objections thereon, and that from first to last the defendants "never admitted indebtedness" to the plaintiff.

But the Limitation Act of 1877 does not require as an essential of an acknowledgment an admission of money being due, or an admission of indebtedness, as was required in Section 4 of Act XIV of 1859, and in Section 20 of Act IX of 1871. Both of which Acts have been repealed. Under the Acts last mentioned, the operation of an acknowledgment to bar limitation was limited to suits to recover debts and legacies, and for redemption of mortgages, and pledges of property and to certain execution proceedings. But in the Act of 1877, Section 19, the operation of an acknowledgment extends to any "suit or application in respect of any property or right." That section provides that if, before the expiration of [265] the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing, signed by the party against whom such property or right is claimed, a new period of limitation according to the nature of the original liability shall be computed from the time when the acknowledgment was so signed. Such acknowledgment may be made to a person

(1) (Reporter's Note) See *Lakshmayya* v. *Jagannathan*, 10 M. 199.

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other than the person entitled to the property or right—see Section 19, Explanation 1. In Section 19, Explanation 2, it is declared that "signed" in that section means either personally or by an agent duly authorised in that behalf.

The right claimed by the plaintiff, was, and is, a right to recover from the defendants Nos. 1 and 4 a balance which he alleges to be due to him on the accounts between them. The defendants in Exhibit A, though they deny that any balance is or shall be found due by them, acknowledge that the accounts must be taken, and that they are liable in respect of plaintiff's right to pay him any such balance, if any, that might be found due to him—see concluding paragraph of Exhibit A, *ante* page 262, and see Exhibit RR. Such acknowledgment of liability is a clear inference from the terms and provisions of Exhibit A. When Exhibit A was signed, there was no doubt that limitation had not applied and there was no difficulty in each side admitting liability for any balance found due.

For the purpose of an acknowledgment of right to bar limitation the fact that the defendants in the acknowledgment contended that nothing would be due to plaintiff on taking the accounts is immaterial—see *Prance* v. *Sympson* (1) and *River Steamer Company*, re (2). The acknowledgment is of the plaintiff's right to have the accounts taken and of the defendants' liability to pay any balance that might be found due to the plaintiff. What was the balance must depend upon the taking of their accounts. The acknowledgment contained in Exhibit A, dated 31st March 1880, was made within time under Section 19 of the Limitation Act, 1877. The result is the decree of the District Judge must be reversed and the case remanded for trial, as the Judge disposed of the case on the preliminary issue of limitation which excluded evidence on the record.

[266] No relief is sought by the plaintiff against the defendants Nos. 2 and 3, as they are merely made parties to have the accounts taken in their presence. No objection has been taken by them or on their behalf.

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10 M. 266=11 Ind. Jur. 253.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Muttusami Ayyar.

PADAKANNAYA (*Defendant No.* 2) *Appellant v.* NARASIMMA AND OTHERS (*Plaintiffs*), *Respondents.** [11th October and 13th November, 1886.]

Rent Recovery Act—Act VIII of 1865—*Mulageni lease—Encumbered tenancy—Sale for arrears of rent.*

A demised land to B on a mulageni lease. B mortgaged his tenancy to C. The rent under the mulageni lease fell into arrears, and A obtained a decree against B for the amount:

Held, that arrears of rent are not a first charge on the tenant's holding, and accordingly that the landlord could not execute his decree by sale of the tenancy free from the mortgage created by the tenant—*Rajagopal* v. *Subbaraya* (I.L.R., 7 Mad. 31) followed.

APPEAL against the decree of H. M. Winterbotham, District Judge of South Canara, confirming the decree of A. Venkataramayya, District Munsif of Mangalore, in Original Suit No. 40 of 1884.

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* Second Appeal No. 13 of 1886.

(1) Kay, p. 678. (2) L.R. 6 Ch. App. 822.

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The plaintiff was the mulagar or proprietor of certain lands of which defendant No. 1 was the tenant under a mulageni or permanent lease granted by the plaintiff's father. The lease reserved a certain annual rent which subsequently fell into arrears. The plaintiff sued defendant No. 1 to recover the arrears of rent and obtained a decree for the amount in Original Suit No. 302 of 1881 on the file of the District Munsif of Bantval, and in execution of the decree attached the mulageni right of defendant No. 1. But, long before the suit, defendant No. 1 had mortgaged his mulageni right to the father of defendant No. 2 under Exhibit II of which the material parts are set out in the first paragraph of the judgment of the Court, see *infra*. Defendant No. 2 accord-[267] ingly preferred a claim as mortgagee in the attachment by the plaintiff, and his claim was allowed. The plaintiff brought this suit under Section 283 of the Code of Civil Procedure for a declaration that he was entitled to execute his decree by the sale of the mulageni right of defendant No. 1 free from the mortgage of defendant No. 2.

Both the Lower Courts decreed in favor of the plaintiff, and defendant No. 2 preferred this second appeal.

Ramachandra Rau Saheb and *Srinivasa Rau* for appellant argued that the plaintiff could only sell the mulageni interest subject to the mortgage of defendant No. 2, because defendant No. 2 did not undertake to pay rent either expressly or impliedly, and was not a party to the decree sought to be executed. They further urged that the decree was only a money decree, and that neither it nor the mulageni lease made the rent a charge on the mulageni interest of the tenant; and relied, *inter alia*, on *Rajagopal* v. *Subbaraya* (I. L. R. 7 Mad. 31).

Gopala Rau, for respondents.

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.).

JUDGMENT.

On the 29th June 1854, the plaintiff's father granted the land in suit to the defendant No. 1 on a "Mulageni" or permanent lease. On the 22nd April 1865, defendant No. 1 mortgaged his "Mulageni" right to the father of defendant No. 2 with possession. Exhibit II, which is the instrument of mortgage, contained the following provision:—"Henceforth we shall cultivate the said mortgaged garden and land *as under you*, and pay Government assessment out of the produce of the garden, 25 muras of rice for mulageni to the muli proprietor out of the geni of the fields, and from the remaining rice, we shall pay you 23 muras, at 45 polike as fixed on, at your house at the two suggi (second crops) of Kartigai within the 30th Palgunna Babula of every year, and get receipt for the same. The time fixed for redeeming the mortgaged land is 16 years from this date, that is to say, the Mesha Saukramana (the commencement of the Mesha month) of the next Vikrama year. Should any of the loan obtained by us and part of *the interest* remain unpaid, we shall pay for the balance of rice its price during the year, with interest thereon at the fixed rate, and release the mortgage deed and the [268] mulageni chit and the tahanama, the mortgage deed executed to Ballukraya and the simple bond which we have given you and the garden land, &c."

Subsequently to this mortgage, the defendant No. 1 allowed the rent due to the plaintiff (mulagar or proprietor) to fall into arrears; and in Original Suit 302 of 1881 on the file of the Munsif at Bantwal, the latter

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obtained a money decree against the former for those arrears. In execution of the decree, the plaintiff attached the mulageni right of defendant No. 1, but defendant No. 2 preferred a claim with reference to his mortgage. This claim being allowed, the plaintiff brought this suit under Section 283 of the Code of Civil Procedure to obtain a declaration that he was entitled to recover the arrears of rent decreed to him by the sale of the mulageni right free of the encumbrance created thereon by the mortgagee in favour of defendant No. 2. The Courts below decided in favour of the claim. The District Munsif observed that the mulageni right assigned to defendant No. 2 by way of mortgage vested in him subject to the pre-existing liability to pay rent; and on appeal, the District Judge agreed with him and held that the liability to pay rent was inseparably attached to the right of occupancy, and that the one could not be severed from the other by a mortgage executed by the tenant in favour of a third party.

Defendant No. 2 contends in second appeal that rent is not a first charge on land as considered by the Judge, and relies on *Zamindar of Ramnad* v. *Ramamany Ammal* (1) and *Virappa* v. *Kathana* (2).

He also drew our attention to *Munisami* v. *Dakshanamurthi* (3) and stated that it was overruled by the Full Bench decision in *Rajagopal* v. *Subbaraya* (4).

In the *Zamindar of Ramnad* v. *Ramamani Ammal* (1) one of the questions raised for decision was, whether the rent due to the zamindar was a charge on a maganam or division of the zamindari, and whether the persons who purchased it subsequent to the date on which the rent claimed accrued due were liable for its payment by reason of the purchase. It was held in 1880 by a Division Bench of this Court that poruppu (annual payment) due to the **[269]** zamindar was *rent* and not peshcush, and that as such, it was a debt due to the zamindar and not a charge on the maganam.

In *Munisami* v. *Dakshanamurthi* (3) a mittadar at Salem brought to sale the interest of a puttadar on his estate for arrears of rent under the provisions of Act VIII of 1865, and the then plaintiff became purchaser; one Kuppaiya obtained a decree against the puttadar upon a prior hypothecation for the sale of the puttadar's interest in satisfaction of his debt. The question raised for decision was whether the interest that passed to the purchaser at the sale under Act VIII of 1865 was subject to, or free of, the prior hypothecation. It was held that the rent was first charge on the land, and that the puttadar's interest, which was the subject of hypothecation, was an interest defeasible on the exercise by the mittadar of his power of sale, subject to the provisions of Act VIII of 1865.

In *Rajagopal* v. *Subbaraya* (4) the question, whether a sale by a landlord of a tenant's interest in his holding for non-payment of rent under Madras Act VIII of 1865, defeated existing incumbrances, was again raised before a Division Bench. As the prior decisions upon that question were conflicting, it was referred to a Full Bench consisting of four Judges. It was ruled that the sale was subject to the existing encumbrances. The ground of decision was that the course of legislation from 1802 and the provisions of Act VIII of 1865 were incompatible with the view that what the landlord was entitled to sell for arrears of rent was the tenure itself, and not simply such property as existed in the tenant at the time of the sale.

(1) 2 M. 234. (2) 6 M. 428. (3) 5 M. 371. (4) 7 M. 31.

In *Virappa* v. *Kathana* (1) there was a competition between a prior purchaser at a Court-sale of the tenant's interest in execution of a mortgage decree and a subsequent purchaser at the sale held for arrears of rent under Act VIII of 1865. The decision was in favor of the former, and it followed the Full Bench decision.

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We must take it then that arrears of rent are not a first charge on the tenant's holding.

Another contention in second appeal is, that by agreement between the mortgagor and the mortgagee, the rent payable to the mulagar or landlord was charged on the land. But Exhibit II, [270] on which the contention is based, evidences only an undertaking on the part of the mortgagor to pay the mulageni rent due to the landlord out of each year's produce. Further, the landlord was no party to this instrument, and we cannot say that the contention is well founded. However this may be, the decree under execution is only a money decree, and in the case of a competition between the decree-holder and a mortgagee, the former is certainly not entitled to bring to sale the execution debtor's property free of existing incumbrances.

We decree the appeal and reverse the decrees of our lower Courts. The first respondent will pay the appellant's costs throughout.

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10 M. 270.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Parker.

ALWAR AYYANGAR AND ANOTHER (*Plaintiffs*), *Appellants* v. SESHAMMAL AND ANOTHER (*Defendants*), *Respondents*.* [19th April, 1887.]

Civil Procedure Code, Sections 98, 99, 157, 158.

A District Munsif struck a case off the file of his Court on neither party appearing. Subsequently on an application by the plaintiffs the case was restored. The order of restoration was reversed by the District Judge.

Held, (1) that the order to strike off the case was illegal;

(2) that assuming that the case was dismissed, no appeal lay to the District Judge whose order was accordingly made without jurisdiction.

[R., 34 C. 235 (239) = 5 C.L.J. 260; 18 M.L.J. 51 (55) = 3 M.L.T. 225; 10 O.C. 171 (172).]

SECOND appeal against the decree of J. H. Nelson, District Judge of Chingleput, reversing the decree of N.R. Narasimhayyar, District Munsif of Trivellore, and Civil Revision Petition, under Section 622 of the Code of Civil Procedure, praying the High Court to revise an order of J. H. Nelson, District Judge of Chingleput, dated 18th April 1885, reversing an order of N. R. Narasimhayyar, District Munsif of Trivellore, dated 21st January 1885.

A suit filed in the Court of the District Munsif of Trivellore was by an order, dated 13th December 1884, struck off the file on neither party appearing. On 21st January 1885 the District Munsif on an application by the plaintiffs made an order restoring [271] the case to his file. Against the last-mentioned order the defendants appealed.

The District Judge reversed the order of 21st January 1885.

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* Second Appeal No. 770 of 1885 and Civil Revision Petition No. 215 of 1885.

(1) 6 M. 428.

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The plaintiffs appealed.

Subramanya Ayyar, for the appellants argued that the proceedings, dated the 13th December 1884, having, according to the Munsif, been passed under Section 98 of the Code of Civil Procedure, no appeal lay to the District Court against the order, dated 21st January 1885; and that if the case was one falling under Section 158 of the Code of Civil Procedure, the District Court should have upheld the order of the District Munsif, dated the 21st January 1885, whereby the order, dated the 13th December, was set aside.

Mr. Subramanyam and *Srirangacharyar*, for respondents.

The further arguments adduced in this case appear sufficiently for the purpose of this report from the judgment of the Court (KERNAN and PARKER, JJ.)

JUDGMENT.

The order of the 13th day of December 1884 of the Munsif records that neither party appeared and that he struck the case off the file. That was illegal. There is no authority in law justifying the Munsif to make such order. He had power under Sections 98 and 157 to dismiss the suit as neither party appeared.

Assuming he did dismiss it, then it was open to the plaintiff to apply under Section 99 to restore it. The Munsif on notice restored the case, and against that order no appeal lay.

An appeal was, however, made to the District Court, and that Court finding that there was no appeal against an order to restore, treated the order to strike off the file as decision under Section 158. Now Section 158 did not apply to this case, as the application to adjourn to the 13th was not made by the plaintiff alone, but was made on the joint application of defendants and plaintiffs. Section 158 applies where any one party had a case adjourned and on the day of adjournment he is not ready. That is not this case. Again the Munsif did not decide the case, as he was bound to do if Section 158 applied. His order was to strike the case off the file.

In *Comalammal* v. *Rungasawmy Iyengar* (1), *Ambalavana Padeiyatchi* v. *Subramania Padeiyatchi* (2), the plaintiff who got time did not produce his witnesses on that day.

[272] The Munsif says he proceeded under Sections 98 and 157.

We think that the order of the District Judge was made without jurisdiction, and we accordingly reverse his decree of the 18th of April 1885 and restore the order of the Munsif of the 21st of January 1885 with costs of the appeal in the Court below and the costs of this appeal.

This judgment disposes also of the Civil Revision Petition 245 of 1885.

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(1) 4 M.H.C.R. 56. (2) 6 M.H.C.R. 262.

10 M. 272.

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APRIL 5.

APPEL-
LATE
CIVIL.

10 M. 272.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

VENKATACHALAM (*Plaintiff*), *Appellant* v. MAHALAKSHMAMMA (*Defendant*), *Respondent*.* [22nd November, 1886 and 5th April, 1887.]

Civil Procedure Code (Act VIII) of 1859, *Section* 148—Res judicata—*Previous suit by next friend dismissed for default—Evidence of fraud of next friend—Limitation—Contract by a minor—Ratification by acquiescence.*

A sued in 1885 to recover certain estates from B, alleging claim under his adoption which took place in 1865. A suit to recover the same estates had been filed on behalf of A by his next friend and had been dismissed for default in 1872. In 1875 A, being still a minor, relinquished his claim to the estates for Rs. 12,000 under Exhibit B; but now alleged that he thought he was relinquishing it only in favour of the defendant's predecessor in title who died in 1883, having been in possession of the estates since 1867. The plaintiff attained his majority in 1878:

Held, that the claim was *res judicata*, the plaintiff having failed to prove fraud on the part of his next friend: that whether the cause of action arose in 1865 or 1867, it was equally barred from 1879: that assuming the plaintiff was a minor of 15 years of age at the date of the deed of relinquishment, it is not likely he would not have understood its effect, or that he failed to ascertain it when he attained his majority in 1878.

Per cur.—The plea of *res judicata* ordinarily presupposes an adjudication on the merits: but Section 148 of the Code of Civil Procedure (Act VIII) of 1859 contains a statutory direction that in case the plaintiff neglects to produce evidence and to prove his claim as he is bound to do, the Court do proceed to decide the suit on such material as is actually before it, and that the decision so pronounced shall have the force of a decree on the merits, notwithstanding the default on the part of the plaintiff.

[R., 9 C.W.N. 679 (688).]

APPEAL against the decree of J. Kelsal, District Judge of Vizagapatam, in Original Suit No. 6 of 1885.

[273] This suit was filed on 20th June 1885 to get possession of certain estates in the possession of the defendant, a Hindu lady, and for a declaration of the plaintiff's title thereto.

The plaintiff set up the following case.

In 1837 the estates in question descended to two brothers, Venkata Rau and Rama Rau. Venkata Rau managed the estates until 1845, when he died leaving a son Venkatachalam. The Court of Wards then undertook the management of the estates for Rama Rau and Venkatachalam, and in 1863 (Rama Rau having died in 1851) handed them over to Venkatachalam. He died in 1865 leaving a widow Ramayamma for whom the Court of Wards undertook the management for two years, and who remained in possession till her death in 1883 when she was succeeded by her daughter, the present defendant. The plaintiff now alleged that he had been adopted on 19th August 1865 at the age of three years by Bhanamma, widow (since deceased) of Rama Rau, acting under the authority of her deceased husband, and claimed accordingly.

The defendant denied the authority and the adoption, and further alleged that Rama Rau had never any interest in the estate. It was also pleaded that the matter was *res judicata* by reason of a suit brought by the plaintiff's father (Exhibit III) as his next friend in 1872, which was dismissed; that the plaintiff was estopped from suing by a document

* Appeal 146 of 1885.

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(Exhibit B) executed by him in February 1875 to Ramayamma, by which he surrendered his claims on the estate in consideration of receiving Rs. 12.000; and that the suit was time-barred as not having been filed within 12 years from the date of the alleged adoption, or within 3 years of the date when the plaintiff attained the age of 18, *viz.*, 1878.

The plaintiff said, with regard to the plea of *res judicata*, that the suit of 1872 was dismissed for default, owing to the fraud of his next friend, and to collusion between him and the defendant; with regard to the plea of estoppel, that Exhibit B was executed by him when still a minor and was obtained from him by fraud and misrepresentation, as he was induced to believe that he was relinquishing his rights only as long as Ramayamma lived; with regard to the time-bar, that under Act IX of 1875, Section, 3, he only attained his majority at the age of 21 years, and further that the cause of action arose only on the death of the defendant's mother in 1883.

[274] The District Judge dismissed the suit on the ground that it was precluded by the decree in the former suit and barred by limitation. With regard to the allegation of fraud against the plaintiff's next friend in his conduct of the former suit the District Judge made the following observations (referred to by the High Court) in paragraphs 25-27 of his judgment:—

"25. The first six witnesses have been examined as to the conduct of Original Suit 7 of 1872. Rama Jogi (first witness), a pleader, acted in it as the adviser of the next friend who refused to go on with the case, because an adjournment was refused, or to examine even the witnesses in attendance, because he wanted them examined at the same time as others not in attendance. About the conduct of the case in appeal he thinks 'the next friend' was 'not much interested' in it. Venkayya Garu (second witness) gives evidence to same effect.

"26. Venkat Row (third witness) is brother of plaintiff's mother. He considers the next friend mismanaged the case. 'He was not calling witnesses properly and changed his vakil from time to time. He was in communication with the defendant and told me he thought of compromising the suit as he could not stand the trouble.' Another uncle (fourth witness) considers the suit was mismanaged because the next friend did not attend Court in person and changed his vakil several times. The fifth witness is a man who was summoned in Original Suit 7 and though present was not examined. Somiajulu (sixth witness) was another witness who was not called, and he says the 'next friend' told him he had arranged a compromise and that the suit had been dismissed, but did not mention the terms of the compromise.

"27. There is absolutely no evidence of any fraud on the part of the next friend or of any collusion between him and the defendant Ramayamma."

The plaintiff appealed.

Mr. *Shephard* and *Venkata Subbu Rau*, for appellant argued, *inter alia* that even if the plaintiff was not misled as to the effect of the deed of 1875 (Exhibit B), it was for the defendant to prove that he ratified his promise not to disturb the heirs of the defendant's mother: and that at any rate after the date of Exhibit B, the possession of the defendant's mother was permissive and not adverse to the plaintiff.

[275] The Advocate-General (*Hon. P. O'Sullivan*) and Mr. *Spring Branson*, for respondent.

The further arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ). 1887 APRIL 5.

APPEL-LATE CIVIL.

10 M. 272.

JUDGMENT.

This is an appeal from the decree of the District Judge of Vizagapatam who dismissed, with costs, the appellant's suit to recover from the respondent possession of the estates of Kasimkota and Melupaka. The party last in possession was one Ramayamma, the respondent's mother, and upon her death in August 1883, the appellant commenced the present litigation. Assuming that Ramayamma was the lawful owner, there can be no doubt that the respondent, her daughter, is entitled to succeed to her in preference to the appellant.

But the appellant's case was that his title was superior to that of Ramayamma. K. Venkatachalam was the male ancestor under whom both parties to this appeal claim and upon his death in 1837, without male issue, the two estates in suit devolved on the sons of his daughter named Venkata Rau and Rama Rau. Of these the former died in 1845 and the latter in 1851. Venkata Rau left a son named Venkatachalam, and Rama Rau left a widow named Bhanamma, and in 1851 Venkatachalam was the surviving male coparcener of the joint Hindu family which consisted previously of Venkata Rau and Rama Rau. The properties in question then vested in him as sole owner, and continued in his possession until the 2nd May 1865, when he died leaving him surviving the respondent, a daughter, Ramayamma, a widow, the lady last in possession, and Bhanamma, his uncle Rama Rau's widow. Under the Mitakshara law which governs the parties, the estates devolved on Venkatachalam's widow upon his death. The appellant's case was that Rama Rau authorized Bhanamma in 1851 to adopt a son for him, and that, in pursuance of that authority, she adopted the appellant, when he was a child of three years of age, on the 19th August 1865. It is alleged for him that the adoption divested Ramayamma of the property which vested in her husband as sole owner during his life and in her upon his death and constituted the appellant the sole owner under the law of survivorship. On the other hand, the respondent denied that Bhanamma adopted the appellant or that Rama Rau authorized her to adopt, or that by such adoption the appellant acquired any right to the estates [276] which she inherited from her father through her mother. The Judge, however, did not go into the merits, but disallowed the appellant's claim on the ground that it was *res judicata* and that it was barred by limitation. The only question which we have now to determine in this appeal is whether the suit was properly dismissed for the reasons mentioned by the Judge.

On the death of Venkatachalam in 1865, a disagreement arose between his widow, Ramayamma, and uncle's widow, Bhanamma, and the Court of Wards assumed management of the estates now in litigation. Each of the ladies claimed a certificate under Act XXVII of 1860 to collect the debts due to Venkatachalam, but the widow's claim prevailed, the uncle's widow being referred to a regular suit to establish the appellant's adoption. In 1867 the Court of Wards restored the estates to Ramayamma and placed her in possession, and Bhanamma died in June 1869. In Original Suit No. 7 of 1872, the appellant's natural father, Sita Ramayya, alleged his adoption, and as his guardian and next friend claimed from the respondent's mother possession of the estates.

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That suit came on for final disposal in October 1872, but an adjournment was applied for, and on it being refused, the appellant's guardian declined to call such of his witnesses as were in attendance. Thereupon the Judge dismissed the suit under Section 148 of Act VIII of 1859, and from the decision passed under that section, the guardian preferred Appeal No. 43 of 1873. On the 16th June 1873, the High Court ordered that upon payment, within one month, of the costs incurred by the then defendant, the respondent's mother, the decree of the District Judge be reversed and the suit be remanded for re-trial, otherwise that the appeal be dismissed. The appellant's guardian failed to comply with the order and the appeal was dismissed. Thus the suit, which the appellant's guardian commenced in March 1872 to establish the adoption and eject the respondent's mother, ended finally in an adverse decision on the 16th June 1873. But on the 4th February 1875, the appellant executed in favour of Ramayamma Exhibit B which premised his adoption and his claim thereunder and purported to relinquish it in her favour and that of her heirs in consideration of Rs. 12,000, which sum it was recited was agreed to be paid to him. When this document was presented for registration, the Registrar held an inquiry in regard to the appellant's age. It appears, however, from Exhibit D, dated the 16th February, one [277] Achuta Ramayya, the respondent's father-in-law who deposed that he was then Ramayamma's agent or manager, wrote a letter to one Lingam Lakshmaji, a relative of the appellant, to the effect that the compromise was brought about by him and that no execution would be issued for the costs decreed in favour of the respondent's mother in Original Suit No. 7 of 1872 (Exhibit D). During the inquiry before the Registrar, the appellant made a deposition on the 18th February 1875 and addressed a petition on the 25th February 1875 (Exhibits I add II). These documents show what the appellant stated repeatedly that he was then 19 years of age that he executed exhibit B with his free consent and that those who wrote anonymous petitions to the Registrar, that the appellant was a minor, ought not to be trusted. Exhibit B was then registered on the 10th March 1875, and on the 11th March the appellant granted the receipt (Exhibit C) acknowledging payment in ready money on that day of Rs. 12,000, the consideration for Exhibit B. Neither the appellant nor his father since instituted any proceeding or took any action with reference to his alleged adoption, until the respondent's mother died in August 1883, when the appellant commenced the present suit stating that a false representation was made to him by Lingam Lakshmaji and Sitaramayya that Exhibit B would be operative only during Ramayamma's life, that it would not preclude him from asserting his claim after her death, and that he discovered the true legal effect of the document shortly after Ramayamma's death in 1883.

As to the plea of *res judicata*, it is urged in appeal that Original Suit No. 7 of 1872 was dismissed for default, and that unless there was in fact an adjudication of the merits, after full investigation, the claim could not be treated as *res judicata*. The plea no doubt ordinarily presupposes an adjudication on the merits as contradistinguished from an adjudication of which the effect consists in suspending the right of action until a certain event occurs or for some time. It appears to us that the learned Counsel for the appellant overlooks the fact that there may be a statutory direction that in case the plaintiff neglects to produce evidence and to prove his claim as he is bound to do, the Court do proceed to decide the suit on such material as is actually before it, and that the decision so pronounced shall

have the force of a decree on the merits, notwithstanding the default on the part of the plaintiff. We are of opinion that Section 148 of Act VIII of 1859 under which there [278] was a decision against the appellant in Original Suit No. 7 of 1872 contained such direction. It was held in *Comalammal* v. *Rungasawmy Iyengar* (1) that the decision under Section 148 was a decree and open to appeal. The material words of the section are "The Court may, notwithstanding such default, proceed to decide the suit forthwith" and the intention which they suggest is that litigation should not be vexatiously prolonged. The ground of decision under that section is not simply that there was default, but that there were no merits proved. In this connection we are referred to several decided cases, but none of them is in our judgment in point. As to the decision in *Rungrav Ravji* v. *Sidhi Mahomed Ebrahim* (2), the first suit was dismissed under Act X of 1877, Section 381, on the ground that the plaintiff who resided out of British India did not furnish security for costs as directed by the Court. The learned Judge who decided that case observed that the dismissal under Section 381 was like a decision under Section 102, not final within the meaning of Section 13. This observation was made with special reference to the facts that the second suit was not brought by the plaintiff in the first suit, and to the contention that the dismissal of the latter precluded him from pleading in the second suit, as a matter of defence, the ground on which the claim was rested in the first suit. The learned Judge guarded himself by saying "I give no opinion as to the result if a plaintiff, whose suit had been dismissed under Section 381, should attempt again to litigate the subject matter of the dismissed suit. Possibly a reference to Section 373 may be found sufficient to preclude him from so doing." Assuming (and we express no opinion on the point) that what is not available as a ground of defence in a second suit is available as a ground of attack, the decision is certainly not in favour of the appellant.

Another case cited is *Bessessur Bhugut* v. *Murli Sahu* (3). The first suit was in that case held to have been dismissed under Section 97 of the Code of Civil Procedure, and the right to bring a fresh suit is then expressly reserved by Section 99.

As to *Denobundhoo Chowdhry* v. *Kristomonee Dossee* (4), the decision proceeded on the ground that the party in the first suit was not represented in the second suit.

[279] As to *Keshava* v. *Rudran* (5), the decision proceeded on the view that the matter in contest was withdrawn from adjudication in the first suit under the Indian Oaths' Act.

We may here refer to the case of *Eshan Chundra Safooi* v. *Nundamoni Dassee* (6) wherein it was held, with reference to Section 97 of Act VIII of 1859, that a party who withdrew a suit without leave of Court was precluded from bringing a second suit on the same cause of action. Sir Richard Garth, C.J., observed that "though the withdrawal did not constitute a case of *res judicata* properly so called, there was a statutory prohibition, and that the rules applicable to cases of *res judicata* generally applied to a statutory bar of this kind." We may also refer to Act X of 1877, Section 103, or Act VIII of 1859, Section 114, as creating another case of a statutory bar.

As to the contention that Section 148 did not expressly prohibit a second suit, it should be remembered that it directed that the Court might

(1) 4 M.H.C.R 56. (2) 6 B. 482. (3) 9 C. 163.
(4) 2 C. 152. (5) 5 M. 259. (6) 10 C. 357.

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proceed to decide the suit, notwithstanding the default, constituting thereby the decision on the imperfect material on the record into a decree on the merits which under Section 13 would bar a second suit. No express rule of prohibition is inserted because the decision is a decree on the merits and not a mere judgment by default. We entertain therefore no doubt that the claim is *res judicata*, unless the appellant showed fraud on the part of his guardian who conducted the former suit.

As to the fraud imputed to the guardian, the Judge has, in our opinion, come to a correct conclusion. Exhibit III, which is a copy of the judgment in Original Suit No. 7 of 1872, shows how the guardian conducted that suit, and the oral evidence on the question of fraud, in connection with it, is stated by the Judge in paragraphs 25-27 of his judgment. Exhibit III shows, no doubt, that the guardian changed his Vakil twice, that he first cited one set of witnesses, and then endeavoured, when it was too late, to cite another set of witnesses. But it does not follow that he did not act *bona fide*. Again, it shows that after the Judge refused an adjournment, the appellant's father declined to call the witnesses who were in attendance and to proceed with the suit. This likewise shows great imprudence, but it appears that he had then a Vakil to advise him. In the absence of any [280] evidence to indicate that those witnesses were ready to prove his claim, we cannot say that the father intended to injure his son, for there was no motive for his seeking to defraud the appellant. The imputation is further inconsistent with his conduct in preferring an appeal to the High Court, in trying to raise money, according to the appellant's fourth witness, to comply with the order made in appeal. As to the statement made by the third and fourth witnesses that the appellant's father was in communication with Achuta Ramayya, and that he said that he could not conduct the suit and desired to effect a compromise, we cannot say that the Judge was in error in not attaching weight to it. The appellant is the nephew of these witnesses, and assuming that what they say is true, it does not prove that the endeavour was not honest. It is argued in appeal that what took place in 1875, in connection with the execution of Exhibit B, should be referred back to the time when the suit was pending, and that the Judge was in error in not doing so. There is not a particle of reliable evidence to show that any negotiation for a compromise took place during the pendency of Original Suit No. 7 of 1872, and we are not prepared to hold that the Judge was wrong in treating Exhibit B as a transaction concluded long after the final decree. We agree therefore in the opinion of the Judge that there is absolutely no evidence of fraud on the part of the next friend or of any collusion between him and Ramayamma. The conclusion we come to is that the Judge was right in holding that the appellant's claim was *res judicata*.

As to limitation, the appellant's adoption took place according to him on the 19th August 1865, whilst Venkatachalam died in May 1865, and the present suit was brought in March 1885. It appears that on Venkatachalam's death, the Court of Wards assumed management of the estates for some time and placed Ramayamma in possession in 1867. Whether the original cause of action arose in 1865 or 1867, the claim was equally barred from 1879. In view, however, to avoid the operation of the Limitation Act, the appellant alleged that he was only three years old when Bhanamma adopted him. It is found by the Judge that he attained his majority in 1878, and even assuming that the appellant came of age only in 1880 as now alleged by him, the additional term of three years to which he would

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be entitled on account of his minority expired in 1883, whilst the suit was insti-[281]tuted only in 1885. In this connection the learned Counsel for the appellant drew our attention to Exhibit B and argued that the appellant, who was a minor, was induced to execute it by a fraudulent representation that it would operate as a relinquishment of his claim only during Ramayamma's lifetime, and that he discovered the fraud shortly after her death in August 1883, which was within three years before suit. As to the alleged fraud, the Judge has found that it was not proved, and we see no reason whatever to come to a different conclusion. It is admitted by the appellant in his evidence that he wrote Exhibit B and it contains the words "I have agreed to receive Rs. 12,000 in money as consideration for the relinquishment and I will not therefore hereafter prefer any claim whatever at any time against you and your heirs in any respect of any matter." Assuming that he was then a minor of 15 years of age, it is not likely that he would not have understood that he was completely relinquishing his right, or failed to ascertain its effect when he attained his majority in 1878.

Again, Exhibits I and II, which are copies of the appellant's deposition and petition in the record of the Registrar, show that he was anxious to get the instrument registered and he did not then consider that he relinquished his claim only during Ramayamma's life. Further, Lingam Lakshmaji, to whom fraud is now imputed, is the appellant's relative, and it is far more likely that he interfered in bringing about the execution of Exhibit B rather to secure Rs. 12,000 for his relation than to defraud him. Exhibit D favours this view of Lakshmaji's conduct, Nor would the appellant's father have stood by and allowed his son to be defrauded. Though the eighth, ninth, and twelfth witnesses have now deposed that Lingam Lakshmaji said, during the execution of B, that the estates would go to the appellant after Ramayamma's death, only one of them appears to have attested the document. We cannot say that the Judge was wrong in refusing to accept their evidence as it is opposed to the probabilities of the case. The evidence conveys the impression that the appellant, after getting Rs. 12,000 through the interference of Lingam Lakshmaji and by representing that he was 19 years of age under the guidance of his father and Lakshmaji, now feigns fraud on the part of Lakshmaji, his father, and the respondent's father-in-law in order to renew a litigation which was set at rest by the decree in Original Suit No. 7 of 1872. The appeal fails and we dismiss it with costs.

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APPEL-
LATE
CIVIL.

10 M. 282.

10 M. 282.

[282] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

THAYAMMAL (*Plaintiff*), *Appellant* v. MUTTIA (*Defendant*), *Respondent*.* [3rd and 22nd March, 1887.]

Rent Recovery Act (Madras) Act VIII of 1865. *Section* 11—*Water-cess—Tenants—Cultivation improved by water taken from landlord's tank.*

A landlord has a right to charge water cess when his tenant cultivates a wet crop on dry land or a second wet crop on wet land by means of water taken from the landlord's tank.

[R., 12 M.L.J. 22 (23).]

SECOND appeal against the decree of J. Hope, District Judge of South Arcot, reversing the decree of the Temporary Deputy Collector of Cuddalore.

This was a summary suit under the Madras Rent Recovery Act, Section 9, to compel the defendant to accept a patta from, and execute a muchalka to the plaintiff of whom he held certain land. The defendant objected to a water-cess inserted in the patta on account of water taken from a tank, belonging to the landlord but it was admitted that he had used it to cultivate a wet crop on his dry land and a second crop on his wet land.

The Temporary Deputy Collector decreed in favour of the plaintiff: the defendant accordingly appealed to the District Court which modified the original decree by directing that the water-cess should be struck out of the patta.

The plaintiff preferred this second appeal.

Rama Rau, for appellant, argued that the introduction of the water-cess or kasar in the patta was not an enhancement of rent, but that it was a charge which the landlord was entitled to make on dry lands cultivated with the aid of his tank water.

Mr. *Spring Branson*, for respondent, argued that the charge was an additional rent which could only be charged under Section 11 of the Madras Rent Recovery Act, and cited *Kottasawmy* v. *Sandama Naik* (5 M.H.C.R. 294).

[283] The Court (COLLINS, C.J., and PARKER, J.) delivered the following

JUDGMENT.

The question is whether the landlord has a right to charge water-cess when a wet crop is cultivated on dry land, and when a second wet crop is cultivated on wet land.

It is not denied that the water taken for these purposes is taken from the proprietor's tank.

This is not a question of a landlord having, at his own expense, repaired a tank and rendered land formerly cultivated as punjah cultivable as nunjah as in *Kottasawmy* v. *Sandama Naik* (1), but the question is whether the tenant can be called upon to pay for extra water taken from the landlord's tank for special crops. There is nothing illegal in such a charge see *Vaythenatha Sastrial* v. *Sami Pandither* (2).

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* Second Appeal 753 of 1886.

(1) 5 M.H.C.R. 294. (2) 3 M. 116.

In the present case there is no dispute about the rate of assessment.

The appeal must be allowed and the decree of the Lower Appellate Court reversed and that of the Temporary Deputy Collector restored.

The respondents must pay appellant's costs in this and in the Lower Appellate Courts.

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10 M. 283 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusami Ayyar, Mr. Justice Brandt and Mr. Justice Parker.

MUTTIA (*Counter-Petitioner*), *Appellant v.* VIRAMMAL (*Petitioner*), *Respondent.** [13th October 1886 and 29th. April, 1887.]

Hindu Law—Execution of decree for maintenance of widow—Liability of ancestral estate.

Maintenance decreed to a coparcener's widow by reason of her exclusion from succession in a joint family cannot be regarded as a charge on the family estate or the decree treated as a decree against the managing member of the family for the time being.

[284] A, the widow of an undivided member of joint Hindu family, obtained a decree for maintenance against B, the brother of her deceased husband, not expressed to be a decree against the head or representative of the joint family.

B died, and C, his son, having been brought in as his representative, resisted the execution of the decree by attachment of the family estate:

Held, that the family estate was not liable.

Per cur.—In a regular suit, C may clearly be held liable to pay maintenance to A, and a decree may be passed against him; but in execution proceedings the decree must be taken as it stands and executed against the son as his legal representative in the mode prescribed by Section 234 of the Code of Civil Procedure, and it is not open to extend the scope of the decree in such proceedings—*Karpakambal* v. *Subbayyan* (I.L.R. 5 Mad. 234) approved and followed.

[F., 24 M. 689 (694); R., 16 A. 449 (461); 19 C. 139 (144) (F.B.); 13 M. 265 (266); 27 M. 106 (108); 30 M. 324 (326)=17 M L J. 180=2 M.L.T. 83; 35 M. 685 (688)=10 Ind. Cas. 874=21 M.L.J. 508=(1911) 1 M.W.N. 442; 8 C.W.N. 843 (857); 17 M.L.J. 541 (542).]

APPEAL against an order of J. W. Reid, District Judge of Coimbatore confirming an order made by P. Narayanasami Ayyar, District Munsif of Coimbatore, in Original Suit No. 19 of 1872.

In the above suit one Virammal obtained a decree for maintenance against Venkatakristna Gounden, the undivided brother of her deceased husband, not expressed to be a decree against the head or representative of the joint family. The decree was executed from time to time against Venkatakristna Gounden, and, on his death, his son, Muthu Gounden, was brought on to the record as his legal representative. The plaintiff now filed Civil Miscellaneous Petition No. 210 of 1885 in the above suit applying for the execution of her decree by the attachment of a house, which formed part of the ancestral property of the family.

The defendant opposed the petition on the ground that the maintenance decreed to the petitioner did not constitute a charge on the family estate.

* Appeal against Appellate Order No. 1 of 1886.

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10 M. 283 (F.B.).

Both the Lower Courts held that the family house was liable for the decree amount and ordered accordingly.

Bhashyam Ayyangar, for appellant.

The decree to be executed was only a decree for money passed against the appellant's father in a suit to which the appellant was no party; therefore, the decree-holder is not entitled to execute the decree by the attachment of ancestral property which has passed to the appellant by survivorship. *Karpakambal* v. *Subbayyan*, I.L.R. 5 Mad. 234, does not apply; for, in the present case, the property sought to be made liable was not the self-acquired property of the father.—*Nanomi Babuasin* v. *Modhun Mohun* (I.L.R. 13 Cal. 21) was also referred to.

Ramanujacharyar, for respondent.

The further arguments adduced on this appeal appear suffici-**[285]** ently for the purpose of this report from the order of reference and the judgment of the Court.

This appeal came on for hearing on 30th July 1886, before Muttusami Ayyar and Brandt, JJ, who seeing reason to doubt the correctness of the decision in *Karpakambal* v. *Subbayyan*, decided to refer the case to the Full Bench, and accordingly made the following.

ORDER OF REFERENCE:—The respondent, the widow of a deceased brother of the minor appellant's father, an undivided member of a joint family, had a decree for maintenance against the appellant's father, now deceased.

The minor appellant's name was entered on the record as the representative of the original decree-debtor, and the question is whether the Courts below are right in holding that the ancestral property of the family now represented by the minor is liable in execution of the decree.

The District Munsif referred to the Full Bench decision in the case of *Karpakambal* v. *Subbayyan* (1), but held, on the authority of the *Sivagiri case* (2), subsequently decided, that the "estate which a son takes by heritage from his father constitutes assets by decent for the payment of the father's debts," being debts not incurred for vicious or immoral purposes.

The District Judge appears to have considered *Karpakambal's* case to be an authority for holding that a decree for maintenance, such as we have to deal with here, can be executed against all the right and interest of the son to the extent of the assets descended to him from his father, and that the right and interest of the son in the ancestral property descending to him constitute assets liable in execution of such decree.

It is doubtful if the District Judge rightly apprehended the principle of the decision in *Karpakambal's* case, and we are bound by that decision, which, unless it be re-considered and modified or overruled by another Full Bench decision, is conclusive, and the orders of the Courts below must be reversed.

Having considerable doubts as to whether that case is decided on correct principles, and seeing reason to doubt whether the view now propounded is not more correct, we resolve to lay this case before the Full Bench in view to discussing the question whether **[286]** there are or are not sufficient grounds for re-considering that decision on the following grounds.

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(1) 5 M. 234. (2) 6 M. 1.

If the decree passed against the deceased had been expressed to be passed against him as representing the undivided family, or if that ancestral property had been indicated as the source from which the maintenance was to be provided, it could no doubt be executed against the property in the hands of the appellant. Is it not an inference necessary from the facts of the case itself that the decree was passed against the deceased in his capacity of representative of the family, and that it was intended to be satisfied by means of the ancestral property, if any? It is suggested that the true principle upon which the solution of the question appears to depend is as follows: according to the Mitakshara law, widows of co-parceners are excluded from inheriting their husbands' shares, and in consideration of their exclusion from such inheritance, the right of survivorship is burdened with the obligation to provide for their support. The right then that survived to the appellant's father survived as a potentiality, in other words what actually survived was the difference between the value of the undivided share, and the cost of the widow's maintenance during her life; and having regard to this legal basis of a decree for the maintenance of an undivided brother's widow, the decree might be taken to be a decree passed against the appellant's father as the head or representative for the time being of his branch of the joint family. We would observe that it does not appear from the report in *Karpakambal's* case, whether the maintenance was awarded to the widow of an undivided coparcener, or to a mother, or other female relative.

We would also draw attention to the results which must follow if the decision in that case is correct; it would, in such case, be necessary for a widow of a coparcener in a joint Hindu family in Southern India to institute a fresh suit for maintenance as often as the head or managing member of the joint family happens to die.

The decision must be in accordance with the true principles of the law applicable, but if decrees for maintenance in such cases cease to have effect on the death of the person originally made a party to the suit, it may be matter for consideration whether it is not desirable to have recourse to the assistance of the Legislature.

This appeal came on for hearing before the Full Bench [287] (COLLINS, C.J., KERNAN, MUTTUSAMI AYYAR, BRANDT and PARKER, JJ.,) on 13th October 1886 and on 29th April 1887, the following judgment was delivered:—

JUDGMENT.

In this case the respondent obtained a decree against the appellant's father, since deceased, for her maintenance, in Original Suit No. 19 of 1872 on the file of the District Munsif of Coimbatore. It is conceded that the maintenance awarded was not charged in the decree against family or ancestral property. Nor does it appear that the decree was in terms a decree against the head or representative of the joint family. So long as the appellant's father was alive, the decree was executed against him from time to time. For some time after his death, the appellant's guardian paid the maintenance whenever the decree was put into execution. When the respondent attempted to execute the decree in 1885 by attaching a house, the guardian objected to the attachment, alleging that the appellant's father left no separate estate, and that, as the ancestral property survived to the appellant on the death of his father, a mere personal decree against the latter could not be executed against the former who had inherited no separate estate from the judgment-debtor.

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The District Munsif overruled the objection on the ground that the house, which was ancestral, formed assets in the son's hands available for the payment of the father's debts, provided they were neither vicious nor immoral. The District Judge upheld the order in appeal, relying on the decision of the High Court in *Karpakambal* v. *Subbayyan* (1). In that case, there was a decree for maintenance against the respondent's father, but it did not appear on the face of the decree that he was sued as the manager of the family. It was held by the Full Bench of this Court that, though a decree can be executed against the sons for arrears which have accrued since their father's death, it can only be executed against them as representatives of their father, and, until his assets are exhausted, it being, of course, understood, that, on the father's death, the interest he had in his lifetime in joint ancestral property lapsed, and would not be available as assets.

This decision, far from supporting the order made by the Judge, is clearly an authority against it.

Muttayyan v. *Sangili Vera Pandia Chinnatambiar* (2), on which **[288]** the District Munsif relied, shows only that in a regular suit ancestral property that has survived to the son may be treated as assets for the payment of the father's debts, those debts being neither vicious nor immoral. It is not a decision as to the extent to which a personal decree against the father can be executed against his son as his representative under Section 234 of the Code of Civil Procedure.

The question referred by the Division Bench in this appeal is, whether maintenance decreed to a coparcener's widow by reason of her exclusion from succession in a joint family cannot be regarded as a charge on the family estate or the decree treated as a decree against the managing member of the family for the time being. It now appears, upon further consideration, to Muttusami Ayyar and Brandt, JJ., who entertained some doubt on the point, as well as to the rest of the Court, that the question must be answered in the negative. In a regular suit the appellant may clearly be held liable to pay maintenance to the respondent, and a decree may be passed against him; but, in execution proceedings, the decree must be taken as it stands and executed against the son as his legal representative in the mode prescribed by Section 234 of the Code of Civil Procedure, and it is not open to extend the scope of the decree in such proceedings. As to the observations contained in the order of reference, it may be pointed out that the difficulty suggested may be obviated by the person entitled to maintenance obtaining a decree making it a charge on the family property, if any, or making the judgment-debtor liable as the representative of the undivided family. We are, therefore, of opinion that the decision of the Full Bench in *Karpakambal* v. *Subbayyan* (1) must be adhered to, and that the case must be referred back to the Division Bench for disposal with reference to the foregoing observations.

This second appeal came on for hearing on 15th July 1887 before the Division Bench (MUTTUSAMI AYYAR and BRANDT, JJ.), when the following judgment was delivered:—

In accordance with the decision of the Full Bench, the orders of the Courts below are set aside, and the application for execution is dismissed with costs throughout.

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(1) 5 M. 234. (2) 6 M. 1=9 I.A. 128.

10 M. 289.

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APPELLATE CIVIL.

10 M. 289.

[289] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

SUBBAMMAL AND OTHERS (*Defendants Nos.* 1—3), *Appellants v.* VENKATARAMA AND ANOTHER (*Plaintiff and Defendant No.* 4), *Respondents.** [23rd March, 1887.]

Transfer of Property Act—Act IV of 1882, *Sections* 131, 135—*Notice* –*Assignment of actionable claim—Rights of transferee for value.*

A sued for principal and interest due on a mortgage assigned to him for value by the mortgagee. No notice of the assignment was given to the mortgagors before the plaintiff's demand. The sum sued for exceeded the amount paid by the plaintiff for the assignment and reasonable interest on it; but such amount was not paid or tendered to the plaintiff:

Held, that the plaintiff was entitled to a decree for the whole amount due on the assigned mortgage.

[Overruled, 13 M. 225 (F.B.); F., 18 C. 510 (513); R., 16 A. 315 (317) (F.B.); 21 B. 60 (63); 21 C. 568 (575); 7 C.P.L.R. 82 (83).]

APPEAL from the decree of A. J. Mangalam Pillai, Subordinate Judge of Madura (West), reversing the decree of P. A. Lakshmanan Chettyar, Acting District Munsif of Madura, in Original Suit No. 546 of 1884.

This was a suit to recover Rs. 149-4-0, being principal and interest due on a registered mortgage-deed, dated 1st July 1881, and executed by defendants Nos. 1, 2 and 3 to Venkatachalam Ayyar. The plaint alleged that on 16th April 1884 he obtained an assignment of the mortgage from the mortgagee for the sum of Rs. 100. No notice of the assignment was given to the mortgagors before the plaintiff's demand. Defendant No. 4 asserted a mortgage lien over part of the property included in the mortgage sued on.

The District Munsif dismissed the suit on the ground that the mortgage sued on was obtained by fraud.

The Subordinate Judge reversed the decree of the District Munsif and decreed "that subject to the mortgage right of defendant No. 4 in plot No. 3, the plaintiff is entitled to recover the sum sued for."

[290] Defendants Nos. 1, 2 and 3 preferred this second appeal; the plaintiff and defendant No. 4 being joined as respondents.

Venkatramayyar and *Seshagiri Ayyar*, for appellants, argued that the assignment was invalid for want of notice to the mortgagors under Section 131 of the Transfer of Property Act, and that in any case the plaintiff was only entitled to a decree for the purchase-money and interest under Section 135 of that Act.

Subramanya Ayyar, for respondents, pointed out, as to the contention that the plaintiff could not recover the whole claim, that no payment or tender of the purchase-money and interest had been proved.

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and PARKER, J.)

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* Second Appeal No. 477 of 1886.

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JUDGMENT.

The principal point argued before us is that no notice of transfer was given under Section 131 of the Transfer of Property Act. This point was not raised at settlement of issues.

We follow the rulings in *Lala Jugdeo Sahai* v. *Brij Behari Lal* (1) that the transfer came into operation when the debtors became aware of it (and he became aware of it when the action was brought), and in *Grish Chandar* v. *Kashisauri Debi* (2) that plaintiff is not debarred from recovering the full amount.

The second appeal is dismissed with costs.

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10 M. 290.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Parker.

ALWAR AND ANOTHER (*Plaintiffs*), *Appellants v.* SESHAMMAL AND ANOTHER (*Defendants*), *Respondents.** [9th April, 1887.]

Civil Procedure Code, Sections 98, 99—*Decree passed in a restored suit pending appeal against order of restoration.*

A suit was filed in a Munsif's Court, but neither party appeared for the hearing, and the suit was dismissed. The Munsif subsequently on review made an order restoring the suit and eventually decreed for the plaintiff. The defendant in the meanwhile appealed to the District Court against the order of restoration, and after [291] the date of the decree, the District Court made an order allowing the defendant's appeal. The plaintiff appealed to the High Court and the order of the District Court was reversed and the order of restoration upheld :

Held, that the Munsif's decree was not passed without jurisdiction.

SECOND appeal from the decree of S. T. McCarthy, Acting District Judge of Chingleput, reversing the decree of N.R. Narasimhayyar, District Munsif of Trivellore, in Original Suit No. 830 of 1883.

This was a suit to recover principal and interest due on a mortgage bond executed by defendant No. 1 in favour of the minor plaintiff's father. On 12th January 1885, the Munsif dismissed the suit under Section 98 of the Code of Civil Procedure ; but on 21st January he made an order restoring the case on the file of the Court, and eventually passed a decree in favour of the plaintiffs on 20th March. Meanwhile an appeal had been preferred against the order of 21st January, and the late District Judge heard the appeal and reversed the order appealed against on 18th April. The defendants appealed against the Munsif's decree of 20th March, alleging as their first ground of appeal that the decree of the Lower Court was void in that the Munsif's order of restoration had been set aside on appeal. S. T. McCarthy, the Acting District Judge, heard the appeal and reversed the decree appealed against as having been passed without jurisdiction, but expressed an opinion favourable to the plaintiffs on the evidence.

The plaintiffs preferred this second appeal ; the order of the District Court, dated 18th April, having been meanwhile reversed by the High Court. See *ante*, p. 270. (3)

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* Second Appeal No. 1112 of 1886.

(1) 12 C. 505. (2) 13 C. 145. (3) [10 M. 270.—ED.]

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Subramanya Ayyar, for appellants, argued that the order of the District Judge setting aside on appeal the Munsif's order of 21st January having been made subsequently to the Munsif's decree, the decree was not passed without jurisdiction.

Srirangacharyar, for respondents, argued that the Munsif's decree was *ultra vires*.

The Court (KERNAN and PARKER JJ.,) delivered the following

JUDGMENT.

The District Judge on 18th April 1885 reversed the order of the Munsif to restore that of the 21st January 1885, and in appeal reversed the decree of the Munsif of the 20th March 1885. The appeal against the decree of the Munsif was filed on the 8th of May 1885 and the hearing was on 1st September 1886. By the decree the District Judge reversed the decree of the Munsif on the ground that the decree of his predecessor [292] of April 1885 reversed the order to restore the suit, the effect of which was that the suit was no longer in Court and the decree of the Munsif was wrong.

The present District Judge expressed an opinion in favour of the plaintiff on the merits, in order that the Court might, if it felt justified, act on that opinion. But we cannot do so, as the District Judge had no jurisdiction to pronounce such an opinion as long as the decree of his predecessor stood.

We have reversed the decree of 18th April 1885. Therefore the order of restoration stands and the decree of the Munsif made before the decree of 18th April 1885 stands.

We reverse the decree of 1st September 1886 and direct the District Judge to re-hear the appeal on the merits, but not on the first ground of appeal which we have already decided. Costs of this appeal to be paid by the respondents to the appellants and the costs of the appeal to the Lower Appellate Court and of the original suit are to abide the result of the suit.

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10 M. 292.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

GANAPATI (*Defendant*), *Appellant v.* SITHARAMA (*Plaintiff*), *Respondent.** [28th and 29th March, 1887.]

Civil Procedure Code, Section 561—*Appeal from appellate decree disallowing memorandum of objections—Limitation Act—Act XV of* 1877, *Section* 12—*Karnam—Rights of* de facto *karnam.*

A filed a plaint on 28th June 1882 for a declaration of his title as karnam of a village and for arrears of dues payable to him as such, including those for Fasli 1288, which accrued due on 1st July 1879. His family had held the office and discharged its duties for three generations, but there was no evidence of any formal appointment of A or his ancestors:

Held, that the plaintiff was entitled to the dues as *de facto* karnam, and his claim was not barred in respect of any of the arrears claimed.

Per cur.—The preliminary objection taken by the respondent that no second appeal lies from so much of the decree of the Subordinate Judge as disallowed

* Second Appeal No. 361 of 1886.

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the objections filed by the appellant under Section 561 of the Code of Civil Procedure is without weight.

[F., 4 Ind. Cas. 599 (600) = 3 S.L.R. 106.]

[293] APPEAL against the decree of S. Gopalachari, Acting Subordinate Judge of Madura (East), modifying the decree of P. S. Gurumurthi Ayyar, District Munsif of Tirumangalam, in Original Suit No. 584 of 1883.

This was a suit to declare the plaintiff's right to, and to recover arrears of, certain dues alleged to be payable to the plaintiff as karnam of a certain village. The arrears sued for were for Faslis 1288—1290. The plaint stated that the karnam mirasi of the village of Pattam belonged to the plaintiff, and that he and his ancestors since the faisal, had performed the duties of the office and enjoyed the emoluments (mannihams and swatantrams) appertaining to it; and that the defendant did not pay the swatantrams assessed on the land cultivated by him. The plaint was filed on 28th June 1882.

The defendant pleaded that the plaintiff was not the karnam of the village and had no right to the dues in question.

The District Munsif held that the plaintiff was the mirasi-karnam of the village in question and made a decree for the payment to him of the dues of Faslis 1289 and 1290, but held that the claim for the dues of Fasli 1288 was barred by limitation.

The plaintiff appealed to the Subordinate Court in respect of that part of the decree which refused part of his claim, and the defendant filed a memorandum of objections.

The defendant preferred this second appeal.

Kalianaramayyar, for appellant, argued that the plaintiff had no mirasi right to the office, as he was not appointed by the zamindar, and referred to Regulations XXV and XXIX of 1802 and Regulation VI of 1831; that the formal requisites of the appointment of a karnam cannot be dispensed with, and that as *de facto* karnam he was not entitled to the dues claimed. It was further argued that in any case a claim for the arrear of Fasli 1288 was time-barred.

Kistnasami Ayyar, for respondent, objected that no second appeal lies from so much of the decree of the Lower Appellate Court as disallowed the defendant's objections. This contention was overruled.

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.).

JUDGMENT.

This was a suit brought by the respondent to [294] recover the swatantram (emolument) payable by the appellant for Faslis 1288—1290 to the karnam of the village in question. It was not shown by the appellant that he ever held the office, or that he was entitled to it, or that he was under no obligation to pay. It has been found that the respondent has been serving as karnam for the last five or six years; that his grandfather held the office during his lifetime, and that one Subramanyam served as their gumastah during the minority of the respondent, and during the lifetime of his father. It was also in evidence that the respondent was described as karnam in the Inam Register of 1864, and that the appellant, his father and his guardian paid the swatantram to the gumastah (agent) Kuppu Subramanyam, until Fasli 1287.

Upon these facts, we are of opinion that the Subordinate Judge properly decreed the respondent's claim. It is true that one Picha Pillai was the karnam at the time of the permanent settlement, and that the respondent is in no way related to him. Nor is it proved when, by whom, and in what circumstances the respondent's grandfather was appointed to the office, or whether there was a formal appointment at all. But the recognition of the respondent's claim contained in the Inam Register of 1864 and the fact of his family having held the office for three generations are sufficient to raise the presumption that there has been a valid appointment.

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Another contention is that the claim to the emolument due for Fasli 1288 was barred by limitation. It is conceded that it accrued due on the 1st July 1879, and the period of limitation began therefore to run only from that date, which must be excluded from computation under Section 12 of Act XV of 1877. The decision of the Subordinate Judge that the claim was not barred is right.

The preliminary objection taken by the respondent that no second appeal lies from so much of the decree of the Subordinate Judge as disallowed the objections filed by the appellant under Section 561 of the Code of Civil Procedure is without weight, and the decree appealed against was a decree passed in appeal within the meaning of Section 584, whether it dealt with the grounds of appeal urged by the appellant or the objections taken by the respondent under Section 561.

This second appeal fails, and we dismiss it with costs.

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[295] APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, and Mr. Justice Parker.

QUEEN-EMPRESS *v.* RANGI AND ANOTHER.* [29th November, 1886 and 12th January, 1887.]

Criminal Procedure Code, Sections 342, 364—*Withdrawal of uncorrborated evidence by the witness—Examination of the accused—Confessions.*

A and B were charged with the murder of C, the husband of B. There was some evidence that B had said her husband was dead, a few days after his disappearance; and some bones, a skull, and some cloths were found in a neighbouring burying ground which were identified as those of C. B made a statement, recorded on June 4 by the Village Munsif, to the effect that she had lured C into a garden, and that A, who was her paramour, had murdered him in her arms, which statement she repeated frequently with greater detail in answer to questions from the committing Magistrate, and subsequently before the Sessions Court. On her appeal to the High Court after she had been sentenced to death, she retracted her former statements and made the usual charges of ill-treatment against the Police. A made a statement to the committing Magistrate which he subsequently repudiated before the Sessions Court, to the effect that he had assisted in disposing of the corpse of C at the request of his brother-in-law, who corroborated the statement in two deposition before the Magistrate which were likewise repudiated by the deponent before the Sessions Court:

Held, that the conviction of A was wrong and further (*Parker, J.*, dissenting) that the conviction of B was wrong.

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* Referred Trial No. 38 of 1886 and Criminal Appeal No. 429 of 1886.

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Per Kernan, J.—"As the second prisoner has withdrawn all the confessional statements made by her, it is necessary, according to the rulings of this Court, to examine the evidence and see if there is reliable independent evidence to corroborate to a material extent and in material particulars the statements contained in the withdrawn confessional statements. If no such corroborative evidence exists, then the contradictory statements of the second prisoner remain and doubt exists as to which statements is true, and the confessional statements cannot be safely relied on against the prisoner."

Semble.—The same rule should be followed when a witness withdraws his deposition before the Sessions Court.

Per Kernan, J.—The examination of an accused person under Criminal Procedure Code, s. 364, is subject to the purpose referred to in Section 342, *viz.*, "to enable him to explain any circumstances appearing against him," and not to supplement the case for the prosecution against him to show that he is guilty.

[**Diss.**, 19 B. 728 (729); 1 L.B.R. 238 (246); Rat. Unrep. Cr. Cas. 719 (720); **Appl.**, 27 C. 295 (307) = 4 C.W.N. 129; **R.**, 18 A. 78 (81) = 15 A.W.N. (1895), 227; 20 A. 133 (134); 12 M. 123 = 2 Weir 376; 2 Weir 510 (511).]

[296] THIS was a case referred to the High Court by the Sessions Judge of Kistna for confirmation of the sentence of death passed upon the second prisoner and appeal by the first and second prisoners against the sentences passed upon them.

The most important exhibits in this case were—Exhibit B, a memorandum of confessional statement made by the second prisoner to the Village Munsif, dated 4th June; Exhibit J1, dated 6th June, Exhibit J2, dated 14th June, Exhibits J3 and J4, dated 15th June, and J5, dated 25th August, all being confessional statements made by the second prisoner to the Second-class Magistrate of Bezvada, but not all recorded as having been voluntarily made. Some of these were made in answer to numerous questions from the Magistrate and all of them were made when the prisoner was in the custody of the Police. Further, the second prisoner made a self-incriminatory statement in the Sessions Court and finally filed a petition of appeal in the High Court withdrawing all the previous statements.

Mr. *Kernan*, for the appellants.

The Acting Government Pleader (Mr. *Powell*), for the Crown.

The facts of the case and the arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgments of the Court.

The Court (COLLINS, C. J., and PARKER, J.) before whom this appeal came on for hearing in the first place, delivered the following judgments:—

COLLINS, C. J.—I am of opinion that the evidence against the first prisoner Meer Shufee is not sufficient to convict him, and the Government Pleader did not press the case against him; the conviction should therefore be reversed and Meer Shufee discharged.

The case against the second prisoner Rangi, who was sentenced to death, is very different from that against the first prisoner.

The man who is said to have been murdered was her husband; they had been living apart for many years, and there is strong evidence that Rangi was carrying on an adulterous intrigue with Meer Shufee. It is alleged that Vengataswami, the husband of Rangi, was murdered on the 22nd May 1886, and the 4th witness for prosecution, the brother of the second prisoner, alleges that Vengataswami, who was living at Talagatur, came to Vallur where his wife was living, apparently in the hope of inducing his wife to return with him to Talagatur, and there is evidence that Vengataswami and Rangi were together about that date, that

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[297] he saw both of them walking up the Kistna embankment, and sometime afterwards Rangi, the second prisoner, came back alone, that upon being questioned, she said she had told her husband that as she was giving milk to two children in the village she would go three days afterwards, that he (her husband) got angry and went away, and would be at that time at Chagantipadu, a place on the way to Talagatur where her husband lived. The fact of second prisoner and her husband being together about this time is also spoken to by the fifth witness for prosecution. The second prisoner went to Talagatur on the third day after this interview with her husband, taking her children with her. The third witness for the prosecution, the daughter of Rangi and Vengataswami, says that the last she saw of her father was when her mother's elder brothers came to Talagatur and took him to Vallur saying, "they would send his wife." This witness also deposes that when her mother Rangi returned some nine days after her father had left for Vallur, she asked her where her father was, that the second prisoner tried to beat her with a brass vessel and said, "your father is rotting in a pit." In June inquiries were made about Vengataswami. A man named Budden Sahib was arrested on suspicion, and he, after he had been in custody for a considerable time, gave an account of how he and the first prisoner had buried the body of Vengataswami, and on the 15th June he took the Second-class Magistrate to the place of the supposed burial, and bones, flesh, pieces of blanket, &c., were found there. It appears, however, that on the 3rd June a search had been made at this spot, which was used as a burial ground, by the constable, the seventh witness, and the Village Munsif, and that two skulls and other bones, pieces of blanket and other things were found there. Budden Sahib when before the Sessions Judge retracted the whole of his former statement and declared that the Police had instigated him to make it.

Rangi when arrested made a long statement in which she alleged that the first prisoner had induced her to lure her husband into a garden for the purpose of having connection with her; that whilst her husband was, as she describes it, " sitting on her," the first prisoner came from behind some bushes and struck her husband on the head with a large stick, that on the second blow being given the head broke and the brains came out. She made a very similar statement before the Sessions Judge when on her [298] trial, and it is clear, if her confessions are to be believed, that she took her husband into the garden at the suggestion of the first prisoner and for the purpose of the first prisoner's killing him. The second prisoner in her appeal petition to the High Court declares that she knows nothing of the alleged murder, and that the Police *teased* her into making the statement incriminating herself and the first prisoner.

I am of opinion that it would not be safe to convict this woman of murder under the circumstances. In the first place I am not satisfied on the evidence that Vengataswami is really dead. The Sessions Judge in his statement to the High Court under date 11th September 1886 says, " it is highly improbable that he (Vengataswami) '*will ever turn up in the flesh*,' and although he has sentenced the woman to death, he recommends that 'the possibility of such an event happening (that is, Vengataswami turning up in the flesh) should be taken into consideration and that an irrevocable sentence should not be passed.' "

One of the daughters of Vengataswami and Rangi called before the Magistrate but not before the Sessions Judge deposed that her maternal uncles made her father lie down by some bushes and one of her uncles cut

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her father's throat with a small knife. "He cut," she says, "as if he did a sheep and killed him." She also said she made this statement which she afterwards said was false, because her grandfather and paternal uncle told her to say so.

Another daughter, third witness, is bold enough to swear that one of the skulls dug up from the burial ground is her father's, because she "*used to pick lice out of his head.*" She also swears, "the bones are my father's."

With regard to the skull identified as that of Vengataswami it was when found (so say the witnesses) broken into two pieces. The second prisoner in her confessional statement says that first prisoner "broke" her husband's head. The apothecary who examined it, however, says that in his opinion the fracture was caused *after death* and gives good reasons, in my judgment, for his opinion.

Taking into my careful consideration the whole of the evidence of this case, I cannot say that the statement of the first prisoner that he heard the Police tutoring the second prisoner as to what she should say is false beyond reasonable doubt and that the confessions relied on against the second prisoner are true, it may [299] be she made them in the hope of saving her brothers who are described as "*ruffians,*" from being accused of the crime. But above all, the suggestions of the Sessions Judge who tried the case, heard the witnesses and observed their demeanour, that the extreme sentence of the law should not be carried out for the only reason apparently that the man supposed to be murdered might turn up some day in the flesh, leaves me no alternative but to say that the safer course is to acquit the second prisoner.

PARKER, J.—The appellants in this case, Meer Shufee and Rangi, have been convicted of the murder of one Vengataswami on or about the 22nd May last. The second prisoner in the case, Rangi, is the wife of the deceased, and the first prisoner a man with whom she had been carrying on an illicit intercourse.

The evidence shows that deceased and his wife had been living apart for some three or four years, the deceased in the village of Talagatur with one daughter and a son, and Rangi with the younger children at Vallur where her brothers also lived. Deceased used to go now and then to Vallur, but was not on good terms with his wife's brothers.

The case for the prosecution is that Vengataswami left Talagatur for Vallur with his wife's brothers some time in May,—the date is not accurately fixed, but it is endeavoured to fix it with reference to some local festival—and did not return. About 31st May Rangi returned to Talagatur without him, and was met with inquiries as to where he was. She said he had left her to return alone, but her answers were regarded as suspicious and her husband's brother Gopadu was not satisfied about Vengataswami's disappearance. The village people appear to have taken second prisoner to Vuyyur where she was kept in the lock-up while Gopadu and Ammallu, her elder daughter, went on to Vallur to make inquiries. On 2nd June the Police and the Village Magistrate were searching about Vallur for traces of Vengataswami, as Gopadu and his daughters declared a murder had been committed. On 3rd June were found by the Village Munsif and the Police Constable No. 40 (seventh witness) two skulls, some leg bones, pieces of arms, &c., in a pit in the burial-ground which appears to be situated close to the bank in the bed of the Kistna river; with these were found some pieces of blanket and also bits of two cloths which Ammallu identified as belonging to her father. An inquest was

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held the same day in which it was reported that the remains [300] were those of Vengataswami who appeared to have met his death by violence and that seven persons, including the brothers of Rangi, were suspected of the crime.

The Village Munsif Ganganna (second witness), who conducted the inquest, has deposed that Rangi was then present, having been brought by the Police and others, and confessed to him then and there that her husband had been beaten and killed by Meer Shufee, the first prisoner, in her presence. He speaks to a statement (Exhibit B) as having been made by her at the time, and recorded in writing by him in which she confessed to him that she had decoyed her husband into the garden in order that Meer Shufee might kill him, and that the first prisoner had been lying in wait for them and had killed her husband in accordance with their joint plan,—having previously arranged that Vengataswami should be first intoxicated.

This statement is dated however on 4th June, and though Ganganna declares that he began it on the 3rd and finished it on the 4th (Exhibit B being really a fair copy of the original statement given), there is reason to believe he was not telling the truth in regard to this. From the evidence of the Police Constable H. Nammayya (seventh witness) I find that Rangi was not present at the inquest, but was sent for from Vuyyur—where she was in the Police Station—on the following day, *i.e.*, 4th June, and the absence of all allusions in the inquest paper to the statement, said to have been made by her before the inquest, is almost proof positive that the statement had not been then made. Ganganna's explanation of the absence of any reference to it in the inquest paper is that he considered Rangi was not speaking the truth, and therefore he put down what her daughters stated, *viz.*, that the suspicion was upon her brothers; but this statement appears to me to have been probably made to cover the originally inaccurate statement that Rangi was present at the inquest.

It is however certain that the statement (Exhibit B) was made by Rangi on 4th June and was forwarded to the Second-class Magistrate of Bezvada on the same date with the covering report (Exhibit C), which bears the Magistrate's initials of receipt on 8th June.

Seeing that there has been an inaccuracy in describing the circumstances under which and the date on which Exhibit B was [301] taken, I should have put it altogether out of consideration had the evidence against Rangi,—so far as it is based on confessions—depended upon that document alone. This however is not the case. On 6th June, two days later, Rangi made a confession at Vuyyur—which was recorded under Section 164 of the Criminal Procedure Code—before the Second-class Magistrate of Nuzvid, and which she repeated in much greater detail before the Second-class Magistrate of Bezwada on 14th June. She repeated it again on 15th June on which date she made two statements,—after pointing out the place to the the Magistrate where the murder was committed,—one at Vallur and the other at the place where the body was found. More than two months later, *viz.*, on 25th August and again on 28th August, she repeated the same story, nor did she vary it when she was tried at the Sessions. It is now for the first time in her appeal to this Court (after she has been sentenced to death) that she retracts her former statements, and makes the usual charges of ill-treatment against the Police.

The first prisoner Meer Shufee was arrested at Secunderabad on 13th July by the tenth witness Mahomed Ali, a Police Constable. Before the Second-class Magistrate of Bezvada, on 18th August, he made a statement

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that he had assisted in disposing of the dead body of Vengataswami in the pit at the request of Budden Sahib, his brother-in-law; but he denied all knowledge of how Vengataswami met his death. This statement he repudiated at the Sessions saying he was suffering from pain and did not remember what he had said. In his appeal petition he urges that the charge has been brought against him through enmity.

It was urged upon us by the learned counsel for the second prisoner that the death of Vengataswami was not established by sufficient evidence, and that for that reason it would not be safe to convict any one of his murder. I entirely agree with the Sessions Judge that the evidence of identification of the remains found in the pit is not sufficient to enable us to find with certainty that those remains are the remains of Vengataswami. But the evidence of the death of Vengataswami does not rest only on evidence of identification of the remains. There was the unretracted statement of the second prisoner at the Sessions that her husband had been murdered and that his remains had been deposited in that pit, and further the statement of the first prisoner himself before the Magistrate to that effect, though the statements of the two prisoners [302] differed as to the circumstances of the murder. Beyond that there was the evidence of Budden Sahib which the Judge was justified in admitting in evidence under Section 288 of the Code of Criminal Procedure, I think under the circumstances that there was evidence not really open to reasonable doubt on which the Judge might find that Vengataswami is in truth dead, and that his body was buried in that pit. As there is evidence that other persons had also been buried there, it is obviously quite impossible to tell with certainty whether the particular skull and bones produced before the Court were those of Vengataswami or not.

It is then urged that the various confessions made by the second prisoner may not have been voluntary, and we are referred to slight discrepancies between the different statements as to the degree of light and the place where she waited, &c. As the prisoner made no less than seven statements at different times and after intervals of time, some of which statements entered much more into detail than others, it would be surprising if one or two small inconsistencies could not be perceived,—but none that have been mentioned at all affect the main features of the story. It is suggested that Rangi may have told a false story in order to shield her brothers, the real culprits; but if this were so, she would hardly have invented one which throws so much of the guilt upon herself. That the village authorities at first suspected her brothers, and that Gopadu was ready enough to suspect them is obvious, and it is clear that the first suspicions which fell upon them were dissipated by the statements of the second prisoner herself. It would appear from the evidence that deceased went to Vallur at the invitation of his wife's brothers who were anxious that she should return to Talagatur with her husband possibly with the wish to put an end to the intimacy between her and first prisoner as is suggested by the evidence of fourth witness Ramaswamigadu. The fact that deceased had gone at their invitation would naturally incite Gopadu's suspicions against them in the first instance when he found that his brother had disappeared.

The story told by the second prisoner that her husband went away with her in the direction of the Government garden and that she returned alone is corroborated by the evidence of Ramaswamigadu.

Upon all this evidence and upon Rangi's own statements at the Sessions trial I am of opinion that the Judge was justified in

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[303] finding that she enticed her husband to the garden in order that he might be murdered and therefore that she has been properly convicted.

With regard to the first prisoner Meer Shufee it is admitted by the learned Government Pleader that on the evidence on record the conviction can hardly be supported. Rangi's statements are not evidence on which he can be convicted, and there is nothing else against him except the retracted deposition of Budden Sahib, which was given after ten days' detention in custody on suspicion of being himself in some way concerned. The first prisoner's statement of 18th August contains no admission of being in any way an accomplice in the murder, and with regard to him I think that the conviction and sentence should be reversed.

Accepting the second prisoner's statements as regards herself I do not find that she suggested the murder and it is possible that her action was more or less dictated by fear of the anger and jealousy of her paramour. Her confession to which she adhered up to the time of her conviction was given almost as soon as the restraint of his presence was removed. I do not think that weight is due to the suggestion that possibly the first prisoner may have surprised Rangi and her husband in the garden and killed the latter without any previous concert with Rangi. No such defence has been set up by the prisoner herself at any stage of the proceedings, and as she has not scrupled to admit her intimacy with the first prisoner she would hardly have omitted to advance a plea so much in her favour, had it been a true one.

But having regard to the possibility that she may have acted as she did through fear of her paramour I would not confirm the capital sentence, but reduce the sentence to transportation for life.

The first prisoner Meer Shufee should be set at liberty.

The case of the second prisoner was then referred, in accordance with the provisions of Section 378 of the Criminal Procedure Code, to KERNAN, J., who delivered the following

JUDGMENT.

KERNAN, J.—The two prisoners, Meer Shufee and Kuthada Rangi have been convicted by the Sessions Judge of Kistna of the murder of Vengataswami, husband of the second prisoner, on or about the 22nd May 1886. I have to consider only whether the conviction of the second prisoner who has appealed is right.

The principal questions will be.

1. Is it proved that Vengataswami is dead?

[304] 2. Whether certain confessional statements made by the second prisoner and retracted in appeal are under the circumstances of, and on the evidence in the case, satisfactory evidence that her husband was murdered, and that she was a party to the crime?

Upon the evidence it appears that Vengataswami (of the Yerakala caste) who lived by labour as a cooly was married several years to the second prisoner, by whom he had four children, and that for some years the second prisoner lived with him at Talagatur village, and that about four years ago she went to the village of Vallur to a vacant house of her parents leaving two of the children with her husband and having with herself two others of the children.

The fourth witness for prosecution, the second prisoner's brother, says that her husband came to her hut at Vallur, and they were on good terms, and stayed about three days, and that he said to this witness he would

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take his wife back with him as she was saying she would go, and that he would go at night.

This witness says that the husband spoke something to his wife in the hut, and he with his wife went out, up the Kistna embankment, saying he would come back,—that it was then lamplighting time, that she returned at 8 o'clock, and in reply to a question by witness where her husband was, she said she told her husband that she would go with him to the village in three days, and he got angry and went away. The witness says that on the third day after, she left with her children and went to the village of Talagatur. It appears that on the 31st May, she made a statement before the Station-house Officer, Vuyyur, which was put in evidence to the effect that her brothers brought her husband fifteen days before to Vallur and that ten days before her brothers and her husband quarrelled and he went away—and that she arrived at Talagatur the day before yesterday thinking her husband was there, that she did not know whether her husband died or had gone anywhere, that her brothers did not kill her husband. Ammallu, her daughter, stated to the Station Officer that the second prisoner said when she came to the village that "her husband would come but he was not dead." It is alleged by Ammallu in her evidence at the Sessions that the second prisoner on arrival at the village when questioned by her daughter as to her husband said "your father is decaying in a [305] pit." The eighth witness, K. Gopadu, paternal uncle of Ammallu in his evidence before the Session Court, says the same.

As to Ammallu, no such statement was made by her to the Station officer, and it is contrary to her statement above referred to. As to K. Gopadu, Ammallu says that he and she complained against the brothers of the second prisoner from suspicion that they might have killed him. Now a complaint was made by K. Gopadu and by Lakshmidevi, another daughter, to the Station officer. Lakshmidevi stated that her maternal uncles in her presence laid her father on the ground, and that her uncle Lakshmigadu cut his throat. She says in her deposition before the Magistrate, dated 28th August 1886, that the same K. Gopadu, her paternal uncle, told her to say that her maternal uncles had killed her father. In the same evidence before the Magistrate, she was obliged to admit that her statement to the Station Officer was entirely untrue. It is quite plain that no reliance can be placed on the statement of Lakshmidevi or Ammallu or on that of K. Gopadu.

The only complaint of any kind up to the 31st May was made against the brothers of the second prisoner for killing her husband. But the second prisoner denied that—see Station Officer's report, 31st May. No information being obtained up to the 2nd June about K. Vengataswami and his body not having been found, the Police brought to Vallur the second prisoner and her daughters, and K. Gopadu, her brother-in-law, as appears in the evidence of the Village Munsif, the second witness. This witness says that the children were crying and said a murder had been committed. The witness then stated that he searched in the village and in the burning and burying ground of the village in the sand near the river, that on the 3rd June he took Nammayya, a Constable, seventh witness, with him and that he dug up with his stick one piece of skull and bones and pieces of hair, gochi, langoti, sikatadu for tying the hair, and that the second prisoner and her daughters were brought there, and they, the daughters, said those things were of their father and that the second prisoner said 'yes.' He says that some flesh was adhering to the bones and that

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the remains appeared to have been there about fifteen days, and that bones, big bones, were scattered on all sides there. The Constable, seventh witness, says that they searched the *smasana*, burning and burying place, that a pit was dug and they found [306] two skulls, leg bones and three pieces of arms, sikatadu, pieces of cloth and other clothes These two witnesses, *viz.*, the Munsif and the Constable, say that the Inspector came afterwards, but although some pieces of cloths and bones found, the pit was not fully dug out. Several witnesses were examined to identify the pieces of the cumbly and the sikatadu and of the cloths found as belonging to the second prisoner's husband, but upon the evidence it appears that articles of the same description are used by all "Yerakalas," and no special reasons for identification are given by the witnesses. I do not think any reliance can be placed on the evidence as identifying any of the things found as those which were worn by second prisoner's husband. The daughters of the second prisoner and their paternal uncle said that one of the skulls was that of the second prisoner's husband. One of the daughters said his skull was round, and she used to take lice from his head, and therefore she knew it. This is not satisfactory evidence of the skull being that of Vengataswami. The place where the skull bones were found was the burning and burying place for the village, and the discovery of such remains as these would most probably be made there. A punchayat was held on the 3rd June 1886, and its report was put in evidence. It records amongst other things that no body was found and that bones were found. It also records a statement made then by Ammallu, the daughter, and K. Gopadu, the brother of second prisoner's husband, that the latter was killed by the brothers of the second prisoner. It also records that the bones were those of a man who died by violence, but that there was no corpse, and the punchayat could not identify the remains. That punchayat was signed on the 3rd June. The Munsif says the second prisoner was at the punchayat, but was not examined before the punchayatdars, and he says that after the punchayat, the second prisoner made a statement to him which he wrote down on the 3rd June, but that he did not do so at the request of the Police. He also says that next day on the 4th June a copy was made and was read to the second prisoner and that she signed it, and it is marked as Exhibit B. In Exhibit B the second prisoner implicates herself as a party to the murder of her husband. It is not explained by the prosecution how or why or under what circumstances that statement came to be made. All that is proved is that the second prisoner was brought to the punchayat by the Police, and that she on the 3rd June, after the [307] punchayat was over for that day, is stated to have made an original statement not produced, and that she signed Exhibit B on the 4th. It is stated she was not arrested until the 4th. Before the second prisoner made that statement she was aware of the allegations against her brothers. That statement and her subsequent statements J^1, J^2, J^3, J^4, and J^5, all implicating herself in the murder, are inconsistent with her statements made up to the 3rd June. Though the second prisoner adhered to those statements even in the Sessions Court before the verdict was given and before sentence of death was pronounced on her, she in appeal to this Court says that she made the statements at the instance of the Police, who teased her greatly, and that those statements are not true.

The case of the prosecution against the second prisoner depends on these statements, and on the supposed corroboration of them principally by the evidence of Budden Sahib made before a Magistrate on the 14th and 15th June and on the 26th August, and also on other evidence after referred

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to. In the statement by the second prisoner in Exhibit B, dated the 4th June 1886, she states where she and her husband had lived and that he came to Vallur and that she agreed to return with him as before set forth. So far there is no reason to doubt her statement. She says, however, in Exhibit B, that the first prisoner used to have illicit intercourse with her and threatened her on three or four prior occasions of visits of her husband to Vallur, that he would kill him, and that on the occasion of the last visit the first prisoner induced her to decoy her husband after dark into a garden near Vallur called the Circar gardens, in order to have intercourse with her, and that he, the first prisoner, said he then would kill her husband. She says that the first prisoner arranged with Veerama, the fifth witness, a toddy-seller, to give the second prisoner's husband toddy and arrack, on the afternoon of the day that he was to be decoyed into the garden. She says that in accordance with that agreement she and her husband drank toddy at Veerama's shop, and that the second prisoner brought her husband into the Circar gardens in the evening, they lay down, and that while her husband was having intercourse with her, the first prisoner, who was hiding behind trees, came and struck her husband on the neck with a stick two cubits long, that her husband fell on one side of her and then the first prisoner struck another blow on her husband's head, which broke his head, and he then died, and that she went [308] home. and at dawn in the morning the first prisoner came and told her that he and the first witness Budden Sahib had buried the corpse, but refused to tell her where.

On the 6th June 1886 the second prisoner made a statement recorded as a confession, Exhibit J 1, before the Second-class Magistrate in which she repeats in substance what she stated in Exhibit B, but she added that while the first prisoner was coming to where her husband was having intercourse with her, there was noice of leaves, and her husband asked what it was and she said it was perhaps a pig, and that the first prisoner threatened to stab her if she said to any one that he killed her husband, and that the first prisoner's brother-in-law had brought a cumbly and mamoti from the house and dug a pit in which her husband was buried, and that she showed the Police the place where the murder took place.

Again the second prisoner made a statement on the 14th June, Exhibit J 2, before the Second-class Magistrate of Bezwada which he certifies to be voluntarily made. In answer to the question of the Magistrate "when and why did your husband die," the statement appears to show that she repeated what was in the prior statements. The repetition occupies two pages of print. Then fourteen other questions appear to have been put to her by the Magistrate, the answers to which occupy two other pages of print.

Again on the 15th June she made a statement, Exhibit J 3, before the same Magistrate at Vallur which is headed "scene of the offence." This statement *is not* certified to be made voluntarily, but the particulars of it have been used as a confession by the Sessions Judge. The opening questions are—"Where did your husband Kuthada Vengataswami drink toddy and arrack; and how did he and you come from that place into the Government garden? Where did you lie? How did your husband sit? How did Meer Shufee come and beat your husband? How did your husband fall down?" All these questions were put at the same time and before she answered any of them. The Magistrate asked her, how it was there was no blood at the place of offence? She replied that first prisoner told her, he wiped it away and that rain also fell. Then the

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Magistrate refers to her statement on the prior day, that leaves of the trees rustled while her husband was lying with her, and that she told her husband it was a pig—and [309] he asked " Was the thing that was coming a pig, or what did you see and say so? " In reply she says the first prisoner told her that he would come and murder her husband, and that if the leaves rustled she should tell her husband that a pig perhaps was coming. Then the Magistrate asked her, was it convenient for her and her husband to lie down at home. She replied, it was not convenient as her brothers were living in her hut. As to this fact there is evidence of the fourth witness that she lived in a hut belonging to her father and that her brothers lived elsewhere. After recording the statement as taken, the Magistrate states he asked the second prisoner other questions, six or eight in all, and then he says, "I made the prisoner go before me and I went myself behind to the place at the scene of the murder," and then he records what she did and said.

Again on the 15th June the second prisoner made a statement, Exhibit J 4, before the same Magistrate. The statement is headed "at the place where the corpse was buried." The Magistrate appears to have asked her, "to whom a clout and other articles dug there out of the ground at the burial-place belonged," and that she replied that "they belonged to her husband and were worn by him when he was killed."

Again the same Magistrate examined the second prisoner on the 25th August 1886, when the first prisoner was brought before the Court, and she made a statement, exhibit J 5, apparently stating the facts against the first prisoner. No explanation is given by the prosecution of the circumstances under which any of those confessions were taken except the statement of the 25th August in the presence of the first prisoner, as to how they were brought about or whether the second prisoner expressed a desire to make them, or whether she was sent for by the Magistrate or brought up by the Police. She was in custody of the Police when she made all the statements except her statement before the Sessions Judge.

As the second prisoner has withdrawn all the confessional statements made by her, it is necessary according to the rulings of this Court, to examine the evidence and see if there is reliable independent evidence to corroborate to a material extent and in material particulars, the statements contained in the withdrawn confessional statements. If no such corroborative evidence exists, then the contradictory statements of the second prisoner remain, [310] and doubt exists as to which statement is true, and the confessional statements cannot be safely relied on against the prisoner. In this case there is special reason for requiring such corroborative evidence before acting against the second prisoner on the confessional statements, because the second prisoner up to the 2nd June, had made statements about the absence of her husband different from the confessional statements. Again false evidence was given by at least one of the witnesses for the prosecution with the knowledge of another, charging second prisoner's brothers with the murder of second prisoner's husband and that statement preceded second prisoner's statement. It is suggested by one of the assessors that the statements of the second prisoner may have been made to save her brothers. Again she alleges that she made them under Police instruction. The reasons of the examinations and re-examinations in exhibits J 2, J 3, and J 4, by the Magistrate are not given. But one re-examination brings out the extraordinary addition made in the statement, exhibit J 4, supplementing the prior statements of the rustling

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of the leaves by showing that such circumstance had been anticipated, as the second prisoner says, by the first prisoner and an explanation provided if the second prisoner's husband inquired about it.

I now refer to the matters of alleged corroboration of the second prisoner's statements.

The fact that after the first confessional statement, the prisoner made several others subsequently to the same effect, including the confessional statement made at the trial, cannot be accepted as corroboration of the prior statement, as such subsequent statements themselves require corroboration as they are withdrawn. Moreover, the motive which induced the prisoner to make the first confessional statement, may have induced her to make all those made subsequently. That motive may no longer have affected the prisoner when she withdrew all the confessional statements on appeal to this Court.

The fact that the skull produced appears to be broken into two parts is supposed to afford some corroboration to the second prisoner's statement that her husband's head was broken, as she alleges. But the Apothecary Brown states his belief that that skull was broken after life was extinct, and not during life. Moreover, the skull is not at all identified as the skull of second prisoner's husband. The fact that the second prisoner's husband is missing [311] is no corroboration of the statement (unproved) that he is dead. The fact that he was a man who never was in the habit of being absent formerly for any long time, is not evidence that he is not still alive. The brother and brothers-in-law and the two children of Vengataswami say he is dead, but this is mere assumption. There is no legal evidence that he is dead. As to the evidence given by Veerama the toddy-seller, though she says in her direct examination that the first prisoner directed her to give toddy to the second prisoner and her husband, and paid her, and that she did so, yet on cross-examination she says the day was a festival day and that great numbers came, and that she cannot tell the names of any one else that got toddy that day, and that she cannot say that the man who came with the second prisoner was her husband, whom witness admits she did not know, but from the conversation between them she came to know they were husband and wife. The witness did not make her first information until the 15th June. It is highly improbable that in the crowd of people she would recollect these two people got toddy on that day. She says she did not know the husband of the second prisoner, and cannot say if he was one of the two. But if her recollection was correct, her evidence is not corroborative of any important fact in relation to the offence. It is consistent with her evidence that the second prisoner and her husband did not go to the garden as stated by the second prisoner.

As to the alleged corroboration by Budden Sahib—He made two statements, exhibit A, as a witness before the Magistrate, one on the 14th June, and another on the 15th June. In the statement of the 14th June, Budden Sahib stated that the first prisoner came to witness' house about half past eight o'clock on the night in question and said that he and Vengataswami had a fight and that the latter was killed, and he, the first prisoner, would get into trouble if witness did not help him to conceal the body and that after some time witness agreed to do so, and that the first prisoner got a mamoti and cumbly from witness' house and went into the Circar garden and then saw and spoke to the second prisoner and that the first prisoner, tied up the body of Vengataswami, the second prisoner's husband, and that both the first prisoner and witness carried the body 50

or 60 yards to the sand of the Kistna and the first prisoner buried it there, having dug up the sand with a mamoti. In the statement of the 15th June made, as the heading of it shows, "near the place where the [312] dead body was buried," Budden Sahib repeated in substance his statement of the day before, and pointed out the place where he said the act was done to which he was a party. To that statement the Magistrate appends remarks which are not evidence.

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On the 26th August 1886 when the first prisoner was brought before the Magistrate, Budden Sahib was examined, and his depositions of the 14th and 15th June were read and the witness stated that the facts therein stated were true, and that no one taught him to state the circumstances deposed to by him. Budden Sahib, however, at the trial stated these depositions were untrue and were made under Police pressure. These depositions were read as evidence at the trial by the Sessions Court, under Section 288 of the Code of Criminal Procedure, the Sessions Judge having exercised his discretion given by that section. The Judge though with some doubt or difficulty believed they contained the truth and that the evidence given by the witness at the Sessions was untrue. The question now arises, was the reliance placed by the Judge on the truth of these depositions justified, and was the discretion vested in him properly exercised? At the trial before the Sessions Court, Budden Sahib admitted he made these statements in all these details, and says, he stated what is in those depositions because the Police told him to say so, but that he did not tell this to the Magistrate.

Cross-examined he says, "the Police put me in a lock-up in the case of the murder of Vengataswami. They arrested me on suspicion. I was in Police custody for nine days." "I was asked to state what I knew about the murder. I stated I knew nothing and that inquiry should be made regarding my conduct. The Police said 'you must tell, you cannot but tell. If you do not say against your brother-in-law, the first prisoner, we will take your children and keep them in the lock-up.' They said if I spoke against him they would release me and take me as a witness, and that if I did not, they would bring a charge against me. What I stated before the Magistrate is not true. I stated those words as I was told to say so." "I pointed out to the Tahsildar the different places, telling each place as the Police told me to say so; the Police tortured me."

Re-examined. "The Police beat me with hands. There are no marks. I did not complain to the Tahsildar. I was told not to complain." "For fear that I would be handed over again to the [313] Police, I did not complain to the Magistrate. They kept me five days at Vuyyur and three days at Vallur. There is no station at Vallur. There is a chowki of Jamadar Sydalli. They put me in it. They released me on the day after the Tahsildar came to Vallur. The Tahsildar took a deposition from me before I was released. I was released on the day after that on which deposition was taken from me. I did not say on the 26th August fearing that they would beat me. The Police were present when my evidence was taken. I am saying in this way here as you gods are all here."

There are some facts stated in this evidence of Budden Sahib at the Sessions Court which are not contradicted, *viz.*, that he was arrested and kept in the custody of the Police (who had access to him at all times for eight or nine days), and that he was released after he made his deposition on the 15th or 16th June, and that when he made these depositions and the depositions of the 26th August, the Police were present in Court and no doubt were listening to his depositions. His discharge from

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custody synchronizes with the making by him of the depositions, but of course there is not proof that he was coerced to say what he did. However, it shows that when the Police got from him the sworn information, he was no longer wanted by them. He had made a deposition after nine days' confinement, and if he retracted it, he might be prosecuted. He accounts for the re-statement of his evidence on the 26th August by saying that he was afraid of being sent again to the Police or of being beaten. In the Sessions Court, he found himself before a superior tribunal and assessors, and was apparently relieved from fear of the Police, and he says that he then told the truth.

No doubt the above observations may be applicable to all or nearly all cases where a witness chooses to deny the truth of his former statement. The difficulty is to ascertain which of the statements of the witness is the truth. A perjured man the witness must be whichever of his statements is acted on and the responsibility of relying on either statement is very great. It seems to me the course adopted by this Court in similar cases is the only safe one, *viz.*, not to rely on either statement unless it is corroborated as to some main material fact of importance by independent evidence. Mr. Justice Morris in *The Queen* v. *Amanulla* (1) states **[314]** the rule applicable to such case. He says, "it seems to me that under Section 288, Criminal Procedure Code, a Judge may base his judgment on the evidence given before the Magistrate in the presence of the accused, when there are special and particular reasons for considering that evidence to be honest and true, and when that evidence is to a certain extent corroborated by independent testimony before himself. In the present instance there is really nothing of this kind. There is really no one such substantive fact conclusively proved as can enable the Judge to say with confidence that the evidence given before the Magistrate was true as opposed to what was said before himself."

Now, if it is suggested that the facts that Budden Sahib pointed out the places of alleged burial and of the offence, and of his recognition of the pieces of cumbly and cloth, are corroborative, the answer is that these places and similar pieces of cumbly, &c., had been already shown to the Magistrate and to the Police, and were not discovered owing to Budden Sahib's information. Budden Sahib says he pointed them out by direction of the Police in whose custody he then was. The fact that Vengataswami has not been found either alive are dead is consistent with his being still alive. The evidence of Bakar Ali and others which purport to identify pieces of cumbly and cloth and other articles dug out of the pit is entirely insufficient to identify those articles as belonging to any particular person. I am unable to see that there was any independent satisfactory evidence before the Sessions Judge corroborative of the deposition of Budden Sahib to justify credit being given to the statement of Budden Sahib before the Magistrate, rather than to the evidence of that witness in the Sessions Court. I, therefore, do not think that the evidence of Budden Sahib before the Magistrate can be safely relied on as evidence of the facts stated therein or as corroborative evidence of the retracted confessions and depositions made by the second prisoner.

The conclusion I feel bound to arrive at is that it is not proved, beyond reasonable doubt, that Vengataswami is dead, or that if he is dead, the second prisoner was in any way a party implicated in causing his

(1) 12 B. L. R. App. 15.

death. The conviction of, and sentence on, the second prisoner must be reversed.

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I feel bound to notice the fact that the Second class Magistrate has given no explanation why the recorded confessional statement, exhibit J^2, of the 14th June 1886 was taken. The second prisoner had already made the confessional statement, [315] exhibit B, of the 4th of June and J^1, of the 6th of June. The statement of the 14th June goes over all the matters already stated in exhibits B and J^1. Many questions are put by the Magistrate which bring out answers that do not enable the accused under Section 342, Criminal Procedure Code, "to explain any circumstances appearing against her," but on the contrary seem calculated, both questions and answers, to supplement the previous story of the second prisoner told against herself and to fasten guilt on the accused—see the question amongst others as to "What was her intention in bringing her husband into the garden." Under Section 342, Criminal Procedure Code, the Magistrate had power for the purpose specified in that section to put questions necessary for that purpose. The examination referred to in Section 364 is subject to the purpose referred to in Section 342. In *Ex parte Virabudra Gaud* (1), and in the case of *Hossein Buksh* (2), and in other cases, it has been decided that the power to put questions to the accused is not given to force an accused to make criminating admissions after searching examinations. The same Magistrate examined the second prisoner on the 15th June—see exhibit J^3—and a second time on that day—see exhibit J^4. Neither of these examinations is certified as or purported to be a confession. No explanation is given why such examinations were had. It does not appear that these examinations were had to enable the second prisoner to explain any circumstances appearing in evidence against her.

The examinations drew her on to criminating admissions—see the question as to how there was no blood on the spot of the offence, and the question as to the rustling of the leaves, and the question, "Did you see the wounds on your husband;" also the question was it convenient that she and her husband should have intercourse in her hut; see also the answers to the questions put in exhibit J^4. The answers to these questions, if true, were calculated plainly to supplement the case for the prosecution against her, and to show that she was gulity. The examination of the accused after she had confessed, and the bringing her for examination to the scene of the offence and of the supposed place of burial, require explanation.

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10 M. 316.

[316] APPELLATE CIVIL.

Before Sir Arthur J.H. Collins, Kt., Chief Justice and Mr. Justice Muttusami Ayyar.

GURUVAPPA (*Plaintiff*) *Appellant*, v. THIMMA AND ANOTHER (*Defendants*) *Respondents*.* [17th March and 19th April, 1887.]

Hindu Law—Decree against an undivided brother—Mortgage of joint property.

A, an undivided member of a Hindu family, mortgaged part of the family property by way of conditional sale to B. to secure a loan. B having sued A personally for the amount due, A admitted the mortgage and said he would

* Second Appeal No. 574 of 1886.

(1) 1 M.H.C. R. 199. (2) 6 C. 96.

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10 M. 316.

surrender the property in discharge of the debt, and a decree was passed accordingly. A's undivided brothers intervened in execution:

Held, that the decree not being passed against the joint family or its representative, and not describing the property, which it directed to be delivered to the plaintiff by way of absolute sale to be family property, could not be executed against the family property.

[R., 12 M. 325 (329); 35 M. 685 (688)=10 Ind. Cas. 874=21 M.L.J. 508=(1911) 1 M.W.N. 442.]

SECOND appeal against the decree of W. F. Grahame, Officiating District Judge of Cuddapah, in Appeal Suit No. 3 of 1886, confirming the decree of S. Subba Rau, District Munsif of Proddatur, in Original Suit No. 282 of 1885.

Kondadu, the brother of the defendants, mortgaged certain family property to the plaintiff by way of conditional sale, to secure a debt. The plaintiff sued the mortgagor to recover principal and interest in Original Suit No. 152 of 1885. The mortgage was admitted, and the mortgagor said he was willing to surrender the property; the present defendants, however, intervened under Section 332 of the Code of Civil Procedure and claimed two-thirds of the property as their share, and their claim was allowed. The plaintiff filed this suit to declare his title to the property; the declaration was refused by both the lower Courts.

The plaintiff preferred this second appeal.

Mr. *Parthasaradhi Ayyangar*, for appellant argued that the present suit was maintainable and the plaintiff's claim should be allowed if he proved that the mortgage of conditional sale executed **[317]** by Kondadu, the brother of the defendants, was executed for the benefit of the family of which the said Kondadu was the managing member; and pointed out that the decree originally obtained by the present plaintiff was not a simple money decree, but one enforcing the sale.

Mr. *Ramasami Raju*, for respondents.

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.)

JUDGMEMT.

The respondents had a brother named Kondadu, and in Original Suit No. 152 of 1885, the appellant obtained a decree against him. That decree, however, was not passed against him as the managing member or representative of the joint family. It was founded upon an instrument of mortgage which had been executed by Kondadu; and, although Original Suit No. 152 of 1885 was brought only to recover the mortgage debt, the decree directed, apparently by consent of the parties, that the mortgaged property be given up by way of absolute sale in satisfaction of the debt. On the appellant proceeding to take possession in execution of the decree, the respondents objected on the ground that they were not bound by a decree, passed against Kondadu in respect of the property of their joint family. Their objection was allowed, and the appellant brought this suit to establish his right to the possession of the entire property mentioned in the decree inclusive of the respondents' shares. Relying on the decisions reported in *Viraragavamma* v. *Samudrala* (1) and *Umamaheswara* v. *Singaperumal* (2), the District Judge dismissed the suit with costs. In the last-mentioned case, the decree was against a Hindu father, and it is not precisely in point. The first case, however, was one between brothers, and as such, it is similar to the one before us. There it was

(1) 8 M. 208.

(2) 8 M. 376.

held that a money decree against one brother who was not impleaded as the managing co-parcener or representative of the family did not bind his other brothers, and that no more than the judgment-debtor's share was liable to be attached and sold in execution. It was also held that the question, whether or not the original debt was a family debt, could not be gone into in that suit. It is conceded that if that decision governed the case before us, the second appeal cannot be supported, but it is contended that the [318] decree in that case was a mere money decree, whereas the decree in the present suit executes a pre-existing mortgage. Reliance is also placed on the decisions in *Ràmakrishna* v. *Namasivaya* (1) and *Narsanna* v. *Gurappa* (2).

The decree in Original Suit No. 152 of 1885 was admittedly not one passed against the joint family or its representative. Nor does it describe the property it directs to be delivered to the plaintiff by way of absolute sale to be family property. The principle laid down by the Privy Council in *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh* (3) does not therefore apply to this suit. Nor is the decision in *Ramakrishna* v. *Namasivaya* (1) applicable; for in that case the decree in the first suit was against the father, and the Court held that the execution creditor was at liberty to show in the second suit that the character of the debt was such as to bind the son's interest, because it was not brought on the cause of action litigated in the previous suit. Nor are we prepared to hold that the decision in *Narsanna* v. *Gurappa* (2) is exactly in point. That was also the case of a decree against the father and of the liability of the son's interest in ancestral property to be sold in execution. This Court followed in that case the ruling of the Privy Council in *Mussamut Nanomi Babuasin* v. *Modun Mohun* (4). The ruling was, if in execution of a decree against a father, the purchaser bargains and pays for the entire ancestral property, the whole property would pass by the Court sale, provided that the decree debt was neither vicious nor immoral, because the purchaser might clearly defend his title by showing that the nature of the debt justified the sale in case the sons impugned it in a regular suit. The *ratio decidendi* was that the character of the debt, if it was neither vicious nor immoral, was a valid ground of defence in a fresh suit, and the Judicial Committee observed further in their judgment that the rule derived from the son's pious obligation to pay the father's debt was destructive of the son's independent coparcenary rights. But in *Viraragavamma* v. *Samudrala* (5) it was observed as follows:—"It is true that the liability is shown by the decree to have its origin in the father's debt, but there is nothing on the face of the decree to show that the claim was made or relief granted against the then [319] defendant either in his representative character or as manager of the family, and that if we had felt ourselves at liberty to go beyond the decree, we should have acceded to the contention that the debt was a family debt and binding on the respondents." The possibility of a second suit was not contemplated, because there was no fresh cause of action as in the case of father and son. Again, the decree in Original Suit No. 152 of 1885 does not strictly execute the prior mortgage, but it is a decree by the consent of one coparcener that the mortgage be treated as if it were an absolute sale.

We are of opinion that this second appeal must fail, and we dismiss it with costs.

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(1) 7 M. 295. (2) 9 M. 424. (3) 6 I.A. 233. (4) 13 I.A. 1. (5) 8 M. 208.

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10 M. 319.

10 M. 319.

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Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Brandt.

MAHOMED SAIB (*Plaintiff*) *v.* AGGAS (*Defendant*).*
[1st and 14th April, 1887.]

Civil Procedure Code, Section 468—*Army Act of* 1881. 44 & 45 *Vic. c.* 58, *Sections* 144, 151—*Jurisdiction of Small Cause Courts over soldiers.*

A sued a soldier to recover a debt not amounting to £30.

Held, that the suit was cognizable by a Court of Small Causes.

Semble.—The Commanding Officer of the defendant is bound to cause the summons of the Small Cause Court to be served on him.

CASE stated under Section 617 of the Code of Civil Procedure, by B. Ramasami Nayudu, District Munsif of Bellary, in Small Cause Suit No. 667 of 1886.

The case was stated as follows :—

"In Small Cause No. 667 of 1886, the plaintiff, baker, Mahomed Saib, brought a suit against Sergeant Aggas of the Ordnance Department for the recovery of a sum of Rs. 6-13-0 for bread supplied to the defendant. The defendant's summons was forwarded to the Commissary of Ordnance, Bellary, along with two other summonses; but they were returned unserved twice by that officer, stating that soldiers are under Section 144 of the Army Act [320] not liable to be sued for any debt unless it exceeds £30. He quotes Clause 8, Section 190 of the Army Act, 1881, as an authority for the exemption. In a former suit, brought against Sergeant Major Hill, I held that as he came under the definition of soldier under Section 190, Clause 6, he was exempt from being sued in this Court.

"My attention is now drawn to a proviso to Section 144, Clause 5 of the same Act which makes a soldier liable to such action notwithstanding anything in this section after a due notice in writing given to such soldier; and it is alleged by Mr. Shrienes, the plaintiff's vakil, that a notice in writing was given in this case.

"It would appear from a perusal of Section 148 of the said Act that suits against soldiers of the regular forces are not cognizable by a Court of Requests. Therefore it appears to me that soliders are practically not amenable to either forum, if the proviso to Clause 5 of Section 144 of the Act be not applicable to them. It is conceded that Sergeant Aggas is a soldier under the definition above mentioned; but the question which is urged for their Lordships' consideration is whether this action which is for less than £30 is cognizable by the Court of Small Causes under the, proviso to Clause 5 of Section 144, granting that he is a soldier; and secondly, is the Commissary of Ordnance right in refusing to serve the summonses, although I referred him to proviso to Clause 5 of Section 144, because it appears to me that he is bound to serve the summonses leaving it open to the defendant to raise the plea of jurisdiction. It seems to me that a difficulty arises only in the execution of the decree and not before. The town of Bellary, being a large military station, suits of this kind are often filed in my Court."

Counsel were not retained.

The Court (COLLINS, C.J., and BRANDT, J.) delivered the following

* Referred Case No. 3 of 1887.

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JUDGMENT.

The person against whom baker Mahomed Saib has filed a suit in the Court of the District Munsif of Bellary on the small cause side of that Court is, it is understood, admittedly "a soldier" within the definition of the word as interpreted in Clause 6, Section 190 of the Army Act of 1881.

He is, therefore, under Section 144 (1) of that Act not liable to be taken out of Her Majesty's service by any process execution or [321] order of any Court of Law, or to be compelled to appear in person before any Court of Law, the debt claimed not exceeding £30.

But under proviso (1) to that section, any person having a cause of action or suit against "a soldier of the regular forces may, after due notice in writing given to the soldier, proceed in such action or suit to judgment, and have execution other than against the person, pay, arms, ammunition, equipments, regimental necessaries or clothing of such soldiers."

There is no difficulty whatever in giving effect to the proviso. Except where the debt exceeds £30, a soldier cannot by any process or order of a Court of Law be taken out of the service, or compelled to appear in Court in person; but where a claim for a debt, damages or sum of money is under that amount, the creditor may proceed to judgment, as in any other case; after judgment, where the debt, &c., exceeds £30 over and above all costs of the case, the prohibition contained in Section 144 (1) does not apply in the case of decrees for debt, damages or sums of money; but where judgment is given in case to which the first proviso to that Section applies, the judgment-creditor is debarred from executing his decree otherwise than in the limited manner prescribed.

There may be some doubt whether the words in the proviso "may proceed in such action or suit to judgment" are controlled by the words "or to be compelled to appear in person before any Court of Law," but the question is not raised in the reference before us. There is of course nothing to prevent a soldier from so appearing with the permission of his Commanding Officer, if necessary, and Chapter XXXII of the Code of Civil Procedure makes special provision to enable officers and soldiers actually serving in a military capacity to defend suits when they cannot personally appear.

The question referred to us is not affected by Section 148 of the Army Act, for the defendant in this case is not serving "beyond the jurisdiction of any Court of Small Causes" and the section deals only with "actions of debt and personal actions against officers and other persons subject to military law, with the exception of persons being soldiers of the regular forces."

The effect of Section 151 of the Army Act is to recognize the jurisdiction of Courts of Small Causes in India to the extent of their powers, "in actions of debt and personal actions against all persons subject to military law other than soldiers of the regular forces," and in the case of the latter, *i.e.*, of soldiers of the regular [322] forces, to restrict the extent of the powers of those as well as of other Courts, in the manner prescribed by Section 144, but not absolutely to exclude such jurisdiction.

As to whether the Commissary of Ordinance, as the Commanding officer of the soldier in question, is bound to serve a copy of the summons upon the defendant it is sufficient to refer to Section 468 of the Code of Civil Procedure.

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Before Mr. Justice Kernan, Mr. Justice Muttusami Ayyar and Mr. Justice Brandt.

MOIDIN KUTTI (*Defendant No.* 3), *Appellant v.* KRISHNAN AND ANOTHER (*Plaintiffs*), *Respondents.** [18th February, 18th March, and 9th April, 1887.]

Civil Procedure Code, Section 30—*Malabar Law—Joinder of parties*—Res judicata—*Cancellation of deeds—Declaratory suit—Withdrawal of part of claim.*

A and B, junior members of a Malabar tarwad, sued to cancel certain mortgages executed by their karnavan and senior anandravan on the ground that the secured debt was not binding on the tarwad, and to appoint A to the office of karnavan. The last part of the prayer was withdrawn. The mortgages were executed to secure a decree-debt, the decree having been passed *ex parte* against the late karnavan of the tarwad. No fraud was alleged, but the lower Courts found that the karnavan had been guilty of fraud in allowing the decree to be passed *ex parte*. The plaintiffs had not been parties to the decree, and the other junior members of the tarwad who had been joined were exempted from liability:

Held, that the nature of the debt was not *res judicata*, and that the plaintiffs were entitled to a declaration that the mortgages in question were invalid as against them.

Held further *per Cur.*—All the members of the plaintiffs' tarwad should have been joined actually or constructively; but (Kernan, J., dissenting), the objection as to non-joinder is not essential, but merely formal, and weight should not be attached to it when it is first taken on second appeal.

[R., 9 C.L.J. 623 (627); 1 Ind. Cas. 530 (532); 14 Ind. Cas. 480 (484)=11 M.L.T. 232=(1912) M.W.N. 386 (390); 17 Ind. Cas. 473 (475)=23 M.L.J. 706 (709)=12 M.L.T. 585=(1913) M.W.N. 79 (82).]

SECOND appeal against the decree of W. Austin, District Judge of North Malabar, in Appeal Suit No. 660 of 1885, confirming the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, in Original Suit No. 10 of 1885.

The plaintiffs were junior members of a Malabar tarwad, of which defendants Nos. 1 and 2 were, respectively, karnavan and [323] senior anandravan. The other members of the tarwad were not joined as parties.

This was a suit to cancel certain mortgage deeds executed by defendant No. 1 in conjunction with defendant No. 2 in favour of the remaining defendants on the ground that the secured debts were not contracted for tarwad purposes, and, to appoint plaintiff No. 1, karnavan of the tarwad, in the place of defendant No. 1. The prayer for the removal of the plaintiff's karnavan was withdrawn before the District Munsif.

Exhibits II and III, two of the mortgage deeds in question, were executed in satisfaction of a decree on a bond passed in Original Suit No. 157 of 1875 against the plaintiffs' karnavan who did not defend the suit; the decree, however, exempted from liability all the anandravans of the tarwad who were joined as defendants in the suit. The present plaintiffs, however, were not parties.

Defendants Nos. 1 and 2 did not appear.

Defendant No. 3 pleaded that the binding character of the debts secured by the mortgages exhibits II and III was *res judicata*. The remaining defendants asserted mortgage rights over part of the property

* Second Appeal No. 730 of 1885.

of the plaintiff's tarwad. The Subordinate Judge decreed for the plaintiffs as far as concerned exhibits II and III executed in favor of defendant No. 3) and exhibit XVII (executed in favor of defendant No. 5); ordering that the documents be set aside and declaring the invalidity of the incumbrances created thereunder.

The District Judge confirmed the decree of the Subordinate Judge.

Defendant No. 3 preferred this second appeal against the decree so far as it affected exhibits II and III.

This second appeal came on for hearing before Kernan and Brandt, JJ., when Kernan, J., expressed an opinion that since the plaintiffs were only individual members of a large tarwad, and did not purport to sue on behalf of the tarwad, they were not entitled to maintain the suit in the absence of the other members of the tarwad, and that the second appeal should be dismissed on this ground.

Brandt, J., not concurring in this opinion, the second appeal was heard by a Bench of three Judges (Kernan, Muttusami Ayyar and Brandt, JJ.)

[324] *Srinivasa Rau*, for appellant. The plaintiffs are not entitled to any decree on the plaint, partly on account of non-joinder of the other members of the tarwad; and because the suit, as now framed, is merely for a declaration; nor are they entitled to impugn alienations made by their karnavan and concurred in by their senior anandravan for the purpose of discharging a decree-debt binding on the tarwad. No fraud is alleged against the karnavan, and the binding nature of the debt is *res judicata*. It was further argued that the plaintiffs ought not to have been allowed to withdraw their prayer for the removal of their karnavan.

Sankara Nayar for respondent pointed out that the objection to the plaint on the ground of the non-joinder of the other members of the tarwad was only taken on second appeal, and argued that it was a merely formal objection.

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgments of the Court (KERNAN, MUTTUSAMI AYYAR and BARNDT, JJ.).

JUDGMENTS.

KERNAN, J.—The appellant was the defendant No. 3 in Original Suit No. 10 of 1885 on the file of the Subordinate Judge of North Malabar. In that suit, two out of nine or ten members of their tarwad, which is called Nambiattil, are plaintiffs, and the defendants Nos. 1 and 2 are, respectively, the karnavan and senior anandravan of that tarwad. Defendant No. 3 obtained from defendants Nos. 1 and 2, Exhibit II, dated 1st April 1882, and Exhibit III, dated 24th February 1882, mortgaging to defendant No. 3 certain lands of the tarwad. In the plaint it is alleged that their mortgages were not executed for the purposes of the tarwad, and that they are not binding on it, and prayed that Exhibits II, III, IX, XVI and XVII may be cancelled; that defendant No. 1 may be removed from, and plaintiff No. 1 appointed to, the office of karnavan, and that the right of succession of defendant No. 2 may be cancelled. The defence of defendant No. 3, so far as necessary to be now alluded to, was that the lands of the plaintiffs' tarwad had been attached in execution of a decree in Original Suit No. 157 of 1875 obtained by him against the plaintiffs' tarwad for debts due by the plaintiffs' ancestors, and in discharge of the decree debt, Exhibits II and III were executed.

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The issue framed were (1) whether the deeds (Exhibits II and III) were granted for proper tarwad purposes : (2) as to limitation, upon which no question arises.

[325] The suit No. 157 of 1875 was brought by defendant No. 3, the appellant here, against the karnavan and seven or eight other members of the plaintiffs' Nambiattil tarwad, and against the karnavan and five or six other members of a branch tarwad called Eledath tarwad, to recover the amount of a debt due by the then karnavan, and the now karnavan and plaintiff contended that both branches of the tarwad were liable to pay the amount.

Evidence was given in that suit by defendant No. 3 (appellant) and his witnesses. The Eledath tarwad resisted the suit and it was dismissed against that tarwad ; but at the hearing, the plaintiffs' Nambiattil tarwad did not appear, and a decree was made against the plaintiffs' karnavan on the ground that the debt was contracted for tarwad purposes, and the individual members of the tarwad were held not liable.

The decree in appeal is dated 19th July 1877. Exhibits II and III were executed to discharge that decree.

The plaintiffs were not parties to that Suit No. 157 of 1875, and, although applying the decision of the Full Bench in *Ittiachan* v. *Velappan* (1), they were bound by the decree against their karnavan in his capacity of karnavan, yet they were under the authority of the same decision at liberty to show that the debt for which the decree was obtained was not a tarwad debt.

The suit, as it now stands, after some amendments, is filed to have a declaration that the debt for which the decree was obtained, and in consideration for which Exhibits II and III were executed, was not a debt properly due by the plantiffs' tarwad. Evidence was given on both sides. The appellant and his witnesses were examined and were cross-examined. The appellant was cross-examined as to a deposition of his in Suit No. 157 of 1875. It is not necessary to go into the details of the evidence, as it is clear there was evidence entirely apart from the question of fraud in reference to the decree above referred to, from which it was open to the Court to find that the debt for which the decree in Suit No. 157 of 1875 was obtained was not a debt contracted for proper tarwad purposes. Both Courts came to that conclusion, in fact, and we cannot interfere with that finding. Exhibits II and III were given to appellant on condition that he was to pay a debt to defendant No. 5, which it is found was not paid. In second **[326]** appeal it is contended that the decree in Suit No. 157 of 1875 was *res judicata* against the plaintiffs; but under the decision in *Ittiachan* v. *Velappan* (1), it cannot be so considered in a suit in which the plaintiffs, who were not parties to that suit, alleged that the debt was not contracted for tarwad purposes.

It was contended in appeal that "there was not any allegation or proof of fraud on the part of the karnavan or the decree-holder." This ground has reference to the judgment given by the two Lower Courts, to the effect that the conduct of the karnavan in reference to the original debt, and in reference to his not defending Suit No. 157 of 1875, and allowing the decree to pass against him was grossly negligent, if not fraudulent.

The District Judge states that he looks on the conduct of the karnavan in not defending Suit No. 157 of 1875 as a gross fraud.

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(1) 8 M. 484.

On this point, I am bound to observe that there was no allegation of fraud in the plaint, and that no relief was prayed on the ground that the decree was obtained through fraud or gross negligence of the karnavan or through any fraud of the appellant. There was no issue on the point. A plaintiff must recover on his allegation and proof, and the evidence and decision of the Court on the facts must be guided by the issues. If it is intended by the plaintiffs to prove that the defendant acted fraudulently, and if it is intended to found relief on that ground, the allegations of fraud should be made in the plaint that the defendant may have an opportunity of meeting it. The only issue was whether the debts were proper family-debts of the tarwad and not whether the decree in Suit No. 157 of 1875 was obtained by defendant No. 3 or yielded to by the karnavan by fraud. The act of a man may be mistaken or illegal without fraud. Very great prejudice may arise to suitors if the reasonable rules of pleadings and of procedure are departed from. The findings of the Lower Courts as to the alleged fraud and gross negligence in reference to the decree were, in my judgment, extra-judicial, and do not arise on any facts legally provable on the issues framed.

In the case referred to, *Thenju* v. *Chimmu* (1), the plaintiffs replied that the defendant was guilty of fraud in obtaining the decree. There was an issue on this point. Moreover the party **[327]** who dealt with the karnavan in that case was aware that the latter was acting outside his duty as karnavan.

On the hearing it appeared that the plaintiffs and defendants Nos. 1 and 2 alone of the members of the tarwad are parties to this suit, and it appeared there are others members of the tarwad. It also appeared that the plaintiffs do not in their plaint purport to sue on behalf of the tarwad. The members of the tarwad not parties to this suit are not bound thereby. Under these circumstances, I am of opinion that individual members of the tarwad, as regards tarwad property, have no rights vested in them separate from the tarwad, and that they can only sue as regards tarwad property in a suit when all the members of the tarwad are either joined as plaintiffs or are made parties as defendants to the suit. Members of a tarwad can consent to partition. It is the tarwad alone, as a body, that can sue, and this only for the tarwad, not for the benefit of any individual. The question was thus referred to a Bench composed of Muttusami Ayyar, Brandt, JJ., and myself, whether the two plaintiffs, being members of a tarwad, are entitled to maintain this suit in the absence of the other members of the tarwad—see *Arunachala* v. *Vythialinga* (2). I am not able to agree in the opinion of my learned colleagues that the plaintiffs in the absence of the rest of the tarwad have any right of suit as regards tarwad property. The tarwad is a *quasi*-corporation, and the individual members have no separate right to, or in respect of, tarwad property, save right of maintenance. A karnavan may sue to be declared karnavan, but all the members of the tarwad should be parties. The right of a karnavan is not separate from the right of the tarwad. He represents in many instances the tarwad, and manages for the tarwad. I do not think that this is a question of procedure. It is one that goes to the root of the plaintiffs' title. If it were a question of procedure, the absence of objection taken would be conclusive, and so would be the answer that this ground is not taken in appeal. Assuming

(1) 7 M. 413. (2) 6 M. 27.

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the plaintiffs were entitled to sue, what decree are they entitled to? They did not sue on behalf of the tarwad.

Moreover the decree in Suit No. 157 of 1875 bound defendants Nos. 1 and 2 in this suit, and all the other members of the tarwad who were defendants in that suit. The two Lower Courts *set aside* [328] the deeds executed by defendants Nos. 1 and 2 in discharge of that decree. The suit was one for declaration only, and no other relief could be given. Again those deeds cannot be set aside altogether as the Courts below have done, as defendants Nos. 1 and 2 are bound thereby. The decrees are wrong in this respect. Then what decree were the plaintiffs entitled to as the result? It would be, as it seems to me, that the deeds are not valid as regards the interest of the plaintiffs in the tarwad property.

MUTTUSAMI AYYAR, J.—The respondents are two junior members of a Malabar family called the Nambiattil tarwad; and as plaintiffs, they instituted the suit from which this second appeal arises to obtain a declaration that the incumbrances created by their karnavan, the defendant No. 1, under Exhibits II, III, IX, XVI, and XVII in favour of defendants Nos. 3, 4, and 5 are not binding upon the tarwad or the tarwad property which those documents purported to encumber. The Subordinate Judge dismissed the claim so far as it related to Exhibits IX and XVI, and the plaintiffs preferred no appeal. He decreed, however, the claim so far as it related to exhibits II, III, and XVII, and defendants Nos. 3 and 5, in whose favour they were executed, appealed to the District Court from the decision of the Subordinate Judge. The District Judgec oncurred in the opinion of the Court of First Instance that neither Exhibit XVII nor Exhibits II and III created a valid charge on the tarwad property, and dismissed the appeals. Defendant No. 3 alone has preferred a second appeal to this Court from so much of the decrees of the Lower Courts as invalidated Exhibits II and III which had been executed in his favour. Exhibit II is a jenm panayom deed executed on the 1st April, 1882, for Rs. 1,500 by defendants Nos. 1 and 2, and exhibit III is an otti granted by the same parties for Rs. 750 on the 24th February, 1882. Both transactions were concluded in satisfaction of the decree passed in Original Suit No. 157 of 1875 on the file of the Pynad Munsif against Govindan Nair, the karnavan of defendants Nos. 1 aad 2, who was defendant No. 7 in that suit. That decree was founded upon a bond for Rs. 945 executed to the present appellant by one Raroo Nair who belonged to Eledath tarwad, a divided house from the Nambiattil house, and who held the stanom of Karingatical Nair in conjunction with Unichanen Nair who belonged to the respondents' tarwad and succeeded to the stanom on Raroo Nair's death. The appellant brought Suit No. 157 of 1875 against the [329] members of the Eledath and Nambiattil houses who were defendants Nos. 2, 6, and 7—15 in that suit respectively. The former defended the suit, and the latter allowed it to be tried *ex parte*, and the appellant only showed at the trial that the debt was contracted for the necessity of the stanom and of the Eledath tarwad. The District Munsif passed a decree against the then holder of the stanom, the karnavan of Eledath house, and the karnavan of the Nambiattil house, and exempted from liability all the anandravans of both houses who were then included as defendants. The karnavan of the Eledath house appealed from the decree, and it was reversed, so far as it was against him and his tarwad. As the respondents' karnavan did not defend the suit or prefer an appeal, the decree passed against him became final. The respondents who were not parties to the former suit or to Exhibits II and III brought the present action. It is found by the Courts below that the decree

debt in question is not binding on the tarwad, and that Exhibits II and III are invalid, and, upon this finding, the second appeal must be dismissed. It will, however, be observed that defendants Nos. 7 to 15 in Original Suit No. 157 of 1875 were made parties to it as members of their tarwad, and that the respondents, who instituted the present suit, included as defendants only the defendant No. 1 their karnavan, and defendant No. 2 their senior anandravan. But the non-joinder of the other members of the family was not objected to by the appellant either in the Courts below or in his memorandum of second appeal, and it is conceded for him that he has in no way been prejudiced by this non-joinder. The decree appealed against being in favour of the respondents' tarwad, there is also no reason to think that any other member of the respondents' family may litigate the same matter again. But it is suggested that the respondents could not maintain the suit without making all the members of their tarwad either co-plaintiffs or defendants, or following the procedure prescribed by Section 30 of the Code of Civil Procedure, Act X of 1877, and that the objection is one which this Court ought to take in second appeal of its own motion, but in this opinion, I am unable to concur. Assuming that the non-joinder is only an error of procedure it is not a ground upon which we can interfere in second appeal under Clause (*c*) of Section 584 of Act X of 1877, for it is conceded that the appellant has not been prejudiced by the error. The substantial question then is whether the right which the respondents sought to enforce **[330]** is an individual right or a right which vests in their family only in its collective capacity. Having regard to the family system that obtains in Malabar, I do not consider that a tarwad is a corporate body in the sense that no single member of it has an individual right to enforce. Each member of a tarwad has a right to be maintained in the tarwad house, and this is a personal right. He has also a right, if a male and not incompetent, to succeed to management in the order of seniority, and this is also a personal right. The tarwad property is not partible at the pleasure of any one member, and he cannot maintain a suit to enforce partition because no separate right to demand partition exists. The tarwad property is, however, a common fund for subsistence, and each member is entitled to see that the karnavan to whose management it is entrusted does not exceed his lawful authority, and waste it, and this is an individual right vesting in every anandravan by reason of his position as such. If the anandravan is a female, there is the further right to see that the tarwad property is not wasted by the karnavan, and thereby divested from descent to her children. The conception of a tarwad is that of a joint family under the management ordinarily of the senior male, in which the anandravans have each a group of individual rights which they are entitled to enforce individually or collectively either as against the karnavan or his alienee or both. In the case before us, the karnavan and the senior anandravan who executed Exhibits II and III and the alienee who accepted them are made defendants, and we cannot say that, as a matter of substantive law, the respondents had no individual rights to sustain the suit. Though other anandravans might not object to the alienation, yet the plaintiffs are entitled to object, and it is therefore a case in which numerous parties have the same interest in the object matter of the suit, but not one in which no one party has a separate right. The others ought to be parties because it is desirable to bring them all before the Court by following the procedure prescribed by Section 30 of the Code of Civil Procedure to avoid multiplicity of suits. But the exigency is the outcome of a group of

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similar or equal rights vesting in the anandravans severally and jointly, and is therefore a matter of procedure. It is said that the relief claimed in the plaint is that the documents in question created no valid charge on the tarwad property, but it should be observed that the right is in its nature to see that the tarwad property is preserved, and [331] that the relief claimed is an incident of that right. I agree with Brandt, J., that this second appeal should be dismissed with costs on the ground that as the non-joinder is only an error of procedure, and that, as the respondents were successful, the appellant could not complain that the other members of the tarwad might harass him by litigating the same matter again.

But I entirely concur in the opinion of Kernan, J., that in suits of this kind all the members of the tarwad should ordinarily be brought before the Court by either making them parties or by following the procedure prescribed in Section 30 of the Code of Civil Procedure. Otherwise, in many cases, it may be possible for members of the tarwad to bring successive suits on failure of suits brought by one or more members of the tarwad. The necessity for following this procedure in cases in which members of a tarwad are numerous, was pointed out by this Court in *Kombi* v. *Lakshmi* (1), and approved by the Full Bench in *Ittiachan* v. *Velappan* (2). The old practice that obtained in Malabar consisted in one who is karnavan suing and being sued singly in respect of tarwad property, and in each anandravan being permitted to sue to set aside the decision against the karnavan for fraud. It was pointed out by the Full Bench in *Ittiachan* v. *Velappan* that a decree against the karnavan could only bind the tarwad when it is shown by the record itself that the decree passed against him was in his capacity as karnavan, and when the anandravans failed to prove that the decree debt was not binding on the tarwad. This opinion rests also on the rule of procedure that a decree can only operate *inter partes*. While I am clearly of opinion that as a matter of procedure it is in the highest degree desirable in suits instituted by anandravans, in order to check a successsion of suits in respect of the same right, to follow the procedure laid down in Section 30, so that the question litigated may once for all be determined, I feel precluded from holding that this second appeal, should be allowed. The result is that this second appeal must be dismissed with costs.

BRANDT, J.—I am of opinion that this second appeal must be dismissed.

The respondents were not parties to the Suit No. 157 of 1875, and we have decided in *Ittiachan* v. *Velappan* (2) that members of a tarwad, who were not parties to a former suit, are not estopped [332] from showing that a debt in respect of which a decree has been passed in a suit against their karnavan as karnavan of the tarwad, is not binding on the tarwad.

The securities evidenced by Exhibits II and III were given by defendant No. 1, Chatu Nair, as the karnavan, and defendant No. 2 as senior anandravan of the respondents' Nambiattil tavarai and were accepted by the appellant in lieu of the claim of the latter under the decree which he obtained against Govindan Nair, the then karnavan of the tavarai, in suit No. 157 of 1875.

And the finding of both the Courts below is to the effect that the debt for which that decree was passed was a debt not binding on the respondents'

(1) 5 M. 201. (2) 8 M. 484.

tavarai; that there was in fact no debt which their tavarai could have been compelled to pay; that had the then karnavan not egregiously failed in his duty as such, by neglecting to appear and plead that in the action of the plaintiff in that suit (the present appellant), no decree could properly be passed against his tavarai, the appellant must have failed.

In the case of such gross neglect of duty it has been held in *Thenju* v. *Chimmu* (1) and S.A. 982 of 1886 that the decision is not binding on the anandravans who were no parties to the suit.

It is no doubt true that the respondents did not in their plaint specially refer to the fact that the appellant had obtained a decree against the karnavan of their tavarai, and allege that that decree was the result of fraud on his part, or of gross negligence but for which the decree could not have been passed, but in proof that the debts now called in question were incurred for purposes binding on the tavarai, the appellant himself set up and filed in evidence the decree in the former suit, and adduced evidence in this suit in view to prove that the original debt was a debt binding on the Nambiattil tavarai, and I do not see that the appellant has been prejudiced by the irregularity or defect in the pleadings. The result of holding that it is not open to the respondents in this suit to go behind the decree in Suit No. 157 of 1875 would be that a creditor who has obtained a decree which an anandravan not being a party to the former suit might sue to set aside, and succeed in having set aside on the grounds indicated in *Thenju* v. *Chimmu* (1) can, by taking a mortgage or other security in lieu of his decree, **[333]** succeed in doing indirectly that which he could not do if he stood upon his decree.

And if it is open to the respondents to go behind the decree—as I am of opinion that it is—then on the findings of the Courts below, the respondents undoubtedly succeed in showing that the original debt was a debt not binding on their tavarai and are entitled to relief.

Under the decree in this suit the deeds (Exhibits II and III) are declared invalid and are set aside. The decree shall be modified by striking out the words "that the deeds II and III be and the same are set aside," and limited strictly to a declaration that the deeds are invalid as against the respondents and their interests in the tarwad property, but that this appeal be dismissed with costs.

The principle on which the decision reported in *Arunachala* v. *Vythialinga* (2) was based, does not, in my opinion, apply here; the initial mistake was on the part of the appellant in not making all the members of the tarwad parties to his original suit, and it is in consequence of that omission that, in accordance with the principle laid down in the other cases above quoted, it is open to the respondents to maintain this suit; the case might have been different if this were the first occasion on which the family sued for a declaration that a security given by their karnavan was given for a debt not binding on the tarwad. I do not see how this suit can be held not maintainable on the ground stated in *Arunachala* v. *Vythialinga*, and at the same time given effect to the principle contained in *Ittiachan* v. *Velappan* (3) and other cases above cited; but for the reason above stated, the circumstances being different, there is not, I think, any conflict between the former case and the latter cases.

I quite agree that ordinarily all members of the tarwad should be made parties to suits in which they are interested, actually or constructively,

(1) 7 M. 413. (2) 6 M. 27. (3) 8 M. 484.

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in the manner provided by Section 30 of the Civil Procedure Code; but I am not prepared to reverse the decree and to dismiss the respondents' suit on a ground not taken by the appellant, but with reference to an objection which presented itself to this Court at the hearing of the appeal.

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[334] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

PARVATHI AND ANOTHER (*Defendants*), *Appellants* v. THIRUMALAI (*Plaintiff*), *Respondent*.* [7th December, 1886, and 19th April, 1887.]

Hindu Law—Rights of an illegitimate son of a Sudra—Position of legitimate, adoptive, and illegitimate sons and daughter's sons, compared—Construction of a deed of partition—Partial partition—Admissibility in evidence of petitions signed by a person available but not called as witness.

A, the son of a deceased zamindar, sued B and C, his widow and brother, for possession of the zamindari, which was impartible. In order to prove that A was illegitimate, C filed two petitions purporting to have been signed and sent to the Collector of the District by C, in 1871, referring to A's mother as a concubine. C was not examined as a withness:

Held, that their contents were not evidence, but the petitions were themselves evidence to show that a complaint was made as mentioned therein.

In order to prove that C was divided from the late zamindar, A filed and proved a deed of partition executed by them in respect of their moveable property and of a house, which concluded as follows:—"There shall be connection only by relationship, but there shall be no pecuniary connection between us."

Held, that the deed effected only a partial partition, and that the last clause must be referred to the coparcener's right in partible property described in the instrument, and did not operate as a release of any right of succession to impartible property.

A was found to be an illegitimate son of the late zamindar.

Held, that he could not exclude his father's coparcener or widow from succession to the impartible zamindari—*Krishnayyan* v. *Muttusami*, I.L.R., 7 Mad., 407, and *Kulanthai Natchiar* v. *Ramaman* (unreported), in which it was ruled that a widow's claim to inherit would exclude that of an illegitimate son, approved and followed. *Sadu* v. *Baiza* I.L.R., 4 Bom., 37, and *Jogendro Bhuputi* v. *Nittyanund Man Singh*, I.L.R., 11 Cal., 702, distinguished.

[**F.**, 24 M.L.J. 271 (285); **R.**, 14 B. 282 (285); 23 B. 257 (265); 12 M. 401 (403); 25 M. 429 (430); 25 M. 519 (522) = 11 M.L.J. 399; 27 M. 32 (35); 33 M. 226 (227) = 4 Ind. Cas. 299 = 20 M.L.J. 359 = 7 M.L.T. 26; **Com.**, 34 M. 277 = 12 Ind. Cas. 247 (249); **Expl.**, 15 M. 307 (314).]

APPEAL against the decree of K. R. Krishna Menon, Subordinate Judge of Tinnevelly, in Original Suit No. 4 of 1884.

This was a suit to recover possession of the impartible zamindari of Kollenkondan.

The plaintiff sued as the heir of the late zamindar who died in 1883. Defendant No. 1 was the widow, and defendant No. 2, the brother of the late zamindar. All the parties were Sudras.

[335] The Subordinate Judge decreed as prayed in the plaint, finding (1) on the evidence in the case, including Exhibits III and IV (which were two petitions purporting to have been signed and sent to the Collector of the District by defendant No. 2 in 1871, referring to the plaintiff's mother

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* Appeal No. 27 of 1886.

as a concubine), that plaintiff was the illegitimate son of the late zamindar; (2) on the construction of Exhibit D (a partition deed, the terms of which are set out in the judgment of the High Court), that defendant No. 2 was divided from the late zamindar; and (3) that according to Hindu law an illegtimate son was among Sudras a preferable heir both to a widow and to even an undivided brother.

The defendants preferred this appeal, and the plaintiff filed a memorandum objecting to the finding that he was illegimate.

Bhashyam Ayyangar, for appellant No. 1.

Subramanya Ayyar, for appellant No. 2.

The position of an illegitimate son with regard to other heirs has been wrongly estimated by the lower Court. Besides the authorities cited in the judgment, reference was made to "Mayne's Hindu Law," Section 465, *Sri Gajapathi Radhika Patta Mahadevi Garu* v. *Sri Gajapathi Nilamani Patta Maha Devi Garu* (1), *Katama Natchiar* v. *The Rajah of Shivagunga* (2). The agreement between the late zamindar and appellant No. 2 shows on its true construction that defendant No. 2, while he became divided as regards the house and the moveable property belonging to the family did not renounce his coparcenary right in the impartible zamindari: *Thakur Doyal* v. *Ram Narain Singh* (3), *Muttu Vaduganadha Tevar* v. *Dora Singha Tevar* (4).

The Acting Advocate-General (Hon. *J. H. Spring Branson*) and *Rama Rau*, for respondent.

The evidence does not prove the illegitimacy of the plaintiff. Exhibits III and IV are no legal evidence against him, inasmuch as defendant No. 2 did not offer himself as witness and swear to the truth of their contents. That the right construction has been put on D is made the more probable by the fact (which was proved), that in 1869 the late zamindar had an undoubtedly legitimate son, and the defendant No. 2 had accordingly only a claim for maintenance. But even if the plaintiff is illegitimate, he has a preferable **[336]** claim to a widow or any brother. The texts on the subject have been interpreted to mean that a father can enhance the share of his illegitimate son from a half to a full share, but he cannot refuse him any share. "Manu,"Chap. IX, Sections 178 and 179; "Mitakshara," Chap. I, Section, 12 (5); "Yajnavalkya," II, slokas 133 and 134 (6); "Dhayabhaga," Chap. IX, Sections 29 and 30 (7); "Dattaka Mimamsa," Section 2, Clause 26 (8); "Dattaka Chandrika," Section 30 (9); 3 "Jagannatha's Digest," CLXXIV, 1 "Strange's Hindu Law, pp. 57,69 and 132.

There is also abundant authority in the Courts for the proposition that a dasiputra, who by mere birth, and without any form of legitimation, becomes a member of his father's family, *Pandiya Telaver* v. *Puli Telaver* (10), has a right to inherit his father's estate: *Chuoturya Run Murdun Syn* v. *Sahub Purhulad Syn* (11), *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver* (12), *N. Krishnamma* v. *N. Papa* (13), *Rahi* v. *Govind Valad Teja* (14), and *Sarasuti* v. *Mannu* (15).

The present case is distinguishable from *Kishnayyan* v. *Muttusami* (16) which proceeded on the assumption that a dasiputra is not a sapinda,

(1) 13 M.I.A. 497.
(2) 9 M.I.A. 539.
(3) 8 C. 375.
(4) 3 M. 290 (339).
(5) Stokes' Hindu Law-books, p. 426.
(6) Mandlik's edition, pp. 219, 220.
(7) Stokes' Hindu Law-books, p. 298.
(8) Stokes' Hindu Law-books, p. 551.
(9) Stokes' Hindu Law-books. pp. 659, 660.
(10) 1 M.H.C.R. 478.
(11) 7 M.I.A. 18.
(12) 13 M.I.A. 141.
(13) 4 M.H.C.R. 234.
(14) 1 B. 97.
(15) 2 A. 134.
(16) 7 M. 407.

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and also on the ground that the person who claimed through the illegitimate son had treated the widow of the putative father's brother as the sole representative of the family and had left her in possession for many years.

The further arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.).

JUDGMENT.

The contest in this appeal has reference to the right of succession to the zamindari of Kollenkondan in the district of Tinnevelly. It is conceded that it is an impartible estate capable of being enjoyed but by one member of the family owning it at a time. The last male holder was one Ramasami Thirumalai Vandaya Tevar, who died on the 23rd September 1883, leaving him surviving the plaintiff (respondent), and the defendants (appellants), his widow and brother. As between the appellants themselves there was no dispute, and the widow acknowledged [337] that the brother, who is in possession, is the lawful successor of her husband. It was further admitted for the respondent that, when the late zamindar died, he left a daughter's son among his survivors, and that that child, named Baggiam, has since died. As the plaintiff in ejectment the respondent had to make out a title superior to that of the widow and the brother, and he alleged that he was the eldest son of the late zamindar by his second wife, Angammal, and that the second appellant was a divided brother. The appellants denied that the respondent was the son of the late zamindar at all, and contended that the latter never married Angammal, that she was on the other hand married to one Subbaiya Servai, that the respondent was the issue of that marriage, and that the second appellant was an undivided brother. The Subordinate Judge found that Angammal was the concubine of the late zamindar, and that the respondent was but his illegitimate son. He also found that Angammal was not married to Subbaiya Servai, and assuming, for the sake of argument, that they had been married as alleged, he observed that their conduct in relation to each other amounted to divorce according to the custom of the caste to which they belonged. He considered further that Exhibit D showed that the second appellant was a divided brother, and that it contained a clause, whereby he relinquished all his interest in the zamindari. Finally, he was of opinion that, according to Hindu law, an illegitimate son was, among Sudras, a preferable heir, both to the widow and to the undivided brother, and, accordingly, he gave judgment for the respondent. Each of the findings and the law laid down by the Subordinate Judge are impeached in appeal. It is also argued, for the respondent, that the grounds on which the Subordinate Judge refused credit to the evidence offered in proof of legitimacy are, by no means, satisfactory.

As to the question whether the second appellant is a divided or an undivided brother of the late zamindar, we are unable to support the construction placed by the Subordinate Judge on Exhibit D. It is in these terms:—

"After the demise of our father, who was the zamindar of the said Kollankondan, in the month of Audi of Andu 1030, you, the eldest son, became entitled as usual to the said zamin and the immoveable properties attached thereto; and, after keeping these apart, a division was already effected with regard to the remaining ancestral moveable properties,

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viz., jewels, vessels, cash, cattle and [338] grain, &c., in the presence of arbitrators. According to the succession among brothers, Thirumalai Vandaya Tevar and Subramania Tevar got a moiety; yourself and myself divided equally the other moiety. For maintenance, you gave Olugu seed kottas 7 of nunjah and chains 7 of punjah, and Rs. 10-8-0 out of the teerwah (collected) on palmyra trees; you shall give the said Thirumalai Vandaya Tevar and Subramania Tevar Olugu seed kottas 12 of nunjah, chains 12 of punjah, and Rs. 10-8-0 out of the teerwah (collected) on palmyra. While thus holding enjoyment, I complained that no provision was made for the payment of my share in the value of the house, and an agreement was entered into this day in the presence of arbitrators as follows:—According to the award passed by the arbitrators in respect of the expenses of the building of the said house, the amount agreed to by me is Rs. 700. I got this sum of Rs. 700 assigned to one Vembaian in satisfaction of his decree in Registration Suit No. 30 on the file of the Principal Sadr Amin's Court of Tinnevelly, and as you have agreed to pay the same I shall have no claim in future either to the house, our ancestral property in which you are living, or to the moveable properties. There shall be connection only by relationship, but there shall be no pecuniary connection between us.

"To this effect this agreement was executed with my free will and consent."

It seems to us to be clear that the zamin, and the immoveable properties attached to it, were excluded from partition as property which, according to custom, devolved on the late zamindar as the eldest son, and that a division was effected between the brothers only in regard to other ancestral properties. The Subordinate Judge has apparently overlooked the rule of Hindu Law that a brother may be divided in interest in regard to some property and at the same time a coparcener in regard to other property. He has laid stress, however, on the clause at the end of the document, *viz.*, "I shall have no claim in future either to the house, our ancestral property in which you are living, or to the moveable properties; there shall be connection (hereafter between us) by relationship only, but there shall be no pecuniary transactions," and concluded that it operated as a release of the right of succession now claimed by the second appellant. This conclusion is at variance with the well-known rule of interpretation that general words [339] like those before us are to be construed with reference to the object-matter of the instrument in which they occur, and that they are not to be extended to matters which were not in the contemplation of the parties. It is not denied that, at the date of this instrument, the late zamindar had a legitimate son by his wife Rakkammal, and that the right which since accrued on his death and that of the zamindar could not have then been in contemplation. Again, the instrument recited that all partible ancestral property, exclusive of the zamindari, which devolved solely on the eldest son, had been divided and that some land had been given for maintenance, but that there had been a dispute in regard to the omission to provide a house for the brother. It then went on to set forth the arrangements made in settlement of that dispute according to the decision of certain arbitrators, and contained a clause which released specially all claim to the house in which the zamindar was living and then contained the general words. In these circumstances, those words can only be referred to the coparcener's right in partible property described in the instrument as adjusted by division or otherwise, but not to property expressly excluded as not partible. The

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conclusion we come to is that exhibit D neither imports division in regard to the zamindari which is the property in suit, nor operates as a release of the second appellant's right of succession to it, if any.

The next contention for each party is that the evidence adduced by him or by them ought to have been accepted by the Subordinate Judge as trustworthy. Several witnesses called by the appellants deposed that Angammal married Subbaiya Servai and lived with him for upwards of 10 or 15 years, that the respondent and his brothers and sisters were the children of that marriage, and that Angammal since separated from her husband and lived with the late zamindar as his concubine for about 15 or 20 years. On the other hand, the respondent's witnesses deposed that the zamindar married Angammal as his second wife about 30 years ago in the mode prescribed by the custom of the caste for a lawful marriage, that all her children were born to him, and that they and she always lived under the protection of the zamindar as part of his family and in his house. Apart from this conflict of evidence, there are other difficulties in accepting the case for either party as true in its entirety. We agree with the Subordinate Judge that the oral evidence adduced by the appellants [340] is altogether worthless. Angammal's alleged husband, Subbaiya Servai, deposed that, when he was a child of 4 or 5 years of age, Angammal's father and mother tied a tali (token of marriage) in his name; that Angammal had then attained maturity; that the late zamindar had kept her from that time; that the respondent was born to him, and that the witness was then 10 years old and had no sexual intercourse with Angammal at any time. He does not support the story told by the other witnesses, *viz.*, that Angammal and himself lived together as husband and wife when the respondent and his brothers and sisters were born. His story is also improbable in itself, first, because it was admittedly not usual among Maravars, of whom the late zamindar was one, to marry a girl who had attained her maturity to a child 4 or 5 years old, and secondly, for the reason that his own parents and relations would have ordinarily considered as revolting the idea of marrying her to their child when it was known that she was to become the zamindar's mistress forthwith. Again, the story told by the witnesses appears to be questionable when it is considered in connection with the age of Angammal, with the number of children she has had, and in particular with the conduct of the late zamindar towards them, to which we shall refer presently. As to the oral evidence adduced by the respondent, the Subordinate Judge has accepted it so far as it is corroborated by the conduct of the parties concerned, and refused credit to it so far as it tends to show that there was a legal marriage between the late zamindar and Angammal, because it could not be reconciled with such conduct. In the deposition made by the late zamindar in November 1881 in Original Suit 205 of 1881, he stated upon solemn affirmation: "I did not *marry* Angammal. She is living in her own house" (exhibit I). Again, in March 1873, he described Angammal and the respondent as "my concubine and her son" (exhibit C). This document is an instrument of gift which states that six pangus of land were granted by the zamindar to the concubine and her son, the respondent, for "maintenance," and that the patta was issued in the name of the latter. In the view that the respondent was regarded by him as his concubine's son, the necessity for this grant is intelligible, but in the view that he was the legitimate son and heir to the zamindari, the provision was wholly uncalled for. Moreover, in the instrument of mortgage which was executed by Angammal and the respondent in

March [341] 1873, the executants described themselves as "the daughter of Nagaiyan Servai and her son, Subramania Servai" (exhibit V). In a lease executed by the respondent and others in July 1880, the former styled himself as "Subramania Tevar, son of Angammal, Maravar" (exhibit II). It appears from exhibit A that in August 1883 the respondent was 25 years of age according to the late zamindar, and it is not unreasonable to account for his conduct in describing himself as the son of his mother by concluding that the contention that he was an illegitimate son is well-founded. It is also in evidence that the lands granted to the respondent for his maintenance and that of his mother are still in his possession. The first time when the zamindar said that the respondent was his "eldest son and heir" was in August 1883, when he addressed the petition, exhibit A, to the Collector during his last illness, and in December next the respondent described himself as the son of the late zamindar. It is also true that in March 1883 the late zamindar referred to the respondent as his son in exhibit B. In connection with this change in the zamindar's conduct, it is suggested that the legitimate son he had by his wife, Rakkammal, died before the zamindar about January 1883, and that, when he was suffering from an attack of paralysis and enfeebled by protracted illness, Angammal gained ascendency over him and prevailed on him to favour her son, the respondent. It is also suggested for the appellants that from 1869 the second appellant protested against his brother bringing Angammal into the palace, and denounced his connection with her as immoral, and therefore the late zamindar was inimical to him. The plaint stated that by Rakkammal, the first appellant's co-wife, the late zamindar had a male child named Muthusami, and that both the mother and the child died, the former about 14 years and the latter about a year before suit. Exhibits E, III and IV show that from 1871 there was enmity between the late zamindar and his brother. In this state of mind, enfeebled as it was by protracted illness and affliction and influenced by the respondent and his mother, it was not unnatural that the late zamindar should have desired that his illegitimate son should succeed him in preference to his brother who was obnoxious to him. On the other hand, it was suggested for the respondent that, so long as Rakkammal lived, she had an ascendency over the zamindar and contrived to induce him to treat Angammal and her children with injustice, and that it was after her death the zamindar became [342] inclined to do them justice. We are unable to accept this suggestion for several reasons. There is no evidence to indicate that the late zamindar ever treated them with injustice, and the provision made by him for them shows that, on the contrary, he treated them with kindness. Again, Rakkammal died, according to the plaint, in 1870, or 14 years before suit, and most of the documents in which Angammal was described as a concubine are subsequent to 1870. It was urged that exhibits III and IV are no legal evidence against the respondent, inasmuch as the second appellant did not offer himself as a witness and swear to the truth of their contents. Their contents are certainly no evidence, but they are evidence however to the extent that the second appellant made a complaint as mentioned therein in 1871. The conduct of the late zamindar, of the respondent and of his mother, prior to the death of Muthusami, Rakkammal's son, is not consistent with a belief on their part that Angammal was the late zamindar's wife or that the respondent was his legitimate son. It is conceded that Nagaiya Servai was a watchman on the estate of the late zamindar, and it is not probable that the latter would have

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married his watchman's daughter. But it was said by the learned counsel for the respondent that several of his witnesses were the relations of the late zamindar, and that some were men of great respectability. Of the witnesses who deposed that they saw Angammal married to the late zamindar, the second witness, Karuppan Servai, is Angammal's paternal uncle, and he is engaged in litigation with the second appellant. The fourth witness, Pichali Servai, is the father of Angammal's cousin. At all events, these two witnesses are in a position to be biassed in respondent's favour. The first witness, Ponnappa Tevan, stated that he was the late zamindar's aunt's son; the fifth and sixth witnesses deposed that they were his sons-in-law, and the third and eighth witnesses deposed that they were his agents. In a suit like this, in which the rival claimants are connected with the late zamindar, relations often ordinarily take one side or the other according to their predilection or prejudice, and it is unsafe to place implicit reliance on them unless their evidence is supported, at least not contradicted, by the conduct of the parties concerned and of the last holder of the estate. As to the ninth witness, who is the sub-divisional zamindar of Ramnad, he no doubt believed that the respondent was the late zamindar's son, but he was not in a position to have known whether he was legitimate or illegitimate. We see no sufficient [343] reason to doubt that the Subordinate Judge has properly held that the respondent was only the illegitimate son of the late zamindar.

The next question arising for decision is, whether the illegitimate son of a Sudra is heir to his impartible estate in preference to his undivided brother or widow, daughter or daughter's son. The Subordinate Judge considers that he is, but in this opinion we are unable to concur. According to the decisions of a Division Bench of this Court in *Krishnayyan* v. *Muttusami* (1) and in *Ranoji* v. *Kandoji* (2), an illegitimate son is not a coparcener with his father's undivided brother or with the sons of such brother, and can neither inherit to them nor demand from them a partition of ancestral property. In both those cases, it was not doubted that the illegitimate son inherits the separate estate of his putative father on failure of a legitimate son, son's son, son's grandson, widow, daughter and daughter's son. Nor was it doubted that he is a co-sharer in such separate property with his legitimate brother and a co-heir with his father's widow, daughter or daughter's son. There is considerable authority, as observed by the Subordinate Judge, in support of those propositions of law, but the question which was considered in those cases was whether to any and what extent the coparcenary law modified the special rule laid down in regard to illegitimate children among Sudras in Section XII, Chap. I of the Mitakshara. It is clear that the text of Yagnyavalcya and the comments upon it in Section XII, Chap. I, refer to the estate of a separated householder. As observed in the case of *Ranoji* v. *Kandoji* (2) there is no special provision on the subject, and the Courts of Justice have to find a rule of decision by analogy. For this purpose, the illegitimate son may be compared, as to his position in the family, first, with a legitimate son with whom he participates for half a share, secondly, with a daughter and a daughter's son with whom he takes an equal share, thirdly, with an adopted son who, in competition with a legitimate son, takes but an inferior share, and fourthly, with the father's coparcener. Again, in coming to a decision, his legal status under the special rule of Yagnyavalcya may be considered in connection with

(1) 7 M. 407. (2) 8 M. 557.

his ordinary status among all classes of Hindus, and with the legal basis on which the right conceded to him originally rested and still rests.

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[344] As compared with the legitimate son, it will not be disputed that the analogy fails in several material points—(1), a legitimate brother takes an equal share in the father's separate estate, whilst an illegitimate brother participates but for half a share; (2), the kinship of an "Aurasa" extends to the entire joint Hindu family, whereas that of an illegitimate son is confined to his father and mother and their branch of a joint family; (3), the former has a concurrent and co-ordinate right in ancestral property from the time of his birth with his father and father's coparceners, whereas the latter can only take a share at his father's pleasure, and the father cannot, before partition, give co-parcenary property of his own authority and otherwise than with the consent of his co-parceners; (4), the legitimate son excludes the daughter and the daughter's son, whereas the illegitimate son is an equal sharer with them. The only points in which the analogy apparently holds good are in regard to sonship and to his being a co-sharer with the legitimate son in his father's separate estate. As to the sonship, it is imperfect for want of legitimacy which implies a legal marriage. The nature of the inequality created by this imperfection is indicated by the author of the Dayabhaga in chap. IX, Section 31, wherein he explains the ground on which Yagnyavalcya considers the illegitimate son to be equal to the daughter's son, and observes that the one, though born of an unmarried woman, is the *son of the owner*, and the other, though sprung from a married woman, is only a daughter's son. Thus, the absence of legal marriage between the father and the mother is considered to produce the same effect as severance from the co-parcenary family by reason of sex. As to his position as the partaker of a portion of the father's estate with the legitimate son, it was usual, even at the time of the Mitakshara, to allocate portions of the estate in lieu of maintenance for daughters and mothers. Therefore, there can be no doubt that in the case of a competition between a legitimate son and an illegitimate son, the former must be accepted as a preferable heir to an impartible estate.

As compared with a daughter's son, the position of the illegitimate son is that of an equal sharer and a member of the family of the maternal grandfather, and whether he ought to be accepted as a preferable heir to an impartible estate must be determined with reference to other considerations.

As compared with the adopted son, the illegitimate son's position is certainly inferior. The adopted son has a co-ordinate [345] interest, with his father in ancestral property. He can claim partition from his father. He represents his father as against the father's co-parceners. He excludes the widow, the daughter and the daughter's son. In ancient law, he was one of the twelve descriptions of sons, whereas the illegitimate son, as the son of a female slave, had no place among them—see Mit. chap. I, Section XI. If the adopted son takes a smaller share in competition with the legitimate son, it is because he is a mere substitute provided by a fiction of law, whilst in the case of the "Aurasa" there is actual blood relationship consecrated by legal marriage. In default of a legitimate son, the fiction operated as a special rule of law to give the adopted son the same status in the family as against every one of its members. On the other hand, save as to taking an inferior share, there is no analogy between him and the illegitimate son.

Again, as compared with the father's co-parcener, the analogy equally

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fails. The father's coparcener has the same rights as the father had in ancestral estate and the former was not *bound* to consent to the gift by the latter of any part of the ancestral estate to the illegitimate son. It was pointed out in the case of *Ranoji* v. *Kandoji* (1) that the ancestral property descending through the father to the legitimate son may well be subjected to the individual obligations of the father, whilst his own coparceners may stand on a different footing. As compared with the illegitimate son in the higher classes, it is clear that the illegitimate son of a Sudra is always entitled to maintenance as a member of his father's family by reason of his sonship though through an unmarried woman. Yagnyavalcya's text purported to provide a special rule applicable to Sudras as an exception to the general rule, but the rule has reference to the estate of a separated householder. The special rule was therefore considered in *Ranoji* v. *Kandoji* (1) to allocate a portion of the property of a separated father in lieu of maintenance, and it was held that in cases which did not fall under the special text the general rule must prevail.

Having regard to the basis on which the right of the illegitimate son rests, this view does not seem improbable. It was explained in *Krishnayyan* v. *Muttusami* (2) that an illegitimate son was originally in the position of a slave's son. It was pointed out what the precise position of a continuous concubine was among the fifteen descriptions of slaves enumerated by Narada, and how, [346] under a text of Catyayana, the begetting of a son on a female slave first created an obligation to enfranchise the mother and her son, and eventually passed into a manumission by operation of law owing to the importance attached in early times to a son however begotten. Though relationship as son removed the taint of being born of a slave, still the position of the illegitimate son in the joint family, until slavery was abolished by Act V of 1843, was that of a freedman, and in that sense inferior to that of the other members.

We do not therefore see reason to overrule those decisions; and following them, we must hold that the father's undivided brother is a preferable heir to his illegitimate son who ranks as a co-heir with the father's daughter and daughter's son, both of whom are excluded by the father's co-parcener. In *Kulanthai Natchear* v. *Ramamani* (*vide* Judgment in Regular Appeal No. 86 of 1865), it was held by the High Court that even the widow would exclude the illegitimate son. Having regard to the fact that relationship based on a legal marriage is a ground of preference, and that originally the emancipated slave and her son, though free after the birth of the son, would have ordinarily held an inferior position to that of the regular members of the family, we consider that the illegitimate son was properly postponed to the widow. Our attention was drawn at the hearing of the appeal to two cases, *viz.*, *Sadu* v. *Baiza* (3) and *Jogendro Bhuputi* v. *Nittyanund Man Singh* (4). They may, however, be distinguished from the case before us on the ground that there was no competition in those cases between the illegitimate son and the father's undivided brother. Nor was the ruling of this Court on the subject before the learned Judges who decided those cases. With all deference to them, we do not see our way to adopting the view that the case of an adopted son is analogous to that of an illegitimate son. Following the decisions of this Court, we reverse the decree of the Subordinate Judge and dismiss the respondent's suit with costs, on the ground that he cannot exclude his father's co-parcener or widow from succession to the impartible estate in dispute.

(1) 8 M. 557. (2) 7 M. 407. (3) 4 B. 37. (4) 11 C. 702.

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[347] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice and Mr. Justice Muttusami Ayyar.

ANDI AND OTHERS (*Defendants*), *Appellants v.* THATHA AND OTHERS (*Plaintiffs*), *Respondents.** [4th and 6th April, 1887.]

Civil Procedure Code, Section 43—Declaration of title to continue to enjoy separate possession of land—Suit for partition.

The plaintiffs having obtained a declaration of title to continue to enjoy separate possession of certain lands sued the former defendants again for partition of the same lands:

Held, that the suit was unnecessary and should be dismissed.

Per cur. The claim and the remedy mentioned in Section 43 of the Code of Civil Procedure, have reference to the cause of action litigated in the previous suit.

[R., 12 M. 285 (286).]

SECOND appeal against the decree of J. W. Reid, District Judge of Coimbatore, in Appeal Suit No. 86 of 1885, modifying the decree of W. E. T. Clarke, Subordinate Judge, Nilgiris, in Original Suit No. 45 of 1884.

This was a suit for partition of the plaintiffs' share in certain specified lands and for damages. In 1875, the present defendants sued to eject the plaintiffs from specific portions the lands now in question, but the suit was dismissed. Subsequently, in 1882, the present plaintiffs instituted a suit with regard to the same land against the present defendants and obtained a decree declaring that they were entitled to the specific portion in their possession which were described by them, the Court holding that the actual area in their enjoyment and its proportion to the entire area were not matters to be adjudicated on in that suit. The present suit was brought for partition of the lands, and for damages for obstruction to their title; and the plaint alleged that the defendants had been requested by the plaintiffs but had refused to divide the lands according to the shares decreed in their favour in the suit of 1882.

The Subordinate Judge passed a decree in favour of the plaintiffs, but the District Judge modified it on appeal and passed a [348] decree "that the defendants have partitioned off to them the part corresponding to the parts marked in Mr. Fraser's plan in burnt sienna (as to which it was in evidence that the plaintiffs had been long in possession), and that the suit for damages be dismissed."

The defendants preferred this second appeal.

Mr. *Wedderburn* for appellants argued that no cause of action was disclosed, and that in any case the suit was barred by Section 43 of the Code Civil Procedure; the plaintiffs obtained substantially no relief beyond what they had obtained in the previous suit, and no obstruction had been offered to their demarcating the area in their possession.

Mr *Grant* for respondents argued that the plaintiffs had not in fact gained any relief from the former suit; and further objected that the decree for damages should have been allowed to stand.

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* Second Appeal No. 872 of 1886.

1887
APRIL 6.
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APPEL-
LATE
CIVIL.
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10 M. 374.

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and MUTTUSAMI AYYAR, J.)

JUDGMENT.

The parties to this second appeal are Badagas, on the Nilgiri hills, and it arises out of a suit for partition instituted by the respondents against the appellants. The plaint prayed for partition of the plaintiffs' 5, 2, and 3, equal shares in the plaint lands known as Ekkadahalli, Sarvahalli, and Annahalli, and for damages to the extent of Rs. 100. This litigation was commenced in continuation of two previous suits, Original Suits, No. 53 of 1875 and No. 82 of 1882. The first-mentioned suit was brought by the appellants to eject the respondents from specific portions of the three fields named above on the ground that they were demarcated as included in the patta standing in the names of the former, and that the latter dispossessed them otherwise than in due course of law about eleven months previous to that suit. The Judicial Commissioner found that there was no dispossession as alleged, that the land in dispute had been in the respondents' possession for many years previous to the institution of that suit, that the appellants had no title, and that the respondents' pedigree (which went to show that there were co-sharers with the appellants) was supported by reliable evidence. Upon these findings, the High Court upheld the decree of the Court of first instance which dismissed that suit with costs. It will be observed that the land then in litigation consisted of specific portions of the **[349]** three fields. The respondents then instituted Original Suit No. 82 of 1882 to have it declared that they were entitled to separate enjoyment of 5, 2, and 3 shares in the three fields, and stated that they had been for many years in exclusive possession of 3·45 acres which they said represented those shares. The Court of first instance made a declaration accordingly, adding that such separate possession and enjoyment might be ascertained in execution proceedings. The District Court considered in appeal that that suit was in the nature of a suit for the partition of the respondents' shares. But on second appeal, the High Court held that it was only a suit for a declaratory decree and in that view cancelled the direction contained in the decree of the District Court that the exact area of the portions in the respondents' possession be ascertained in execution, and passed an amended decree, declaring that the respondents were entitled to the specific portions in their possession which were described by them to be 3·45 acres and to represent their 5, 2, and 3 shares in the three fields named in the plaint. In its judgment, the High Court observed that "this was not a suit for partition, but was a suit for a declaration that the land in the respondents' possession has been enjoyed by them for many years in right of inheritance, and that they are entitled to enjoy it in such right by prescriptive title, whatever may be its area, whatever may be its proportion to the entire area." It will be observed that the grounds of decision were that the suit was one for a declaratory decree, and that the declaration to which the respondents were entitled was of title to continue in enjoyment in right of inheritance by reason of the prescriptive title which they had acquired, and that the actual area in their enjoyment and its proportion to the entire area were not matters to be adjudicated upon in that suit. Thereupon the present suit was instituted. The plaint prayed for a partition of the respondents' 5, 2, and 3 equal shares in the three fields mentioned above and for declaration of the areas of the said shares in the said three pieces of land and for

Rs. 100, damages for obstruction to their title and to partition, and for the costs of the suit. The Subordinate Judge decreed the claim with costs, but on appeal the District Judge set aside the decree of the Subordinate Judge, so far as it awarded damages, and directed the appellants to pay the respondents' costs on the relief awarded and the respondents to pay the appellants their costs on the amount of damages. [350] Both parties object to this decree. It is argued for the appellants that the plaint discloses no cause of action and it is alleged for the respondents that damages should have been decreed.

The ground of action mentioned in paragraph 8 of the plaint is that the defendants have been requested by the plaintiffs to divide the lands according to the shares decreed in their favour but that the defendants have refused to do so. The contention, therefore, that the plaint discloses no cause of action cannot be supported. The right asserted is an incident of an alleged coparcenary, and it was not adjudicated upon in any previous suit. If there were a subsisting coparcenary in regard to the lands mentioned in the plaint and if the respondents were entitled to the shares specified by them, they would be entitled to a decree for partition. As to the objection that the suit is barred by Section 43 of the Code of Civil Procedure, it must be observed that the cause of action disclosed by the plaint is distinct from the cause of action in the Suit of 1882, and that it has been held that the claim and the remedy mentioned in Section 43 have reference to the cause of action litigated in the previous suit, *Pathuma* v. *Ayissa* (1).

As to the merits, the Judge observes that the claim to half shares in the three fields in dispute must be taken as made in ignorance. The averment in the plaint that certain shares were decreed to the respondents in the suit of 1882 is opposed to the judgment of the High Court in that suit pronounced on Second Appeal which declared that the area then mentioned and the shares which it was said to represent were mere matters of description; the Judge therefore properly disallowed the claim to any excess area which was not already in their possession. Nor is the decree of the Judge open to objection, so far as it directs that the plaintiffs have partitioned off to them the portions corresponding to the parts marked in Mr. Fraser's plan in burnt sienna. It simply ascertains the precise area and the position of the land already in the respondents' possession in right of inheritance by prescriptive enjoyment, and thereby avoids future litigation on the ground that the area and the site were not defined by the final decree in the suit of 1882. It is contended, however, that the respondents obtained substantially no further relief beyond what they had in the previous suit and that no obstruction was offered to their [351] demarcating the area in their possession and defining it. The Counsel for the respondents is unable to meet this objection. We must, therefore, hold that this litigation was practically unnecessary. On this ground we decree that the respondents do bear their own costs and pay the appellants' costs throughout, and, with this modification, confirm the decree of the Lower Appellate Court. As to the memorandum of objections, it must be dismissed. The damages claimed were in the nature of a fine claimed for vexatious litigation, and the Judge was right in holding that such claim must be disallowed.

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(1) Second Appeal No. 699 of 1883.

1887
APRIL 19.

APPEL-
LATE
CIVIL.

10 M. 351.

10 M. 351.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

LAKSHMANA AND ANOTHER (*Defendants*), *Appellants v.* RAMACHANDRA (*Plaintiff*), *Respondent.**
[14th February, and 19th April, 1887.]

Landlord and tenant— Forfeiture— Waste— Planting a mango tope on dry land.

In the absence of local custom, tenants are not entitled to convert land under cultivation into a mango grove. Tenants from year to year are not at liberty to change the usual course of husbandry without the consent of the landlord.

[D., 22 M. 39 (45).]

SECOND appeal against the decree of J. Kelsall, District Judge of Vizagapatam, in Appeal Suit No. 259 of 1885, reversing the decree of V. A. Narasimha, District Munsif of Parvatipur, in Original Suit No. 5 of 1884.

This was a suit to eject the defendants from certain lands of which they were tenants from year to year, on the ground that they had committed waste by planting mango trees on some dry land which formed part of their holding.

The District Munsif dismissed the suit. His decree was reversed, on appeal by the District Judge, who observed :—"The land is dry land, but the plaintiff hopes at some future time to convert it into wet. Whether it will be practicable for him to do so is beside the question. He leased the land to defendants for cultivation and [352] has a right to be protected against the defendants so dealing with the land as to unfit it for cultivation now and for the future."

The decree of the District Court directed the defendants to remove the young trees planted, and generally before the end of the current fasli to restore the land to the condition in which it was when leased to them, and "in default of their so doing I direct that from that date they be ejected from the land."

The defendants preferred this second appeal.

Mr. *Michell*, for appellants.

Planting mango trees is not waste ; and in any case since it was only on the dry land that the mango trees were planted, the forfeiture was incurred, if at all, only in respect of the dry land which bears a distinct and separate rent from that paid in respect of the wet land.

The Acting Advocate-General (Hon. *J. H. Spring Branson*) for the respondent cited *Bholai* v. *The Rajah of Bansi* (1).

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and MUTTUSAMI AIYYAR, J.)

JUDGMENT.

The respondent is renter of the zamindari of Merangi under the management of the Court of Wards, and the appellants are raiyats on that estate. Their holding consists partly of wet and partly of dry land

* Second Appeal No. 547 of 1886.

(1) 4 A. 174.

1887 APRIL 19. — APPELLATE CIVIL. — 10 M. 351.

assessed at Rs. 83-11-6 and Rs. 10, respectively. In September, 1883, they planted a mango tope on a portion of the dry land which was usually cultivated with a dry crop and thereby rendered it unfit for dry cultivation. Thereupon the renter sued to eject them, and the contest was whether they were liable to be ejected on the ground that they planted the mango tope otherwise than with the permission of their landlord. It is found by the Judge that they were only tenants from year to year, that the land converted into mango garden would, if under dry cultivation, ordinarily yield an eight-anna crop, and that there was no special custom in the village in justification of their acts. He came to the conclusion that the appellants were not at liberty so to deal with the land as to render it unfit for cultivation now and for the future, and directed them to remove the young trees planted, fill up the pits dug and generally before the end of the fasli to restore the land to the condition in which it was when it was [353] leased to them, and in default of their doing so, decreed their ejectment. From this decree the renter has preferred no second appeal and it is not necessary to consider whether the decree is right in ordering a conditional ejectment. To that extent the decree is in the appellant's favor, and we are not prepared to attach weight to the contention that the Judge had no power to grant prospective relief, nor do we consider that in the absence of a local custom, tenants are entitled to convert the land under cultivation into a mango grove without the consent of their landlord and thereby change the nature of the property. As tenants from year to year, the appellants were under the obligation to restore the land in the condition in which it was when it was leased to them, and they were not at liberty to change the usual course of husbandry except with the consent of their landlord. Having regard to the form in which the decree is made, we do not consider them to be entitled to notice after committing waste. The decision of the Judge is right, and we dismiss this second appeal with costs. But in view to giving the appellants sufficient time to comply with the direction contained in the decree, we order that the current fasli mentioned in the decree of the Lower Appellate Court be taken to be the fasli current at the date of this decree.

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10 M. 353 = 1 Weir 620.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr Justice Parker.

QUEEN-EMPRESS *v.* JOGAYYA.* [8th July, 1887.]

Penal Code—Act XLV of 1860, *Section* 504—*Intent to provoke a breach of the peace.*

A abused B to such an extent as to reduce B to a state of abject terror:

Held, that A having given to B such provocation as would under ordinary circumstances have caused a breach of the peace was guilty of an offences under Section 504 of the Penal Code.

[R., U.B.R. (1892—1896) 290 (291) Cr. ; 1 Weir 621; (622).]

THIS case was reported for the orders of the High Court under [354] Section 438 of the Code of Criminal Procedure, by J. Thomson, Acting Sessions Judge of Ganjam.

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* Criminal Revision Case No. 102 of 1887.

1887 JULY 8. — APPELLATE CRIMINAL. — 10 M. 353 = 1 Weir 620.

The accused was convicted by the Second-class Magistrate of Chicacole, under Section 504 of the Penal Code. He appealed to the Principal Assistant Magistrate of Ganjam, who acquitted him, observing that the complainant had been reduced to a state of abject terror by the abusive language of the accused, whose insults were accordingly unlikely to cause him to break the public peace or commit any other offence.

The Sessions Judge submitted the case with the observation that, in order to substantiate a charge under Section 504 of the Penal Code, it was not in his opinion necessary that the "provocation given" should have been accepted by the other party.

Counsel were not instructed.

The Court (COLLINS, C. J. and PARKER, J.) made the following

ORDER.

The accused was convicted of intentionally insulting and thereby giving provocation to the complainant, with the intention, or knowing it to be likely, that such provocation would cause the complainant to break the public peace.

On appeal, this judgment was reversed on the ground that the complainant was in such an abject state of terror that it was impossible to suppose the provocation was likely to cause him to break the public peace.

We agree with the Sessions Judge that the law makes punishable the insulting provocation which, under ordinary circumstances, would cause a breach of the peace to be committed, and that the offender is not protected from the consequences of his acts because the person insulted became too terrified to accept the provocation in the manner intended.

We set aside the acquittal and direct that the appeal be reheard.

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10 M. 355.

[355] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

SUBRAMANYAN (*Defendant No.* 1), *Appellant v.* KALI AND OTHERS (*Plaintiffs and Defendant No.* 2), *Respondents.**
[27th January, and 12th July, 1887.]

Malabar Law — Suit against Karnavan and senior female member of a tarwad — Evidence of intention to sue defendants as representatives of the tarwad.

The karnavan and senior female member of a Malabar tarwad executed a hypothecation bond, on which a suit was brought against them asking for the sale of the tarwad property. The defendants had represented the tarwad in other suits, but were not in this case expressly sued in representative capacity. The plaintiff obtained a decree:

Held, that the decree was binding on the tarwad.

SECOND appeal against the decree of H.M. Winterbotham, Acting District Judge of South Malabar, in Appeal Suit No. 977 of 1885, modifying the decree of P. Govinda Menon, District Munsif of Chowghat in Original Suit No. 336 of 1885.

The plaintiffs, who are members of a Malabar tarwad, sued to set aside the sale of certain land in execution of a mortgage decree obtained in Original Suit No. 460 of 1881 by defendant No. 1 against defendants

* Second Appeal No. 499 of 1886.

1887 JULY 12. — APPELLATE CIVIL. — 10 M. 355.

Nos. 2 and 3, being respectively karnavan and the senior female member of the plaintiff's tarwad. It was admitted that the land sold was the property of the plaintiff's tarwad. But it was denied by the plaintiffs that the decree in question had been obtained against the proper representatives of the tarwad as such, so as to bind the junior members.

Defendant No. 2 did not appear.

The District Munsif dismissed the suit, but his decree was so far as concerned the property involved in this second appeal, reversed by the District Judge on the ground that the decree in question had not been passed against the defendant as representing the tarwad.

Defendant No. 1 preferred this second appeal.

Sankaran Nayar, for appellant, cited *Kannachi* v. *Narayana* (I.L.R., 8 Mad., 491), and relied on evidence, showing that [356] defendants Nos. 2 and 3, who had executed the mortgage sued on in Original Suit No. 460 of 1881, had generally represented the tarwad in suits.

Gopala Nayar, for respondents, argued that the mortgage-decree was not passed against the judgment-debtors in any representative capacity.

The Court (MUTTUSAMI AYYAR and PARKER, JJ.) made the following

ORDER.

"It appears from the decree in Original Suit No. 460 of 1881 that the plaint prayed for the sale of tarwad property. This is evidence of an intention on the part of the appellant to sue the defendants in that case as representatives of the tarwad. In *Kannachi* v. *Narayana* (1) there was only a decree for rent against two members of the tarwad. Nor did it appear from the proceedings in that suit that the plaintiffs sought to obtain more than a personal decree. Though defendants Nos. 2 and 3 in the case before us joined in the execution of the hypothecation bond on which Original Suit No. 460 of 1881 was brought, it does not necessarily imply that they were not intended to be sued in their representative capacity. It is true that the decree is not in terms against the representatives of the tarwad, but the proceedings show that the appellant intended to hold the tarwad responsible for the debt through its karnavan and the senior female.

"We shall therefore ask the Judge to return a finding on the second issue, *viz.*, whether the decree debt in Original Suit No. 460 of 1881 was contracted for purposes binding on the tarwad."

The issue having been found in the affirmative, the Court on rehearing this second appeal set aside the decree of the District Judge so far as it reversed that of District Munsif which was accordingly restored.

(1) 8 M. 484 (491).

1887
APRIL. 21.

APPEL-
LATE
CIVIL.
—
10 M. 357.

10 M. 357.

[357] APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

ACHUTA (*Plaintiff*), *Appellant v.* MAMMAVU AND NINE OTHERS (*Defendants*), *Respondents.** [20th December, 1886, and 21st April, 1887.]

Civil Procedure Code, Sections 335, 623—*Limitation Act—Act XV of* 1877, *Schedule II, Article* 11—*Orderd isallowing claim in execution proceedings—Review of judgment—Malabar law—Personal decree against karnavan.*

Where a review of judgment was applied for on the ground of the subsequent publication of the report of a High Court decision on a point of law which arose in the case but which had not been urged at the previous hearing, it was considered that the applicant was not to blame for his omission to bring the decision to the notice of the Court at the first hearing, and the application for review of judgment was granted.

A sued for possession of certain shops belonging to a Malabar tarwad, which had been attached in execution of a personal decree passed against a karnavan in a suit on a private debt. In the execution proceedings, an objection petition was put in stating that the shops were sridhanam and was rejected ; and the order of rejection was not appealed against for one year. Respondents Nos. 1 to 4, the husbands of the persons who put in the objection petition, were in possession and were now sued for possession. The plaintiff was assignee of the purchaser at the execution sale :

Held, that upon the facts found the plaintiff acquired nothing under the Court sale.

Per Cur. An order rejecting a claim petition under Section 335 of the Civil Procedure Code, not being appealed against within one year, acquires the force of a decree. *Velayuthan* v. *Laksmana*, I.L.R., 8 Mad. 506, followed.

[F., 9 M.L.J. 131 (133) ; R., 11 C.P.L.R. 41 (43) ; U.B.R. Civil (1892—1896) at p. 154.]

SECOND appeal against the decree of K. Kunjan Menon, Subordinate Judge of North Malabar, in Appeal Suit No. 342 of 1884, reversing the decree of B. D'Rozario, Acting District Munsif of Cannanore, in Original Suit No. 462 of 1883.

This was a suit for possession of five shops, together with arrears of rent.

In Original Suit No. 473 of 1876 on the file of the District Munsif of Cannanore, the present plaintiff obtained, on 20th October 1880, a personal decree against Puckroo Cutty, in execution of which he attached the shops in question, being the property of the Ayamandagath tarwad of which the judgment-debtor was karnavan. Objections were made to the attachment by the wives [358] of defendants Nos. 1 to 5 on the ground that the shops had been given away as sridhanam (Exhibit L), but the objections were disallowed and the shops were sold in execution of the decree to Anantha Kamati, whose interest was afterwards assigned to the present plaintiff, possession not having been given under the execution sale. Defendants Nos. 6 to 10 were in possession as tenants of defendants Nos. 1 to 5.

The order rejecting the claim petition under Section 335 of the Code of Civil Procedure, Act VIII of 1859 (re-enacted in Section 335 of the Code of Civil Procedure of 1882) which was filed in this suit as Exhibit L, was not appealed against within the period of a year.

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* Second Appeal No. 506 of 1885.

The District Munsif decreed in favour of the plaintiff, but his decree was reversed by the Subordinate Judge on the ground that the decree in the previous suit was not passed against Puckroo Cutty as karnavan, and that the decree debt was not a tarwad debt.

The plaintiff preferred this second appeal which came on for hearing before Hutchins and Parker, JJ., on 21st October 1885 and was dismissed on the ground that the appellant claimed under a merely personal decree.

The appellant filed on the 17th December 1885 a petition for review of the judgment of Hutchins and Parker, JJ., on the ground that the case was governed by the decision of the High Court in *Velayuthan* v. *Laksmana*, I.L.R., 8 Mad., 506, of which the report had not been published until a month after the hearing of the second appeal. The review petition was admitted by Parker, J., on 6th March 1886 and now came on for hearing before Muttusami Ayyar and Parker, JJ.; Hutchins, J., having meanwhile resigned.

Mr. *Wedderburn* and *Srinivasa Rau*, for appellant.

The order rejecting the claim petition (Exhibit L) not having been appealed against within a year acquired the force of a decree under the ruling of the High Court in *Velayuthan* v. *Laksmana*, I.L.R., 8 Mad., 506. The then petitioners would accordingly be estopped from denying the title of the execution purchaser, and the respondents who claimed through them are subject to the same estoppel.

Mr. *K. Brown* and *Sankara Menon*, for respondents, objected that the subsequent publication of a decision by the High Court was not a sufficient reason for granting a review of judgment and **[359]** cited *Jonmenjoy Mullick* v. *Dassmoney Dassee* (I. L. R., 8 Cal., 700), but this objection was overruled.

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (MUTTUSAMI AYYAR and PARKER, JJ.)

JUDGMENT.

The property in dispute in this case consists of five rooms, which are used as shops by respondents Nos. 5—8 who claim to hold them under respondents Nos. 1—5, and which were similarly used also by defendant No. 7, since deceased. It is conceded that the shops originally belonged to a family in North Malabar called the Ayamandagath tarwad. In Original Suit No. 473 of 1876, on the file of the District Munsif of Cannanore, the appellant, Achuta Mallen, obtained a money decree against one Puckroo Cutty on the 20th October 1880, and, in execution of it, he attached the shops and some other property. Objections were made to the attachment by the wives of respondents Nos. 1 to 4, and defendant No. 3 since deceased, on the ground that the shops were given away as sridhanam or dower to the former; but their claim was disallowed by the District Munsif upon investigation, and the shops were thereafter sold in execution. One Anantha Kamati purchased them for Rs. 500 on 25th October 1880, and upon his death his sons transferred their interest to the appellant. On Anantha Kamati proceeding to take possession by right of purchase, he was obstructed by respondents Nos. 1 to 5, and upon his application under Section 335 of the Code of Civil Procedure, the District Munsif referred him to a regular suit in September 1882. As the assignee of the purchaser in execution of the decree in Original Suit No. 473 of 1876, he instituted the present suit, his case being that the decree debt was incurred

1887 APRIL 21. — APPELLATE CIVIL. — 10 M. 357.

for tarwad purposes, that the execution-debtor, Puckroo Cutty, represented his tarwad, and that by virtue of the Court sale and of the transfer from the representatives of the purchaser he was entitled to possession. Respondents Nos. 1 to 4 and defendant No. 3 contended that the shops were given to them as sridhanam on the occasion of their marriage to the females of Puckroo Cutty's tarwad, that the decree in Original Suit No. 473 of 1876 and the Court sale did not bind them, that Puckroo Cutty was not the karnavan of the tarwad at the time of the Court sale, and that the decree debt was not contracted for tarwad purposes. It was found by the Subordinate Judge that the decree debt was not a tarwad [360] debt, and that the decree was not passed against Puckroo Cutty as the karnavan of his tarwad. He held also that the shops were given as sridhanam to several females of the tarwad, that they were occupied by their tenants (defendants Nos. 6 to 10), and that rent was collected for them by their husbands (respondents Nos. 1 to 4). On these and other grounds the Subordinate Judge dismissed the suit with costs in appeal, and a second appeal was preferred from this decision; but no objection was taken at the hearing of the second appeal in reference to the order (Exhibit L) disallowing the claim preferred by the ladies, on whose behalf the respondents profess to hold the shops. The second appeal was dismissed on the ground that the appellant claimed under a personal decree against a karnavan, and that he could not make out a title except against the parties to the decree while the respondents were in possession, and it was found that they had a good title to hold the shops either in their right or in right of their wives.

Thereupon the appellant applied for review of judgment on the ground that the respondents did not contest the above order (Exhibit L) within one year, and that by their omission to do so, the order acquired the force of a decree as ruled in *Velayuthan* v. *Laksmana* (1). As it appeared that that decision was not published till a month after the hearing of the second appeal, it was considered that the appellant was not to blame for his omission to bring the decision to the notice of the Court when the second appeal was argued, and the application for review of judgment was granted.

The second appeal comes on therefore for disposal again, and it is urged in its support that the shops in dispute are tarwad property, and that the claimants whose objections were disallowed are the wives of respondents Nos. 1—4 and defendant No. 3, and that the respondents themselves have no independent title. It is urged on the other hand for respondents that the objection now taken was not taken at the hearing of the second appeal, and that there was no sufficient ground for granting a review of judgment.

It appears from Exhibit L and the written statements on the record, that the right asserted in June 1880 was that arising from a gift of the shops to the wives of respondents Nos. 1—4 and [361] defendant No. 3, whereas the transaction relied upon in the suit was a gift as sridhanam to those respondents themselves made on the occasion of their marriage.

The finding of the Subordinate Judge is that respondents Nos. 5 to 8 and defendant No. 7 are in occupation and respondents Nos. 1—5 collect the rent due to their wives and that the title to which their possession and management are referable is that asserted and disallowed in June

(1) 8 M. 506.

1880. There can be no doubt that, as was held in *B. Krishna Rau* v. *Lakshmana Shanbhogue* (1), when a summary declaration of want of title in the objector is made in answer to a claim made to property under attachment, and when it is not set aside by a regular suit within one year it becomes equivalent to a final adjudication against his right, and the right ceases on the expiration of one year to be available as a ground either of attack or defence. But the parties in whom legal possession vests and who are really interested are, according to the facts found, *not* the respondents Nos. 1 to 4 or respondents Nos. 5 to 8, but the wives of the former ; they are not parties to the suit before us, and if it were necessary to consider this objection to the decree, we might deem it fit to order a new trial after making them parties to the suit.

But upon the facts found by the Lower Appellate Court, the appellant acquired nothing by the Court sale. It is found that the decree debt was not a tarwad debt and that the decree itself was not passed against Puckroo Cutty in his capacity of karnavan and the shops which on appellant's own showing belong to the tarwad could not pass to him by the Court sale. Unless the appellant proved his own title we do not consider that he is entitled to succeed, though it may be that the respondents are in possession without title and may be liable to be evicted at the suit of the true owner. This was one of the grounds on which the former decision in second appeal proceeded, and we consider that the decision so far as it rests on it is not open to question. Though the respondents cannot plead the title of their wives in favour of the claim, they are not in a worse possession than trespassers, and it is open to them as parties in actual possession to insist that it should not be disturbed until and unless the appellant proves his title.

On this ground we are of opinion that this second appeal must fail and we dismiss it with costs.

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10 M. 362.

[362] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

TIMMA AND OTHERS (*Defendants*), *Appellants v.* DARAMMA AND ANOTHER (*Plaintiffs*), *Respondents.**

[11th January and 25th April, 1887.]

Aliyasantana law—Partition - Evidence—Admissibility as to pedigree in a document that has been set aside by the Court.

In a suit for division of the property of an extinct divided branch of the family of the parties who were governed by the Aliyasantana law, a written agreement which had been set aside by the Court as against the defendants was offered in evidence by the plaintiff to prove that the parties were of equal grade of relationship, in which case it was admitted that partition was enforceable :

Held, that the written agreement was admissible as evidence of pedigree and that the plaintiff was entitled to the decree sought for.

SECOND appeal against the decree of C. Venkoba Charyar, Subordinate Judge of South Canara, in Appeal Suit No. 147 of 1885, confirming the

* Second Appeal No. 276 of 1886.

(1) 4 M. 308.

1887 APRIL 25. — APPELLATE CIVIL. — 10 M. 362.

decree of U. Subba Rau, District Munsif of Karkal, in Original Suit No. 120 of 1884.

This was a suit by the plaintiffs to recover a moiety of certain property belonging to one Puvani Surgi, deceased, the last member of a divided branch of the family of the plaintiffs and defendants. The parties were governed by the Aliyasantana law.

In order to prove the relationship of the parties, the plaintiffs relied partly on Exhibit J, that document being a certified copy of a kararnama entered into by the plaintiff and an ancestor of defendant No. 1 on 7th August 1877, which had been set aside as against the defendants in a previous suit.

Both the Lower Courts decreed in favour of the plaintiffs, and the defendant preferred this second appeal.

Narayana Rau, for appellants, admitted that a division can be enforced under the Aliyasantana law if the reversioners stand in equal grade of relationship, but argued that in other cases a division is not enforceable and contended that the contents of Exhibit were not admissible as evidence to the relationship of the parties.

[363] *Gapala Rau*, for respondents, argued that the document was admissible in evidence though invalid as an agreement.

The Subordinate Judge found (on an issue remitted to him by the High Court) that the parties were reversioners of equal grade to the Surgis.

On the receipt of the finding, the Court (COLLINS, C. J., and PARKER, J.) delivered the following

JUDGMENT.

We must accept the finding.

Though the kararnama J was set aside on other grounds, we see no reason why the relationship therein set forth should not be considered; and, though the evidence is partly hearsay, such evidence is admissible on questions of pedigree.

This second appeal fails and we dismiss it with costs.

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APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

NARAYANA (*Defendant*), *Appellant v.* MUNI AND OTHERS (*Plaintiffs*), *Respondents.** [22nd and 26th July and 10th November, 1886.]

Civil Procedure Code, Section 584—*Powers of High Court on second appeal—Rent Recovery Act—Madras Act VIII of* 1865. *Sections* 3, 4 *and* 7—*Contents of patta—Date of tender of patta.*

A landlord within three days of the end of the fasli tendered to a tenant by way of patta a document containing a statement of account of rent payable in respect of the current fasli:

Held, that the document tendered was a good patta, and that under local custom a valid tender of patta may be made at the end of the fasli.

On second appeal by a landlord against a decree of a District Judge, who stated in his judgment that, "though the tenant admitted the execution of the muchalka, it was not shown that he dispensed with the patta;" no objection was taken

* Second Appeals Nos. 1006 to 1015 and 1035 of 1885.

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in the memorandum of appeal that the muchalka, which contained a statement that no patta was necessary, had been neglected or misconstrued. The High Court ordered that the Judge be asked to take the postscript into his consideration and submit a revised finding.

[R., 12 M. 253 (255) = 13 Ind. Jur. 216, 18 M.L.J. 246 (247) = 3 M.L.T. 280.]

SECOND appeals against the decrees of H. T. Knox, Acting District Judge of North Arcot, in Appeal Suits Nos. 112 to 122 [364] of 1885, confirming the decrees of J. Andrew, Acting Head Assistant Collector of North Arcot, in Summary Suits Nos. 92 to 101 and 103 of 1884.

These were summary suits by the landlord, under Madras Rent Recovery Act, Section 9, to enforce the acceptance of a patta, and by the tenants under Section 49 of that Act for the release of property distrained for arrears of rent.

In Summary Suit No. 94 by the tenants, the execution of the muchalka was admitted, and there was a question whether the tender of a patta was dispensed with. The Lower Court answered this question in the negative, although a postscript to the muchalka stated, that a patta was not necessary : and decrees were accordingly passed in favour of the plaintiffs.

In Summary Suits Nos. 96 and 98 by the tenants, it was found by the Lower Courts that no muchalkas had been executed and no proper pattas tendered : and decrees were accordingly passed in favor of the plaintiffs.

In Summary Suits Nos. 92, 93, 95, 97, 99—101 by the tenants, and Summary Suit No. 103 by the landlord, the tenant's case was that the documents tendered as pattas were not in accordance with the provisions of Section 4 of the Madras Rent Recovery Act, on the ground that they were only statements of an account of rent to be paid, and further that the tender had been made too late, *viz.*, nearly at the end of the fasli in question. The Lower Courts recorded findings in accordance with these contentions and passed decrees in favour of the tenants.

The landlord preferred these second appeals.

Mr. *Subramanyam*, for appellant. The documents tendered as pattas, were lawful pattas, though they were, as the District Judge said, "statements of account of rent payable." Further the tender was lawful, though the fasli in question was about to expire in three days, under a local custom followed for many years by the parties to the suit, by which pattas were tendered only at the close of the fasli when the amount payable by the tenant is ascertained.

Mr. *Parthasaradhi Ayyangar*, for respondents, argued that neither the patta nor the tender was valid according to the provisions of Act VIII of 1865, Sections 3, 4 and 7, and further with regard to Summary Suit No. 94 that the High Court could not on second appeal go behind the finding of fact that it was not shown that the tenant dispensed with the patta.

[365] The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C. J., and MUTTUSAMI AYYAR, J.).

JUDGMENT.

Of these Summary Suits, Nos. 92 to 101 were instituted by certain tenants against their landlord for release of property distrained for arrears of rent under Act VIII of 1865 and Summary Suit No. 103 by a landlord for enforcing the acceptance of a patta by a tenant. Their case was that

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the distraint was illegal, and that the landlord failed to comply with the provisions of Section 7 of that Act. This section provides that no legal proceedings taken to enforce the terms of a tenancy shall be sustainable, unless pattas and muchalkas have been exchanged, or unless it be proved that the party attempting to enforce the contract had tendered such a patta or muchalka as the other party was bound to accept, or unless both parties shall have agreed to dispense with pattas and muchalkas. In none of the cases before us have patta and muchalka been exchanged. The Head Assistant Collector has also found that it was not proved that pattas were tendered, and decreed the claim. On appeal the Judge confirmed the decree but not on the ground mentioned by the Head Assistant Collector.

In Summary Suits Nos. 96 and 98, to which Second Appeals Nos. 1010 and 1012 relate, the District Judge has found that the muchalkas alleged to have been executed by the tenants, had not really been executed by them. It is also found that no proper patta has been tendered and refused. We accept the finding and dismiss Second Appeals Nos. 1010 and 1012 with costs.

In Summary Suit No. 94, from which the Second Appeal No. 1008 arises, the Judge observed that though the tenant admitted the execution of the muchalka, it was not shown that he dispensed with the patta. In coming to this finding he has overlooked the postscript in the muchalka, in which it is stated that no patta is necessary. The District Judge will be asked to take this fact into his consideration and to submit a revised finding.

In the other cases, the District Judge has held that, though certain documents were tendered as pattas and refused, they were not pattas but statements of account and that they do not satisfy the requirements of Section 4 of Act VIII of 1865. This section mentions among the particulars which a patta ought to contain, the amount and nature of the rent payable and the *period at which* **[366]** *payments are to be made.* Adverting to the words, the period at which payments are to be made, the Judge observes, "the section contemplates a document which will prevent *disputes in the future*, whereas the documents produced as pattas are not intended to regulate or declare the relations of the parties, but only to enable the landlord to recover by summary process, a debt long overdue. Though the tenant might have waived this objection and accepted the document as a patta, it cannot be said that the tenant was bound on the 27th June to accept as a patta a document declaring what he ought to have paid months before." It was held by a majority of Judges of this Court that, where pattas were required to be tendered, the tender must be made before the expiration of the fasli for which rent was claimed in the suit: *Gopalasawmy Mudelly* v. *Mukkee Gopalier* (1).

Again, it was held in *Seshadri Ayyangar* v. *Sandanam* (2), that at what precise time these written agreements should be entered into, the Act has not expressly enacted or declared, but that they should be made and exchanged as soon as conveniently may be after the creation and during the existence of the tenancy. The practice of exchanging pattas and muchalkas after the annual settlement is made is observed in several places in the Presidency, and in the case of considerable number of tenants having occupancy rights, the patta is not the original contract which creates the tenancy and its terms but only a written memorial of the settlement made or to be made for the year on those terms.

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(1) 7 M.H.C.R. 312. (2) 1 M. 246.

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The distribution of the amount of rent in instalments in which rent was payable according to usage is not fatal. In cases in which tenants had paid before the annual settlement several instalments on the previous year's demand, the distribution is necessary, as in the case of Government raiyats, to show the amounts for which the landlord was entitled to take credit and the surplus, if any, which should be set off against instalments still due. The construction then placed on Section 4, *viz.*, that the patta may be lawfully tendered before the expiration of the fasli is reasonable regard being had to the usage generally obtaining in places where the amount of rent is ascertained and an annual settlement is made in the course of the fasli. We are, therefore, of opinion that pattas tendered before the expiration of the fasli year for [367] which rent is claimed are lawfully tendered, and set aside the decrees of the Lower Courts in Appeal Suits 112, 113, 115, 117 and 119 to 121 (Summary Suits 92, 93, 95, 97, 99 to 101) and direct that the suits be dismissed with costs, and we reverse the decrees of the Lower Courts in Appeal Suit 122 (Summary Suit 103) and allow plaintiff's claim with costs throughout.

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10 M. 367.

APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Brandt.

RAMUNNI (*Plaintiff*), *Appellant v.* SHANKU (*Defendant*), *Respondent.**
[16th December, 1884.]

Civil Procedure Code, Section 244--Execution proceedings—Re-valuation of improvements allowed for in decree.

A mortgagor obtained a decree for redemption on payment of the mortgage amount, together with a further sum assessed as the value of improvements made by the mortgagee. When the decree-holder applied for the execution of the decree it was contended on behalf of the mortgagee that the improvements ought to be re-valued as they were at the time of execution of more value than at the date of the decree :

Held, that the mortgagee was entitled to a re-valuation in the execution proceedings.

[R., 20 M. 124 (126).]

THIS was an appeal against an order of F.H. Wilkinson, District Judge of South Malabar, dated 15th January 1884, rejecting an appeal from an order passed by the District Munsif of Patambi in Civil Miscellaneous Petition No. 114 of 1883.

In a suit on a mortgage, the Court passed a decree for redemption on payment of principal and interest, together with a sum fixed as the value of certain improvements made by the mortgagee. The value of the improvements increased between the passing and the execution of the decree. The mortgagee accordingly filed a petition in the execution proceedings for a re-valuation of the improvements, but his petition was rejected by both the Lower Courts. He accordingly appealed to the High Court.

[368] *Sankaran Nayar*, for appellant.

Respondent did not appear.

The arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (TURNER, C.J., and BRANDT, J.).

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* Appeal against Appellate Order No. 17 of 1884.

1884 DEC. 16. APPELLATE CIVIL. 10 M. 367.

JUDGMENT.

A mortgagee in possession is liable for waste, and if waste is proved, the mortgagor is entitled to have an account taken and the value of the damage deducted from the mortgage-debt: *Weatherington* v. *Bankes* (1).

The circumstance that the rights of the parties have been ascertained by a decree does not deprive the mortgagor of his equity if the waste is committed subsequently to the decree. Inasmuch as the mortgagee may be entitled to a deduction which he could ordinarily establish by separate suit, the provisions of Section 244 of the Civil Procedure Code appear to us to enable him to require the Court executing the decree to take account of the altered circumstances when application is made for the execution of the decree. This appears to give effect to the policy of the law which is adverse to the institution of a fresh suit; the orders of the Courts below are therefore set aside and the case remanded, costs to abide and follow the result.

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10 M. 368.

APPELLATE CIVIL.

Before Mr. Justice Hutchins, and Mr. Justice Parker.

MAHOMED (*Plaintiff*), *Appellant v.* LAKSHMIPATI (*Defendant*), *Respondent.** [31st August, 1885.]

Civil Procedure Code, Section 11—*Rent Recovery Act—Act VIII of* 1865, *Madras, Sections* 39, 40, 78—*Remedy of tenant aggrieved by notice of attachment.*

A tenant having received a notice of attachment under Section 39 of the Rent Recovery Act sued in a District Munsif's Court to have the notice cancelled, no specific damage being alleged:

Held, that the suit did not lie.

[Disappr., 27 M. 483 (494).]

SECOND appeal against the decree of T. Weir, Acting District Judge of Madura, in Appeal Suit No. 485 of 1884, reversing the **[369]** decree of S. Krishnasami Ayyar, District Munsif of Dindigul, in Original Suit No. 479 of 1883.

This was a suit brought by the plaintiff against his landlord alleging that a notice sent to him by the defendant, intimating his intention to sell certain land specified in the plaint as if there were arrears of rent due from the plaintiff, was invalid in law, in that no change of patta and muchalka or agreement to dispense with such exchange had been made between them; and praying that the notice be cancelled. No specific damage was alleged.

The District Munsif decreed as prayed, but his decree was reversed on appeal by the District Judge on the ground that it was passed without jurisdiction.

The plaintiff preferred this second appeal.

Rama Rau, for appellant, argued that Section 40 of the Rent Recovery Act does not oust the jurisdiction of the ordinary Civil Courts, and that the District Munsif had jurisdiction to entertain and try the suit under Section 11 of the Code of Civil Procedure. Reference was also made to Section 78 of the Rent Recovery Act in support of this view.

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* Second Appeal No. 430 of 1885.

(1) Sel. Ch. Ca. 31.

1885 AUG. 31.

APPELLATE CIVIL.

10 M. 368.

Subramanya Ayyar, for respondent, argued that Section 78 of the Rent Recovery Act did not apply, the suit being neither to recover money paid nor to obtain damages, and that that Act specially barred the jurisdiction claimed by the District Munsif under Section 11 of the Code of Civil Procedure ; and further, that the suit was barred by limitation.

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (HUTCHINS and PARKER, JJ.).

JUDGMENT.

The appellant brought this suit in the Munsif's Court and the relief which he sought was that a notice, intimating his landlord's intention to sell some of his land for arrears of rent, might be cancelled. His case was that there had been no such acceptance, tender, or waiver of a patta as warranted the landlord's taking proceedings under Act VIII of 1865, and further that the rent claimed was excessive.

The Munsif granted the relief prayed for with costs. On appeal, the District Judge held that the Munsif had acted without jurisdiction and dismissed the suit. The contention in this Court is that the Munsif had jurisdiction and that Section 40, Act VIII of **[370]** 1865, does not preclude the Civil Courts from taking congnizance of such a suit.

There is, course, no doubt, that a person, aggrieved by any proceedings taken under colour of Act VIII, is at liberty to file his suit for damages either before the Collector (Section 49) or in the ordinary tribunals (Section 78), but the present suit is not one for damages, and the right to resort to the ordinary tribunals is at least limited by the general principle that there must be a cause of action shown, an injurious act producing damage.

Here there is no cause of action alleged. All that is stated is that the landlord sent a notice under Section 39 that he intended to move the Collector to sell certain land unless certain arrears claimed were paid within a month. Section 40 allows a month's grace within which the alleged defaulter may either pay the money or show cause before the Collector why the sale should not be held. In a certain sense, therefore, the notice gives a cause of action before the Collector, for it enables the defaulter to come into the Collector's Court , and indeed requires him to do so within a month, if he has any objection to make. But it gives no cause of action before the ordinary Courts. The Courts are strictly judicial, but the Collector combines judicial and executive functions, being both bound to sell if no objection is raised and the proceedings appear regular, and bound to adjudicate on such objections as may be raised.

Section 40 says that the appeal, *i.e.*, the showing cause against the intention to sell, must be made before the Collector and within a month. It does not say, nor is there anything in the Act to imply, that it may also be made before the ordinary Courts of justice. If it can be made in a Munsif's Court, it must be under the ordinary law and upon a proper cause of action shown. A mere notice does not afford such a cause of action, but if it did, there being no other article in the Limitation Act applicable, the suit might be instituted at any time within six years under the general Article 118.

The decree of the Lower Appellate Court is right, and we dismiss this second appeal with costs.

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LATE
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10 M. 371

10 M. 371.

[371] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

SUNDARA AND OTHERS (*Defendants* 1—3), *Appellants v.* SUBBA AND ANOTHER (*Plaintiffs*), *Respondents.** [25th April, 1887.]

Valuation of suit—Jurisdiction of District Munsifs—Suit for declaration of title to paid offices—Withdrawal of claim to some of the offices—Office still claimed involving the right to the others.

In a suit to declare title to four paid offices in a temple, the plaintiffs asked that the issues with regard to three of them should not be tried, but on cross-examination asserted right to them :

Held, that the plaintiffs were not shown to have relinquished their claim on the three offices for the purposes of the suit.

On findings that the fourth office carried with it the right to the other three and that the united value of the four offices exceeded the jurisdiction of the District Munsif :

Held, that the District Munsif had no jurisdiction to entertain the suit and that the plaint should be returned for presentation in the proper Court.

SECOND appeal from the decree of S. Gopalacharyar, Acting Subordinate Judge of Madura (East), in Appeal Suit No. 300 of 1884, confirming the decree of P. S. Gurumurthi Ayyar, District Munsif of Tirumangalam, in Original Suit No. 34 of 1882.

This was a suit for a declaration of the plaintiffs' title to certain offices in the temple of Thiruparangundram, *viz.*, the Stanikum, Archaka, Nirvakum and Paricharaka offices. Issues were framed with regard to each of these offices, but the plaintiffs requested that those relating to the last three should not be tried: plaintiff No. 2 said, however, in cross-examination, that he did not limit his suit to the Stanikum office alone.

The District Munsif passed a decree declaring the plaintiffs' title to the Stanikum and his decree was confirmed by the Subordinate Judge who made the following observations with regard to this office :—

"The Stanika is something like a superintendent of the temple, and is responsible to higher authorities for the due perform-[372] ance by the other officers of their duties and for certain acts to be performed by himself. No lands are attached to that office in particular, but there are certain emoluments, honors and responsibilities attached to it specifically, and although the Stanikum office is a distinct one from the other three offices, Archaka, Paricharaka and Nirvakum, and one holding the latter need not necessarily and does not often hold the former, it has so happened in this temple that, while there are individual officers for the other duties, the Stanikas strictly so called have also had a right to the other offices."

The defendants preferred this second appeal.

Rama Rau, *Subramanya Ayyar* and *Ramasami Ayyangar*, for appellants, argued that the suit was beyond the pecuniary limits of the District Munsif's jurisdiction, because the emoluments attached to all the offices claimed in the plaint should be considered in deciding the question of jurisdiction and not those attaced to Stanikum office only.

* Second Appeal No. 897 of 1886.

Bhashyam Ayyanyar and *Rangacharyar*, for respondents *contra*, on the ground that the declaration had been only asked and granted in respect of the Stanikum office alone. 1887 APRIL 25.

The Court (COLLINS, C. J., and PARKER, J,) made the following

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10 M. 371.

ORDER.

We can find nothing on the record to show that plaintiffs relinquished their claim to share in the other three offices besides Stanikum, as far as this suit is concerned. There is nothing in writing to show it, and we cannot infer it from a mere request that certain issues need not be tried in the face of the denial of second plaintiff in his cross-examination that he had ever consented to limit the suit to the Stanikum office alone.

If the right to the Stanikum office carries with it the right to the other three in this temple, they must all be valued for the purposes of jurisdiction.

We will ask the Subordinate Judge to return a finding on the issue "what is the value of the suit for purposes of jurisdiction ?"

In accordance with the above order, the Subordinate Judge recorded a finding that if the emoluments attached to the Stanikum office alone are to be considered, the valuation is Rs. 70-13-4, and if those appertaining to all four offices are to form the basis for calculation, the valuation exceeds Rs. 2,500, the pecuniary jurisdiction of the District Munsif.

[373] This second appeal coming on for re-hearing, the Court (COLLINS, C. J., and PARKER, J.) delivered the following

JUDGMENT.

We must hold that the District Munsif had no jurisdiction on the ground that the plaint stated that the right to the Stanikum included and carried with it the right to the other three offices. The decrees of the Courts below must be reversed and the plaint returned for presentation in the proper Court. The respondents must pay all costs hitherto incurred.

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10 M. 373.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

LAKSHMANAN AND ANOTHER (*Petitioners*) *v.* PERYASAMI (*Respondent*).* [21st April, 1887.]

Civil Procedure Code, Section 599—*Limitation Act—Act XV of* 1877, *Section* 12, *Schedule II, Article* 177—*Period of limitation for admission of an appeal to Privy Council.*

On a petition for leave to appeal to the Privy Council presented on the 8th April, it appeared that the period of six months from the date of the decree to be appealed against had expired on the 23rd of March if the time occupied by the petitioner in getting a copy of the decree was to be computed in that period :

Held, that the petition was barred by limitation.

Per cur. It is not at all clear that the word "ordinarily" in Section 599 of the Code of Civil Procedure does not refer to the circumstance referred to in the second paragraph of that section, *viz.*, when the last day happens to be one on which the Court is closed.

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* Civil Miscellaneous Petition No. 254 of 1886.

1887 APRIL 21.

APPELLATE CIVIL.

10 M. 373.

THIS was a petition under Section 599 of the Code of Civil Procedure for liberty to appeal to the Privy Council.

Subramanya Ayyar and *Rangacharyar*, for petitioner.

Respondent was not represented.

The facts of the case and the arguments adduced on this petition appear sufficiently for the purpose of this report from the judgment of the Court (KERNAN and MUTTUSAMI AYYAR, JJ.).

JUDGMENT.

This is an application under Section 599, Civil Procedure Code, for liberty to appeal to the Privy Council. The question is, whether the application is in time within that section and Article 177, Limitation Act of 1877.

[374] The dates are—

Decree pronounced, 23rd September 1885.
Copy applied for by applicant, 11th December 1885.
Stamps called for by officer, 21st January 1886.
Stamps deposited, 25th January 1886.
Copy ready for applicant, 26th January 1886.

The six months' time under Section 599 and Article 177 expired on 23rd March 1886, which was not a day in vacation. This petition was presented on the 8th of April 1886. It was contended that under Section 12 of the Limitation Act of 1877, the time occupied by applicant in obtaining a copy of the decree should not be counted in the six months. We are unable to agree to this, as Section 12 only applies to appeals and to applications to appeal as a pauper or for review.

Then it was contended by the applicant that this petition is really an appeal to this Court. But this is clearly not so; the appeal is to be to the Privy Council. It is an application for leave to appeal, and therefore in the schedule to the Limitation Act, it is provided for under the head "applications."

It was again contended that by Section 599, it is provided that the application should ordinarily be within six months, and that therefore an exception is thereby allowed in a fit case.

It is not at all clear that the word "ordinarily" does not refer to the circumstance in the second paragraph of that section, *viz.*, when the last day happens to be one on which the Court is closed which would not apply here. But if an exception may be allowed under that term ordinarily, we do not see what circumstances are here to create an exception. The copy of the decree was ready on the 26th of January and the applicant had until the 23rd of March to present his application for leave to appeal.

We are therefore obliged to dismiss this petition and with costs.

10 M. 375.

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[375] APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

GIYANA SAMBANDHA PANDARA SANNADHI (*Plaintiff*), *Appellant v.* KANDASAMI TAMBIRAN (*Defendant*), *Respondent.**
[11th February 1886, and 6th April, 1887.]

Hindu law—Religious institution—Succession in religious houses and among ascetics—Civil Procedure Code, Sections 44, 146, 147, 539—*Suits in respect of religious and charitable trusts—Joinder of claim for moveable and immoveable property—Form of decree not indicated in the plaint but indicated by the issues—Limitation Act,* 1877—*Act XV of* 1877, *Section* 10—*Act V of* 1843—*Spiritual slavery of a pupil to his Guru.*

This was a suit brought in 1881 with no written consent of the Advocate-General by the head cf an Adhinam for declarations that a Mutt was subject to his control; that he was entitled to appoint a manager: that the present head of the Mutt was not duly appointed and his nomination by his predecessor was invalid: and for delivery of possession of the moveable and immoveable properties of the Mutt to a nominee of the plaintiff. The claim extended also to religious establishments at Benares and elsewhere connected with the Mutt. The Mutt was founded by a member of the Adhinam. Many previous heads of the Mutt had agreed to be "slaves" of the head of the Adhinam, but for over 60 years the head of the Adhinam had exercised no management over the endowments belonging to the Mutt; and in a suit (compromised) of the year 1854 the present pretensions of the head of the Adhinam had been denied *in toto.*

The defendant had succeeded in 1880 to the management of the Mutt under the will of his predecessor, dated the same year and was not a disciple of the Adhinam.

Held, (1) that the Mutt is affiliated to the Adhinam, but the head of the Adhinam is not entitled to appoint to the office of head of the Mutt and is not entitled to an order for delivery of the property of the Mutt to himself or to his appointee;

(2) that on the evidence as to the usage in the establishments in question, the head of the Mutt is entitled to appoint his successor, but his election is limited to members of the Adhinam; and the head of the Adhinam is entitled to enforce this rule though he is bound to invest a disciple properly nominated by the head of the Mutt;

(3) that the defendant not being a disciple of the Adhinam, his appointment is invalid and the head of the Adhinam is entitled to see that a competent member of the Adhinam was appointed in his stead;

(4) that the plaintiff is entitled to declarations based on the two last mentioned findings since they were comprised in the issues framed under Sections 146 [376] and 147 of the Code of Civil Procedure, although the appropriate form in which the decree should be passed was not indicated with precision in the plaint itself;

(5) that the suit was barred by limitation in respect of the personal claim to manage the endowments as to which no claim had been put forward for 60 years;

(6) that the suit was not barred by limitation in respect of the claim to set aside the appointment of the defendant (who entered into possession in 1880 under a will, dated in the same year), and to see that a competent member of the Adhinam be appointed, in spite of the total denial of the claims of the head of the Adhinam in 1854;

(7) that the consent of the Advocate-General to the suit is not required; the suit having been instituted under the Civil Procedure Code of 1877 and the cause of action not being an alleged breach of trust;

(8) that there is nothing irregular in seeking to recover moveable and immoveable property in the same suit if the cause of action in the same in respect of both;

(9) that the agreement of the head of the Mutt to become the "slave" of his *guru* could have no legal operation since 1843, and that the adverse possession

* Appeal No. 18 of 1885.

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of the defendant from that year is fatal to any claim of the plaintiff under such agreement.

[F., 31 C. 262 (P.C.)=6 Bom. L. R. 1=8 C. W. N. 146 (150)=14 M. L. J. 8; 33 C. 789 (808)=10 C.W.N. 581; 16 M. 31 (33); 28 P.L.R. 1907=5 P.W.R. 1907; 58 P.W.R. 1908; Appr., 19 M. 127 (131); R., 24 A. 358 (360); 19 M. 243 (247); 21 M. 402 (403); 22 M. 302 (304); 27 M. 435=14 M.L.J. 105 (123); 31 M. 212=18 M.L.J. 205 (215); 33 M. 265 (287)=5 Ind.Cas. 4=19 M.L.J 778=7 M.L.T. 1; 8 C.L J. 499 (505); 14 C.W.N.; 191 (211)=2 Ind. Cas. 385 (398); 3 Ind.Cas. 255 (257)=6 M.L.T. 193 (195); D., 32 M. 490 (507)=2 Ind. Cas. 963=6 M.L.T. 143.]

APPEAL against the decree of M. Cross, Subordinate Judge of Kumbakonam in Original Suit No. 38 of 1881.

The plaintiff was Pandara Sannadhi, and as such the representative for the time being of a religious institution called the Adhinam at Dharmapuram; and the defendant claimed to be Tambiran of a Mutt at Tiruppanandal.

The case set up by the plaintiff was (i) that the Tiruppanandal Mutt belonged to his Adhinam; (ii) that the appointment of Tambiran of that Mutt rested with him; (iii) that only Tambirans of his Adhinam were eligible to be appointed; (iv) that the defendant's succession to that appointment, under the will of his predecessor, was illegal and invalid.

The plaint which disclosed the above case was filed in October 1881, no consent to the institution of the suit having been obtained under Section 539 of the Code of Civil Procedure. The prayer of the plaint, of which the last clause related to both moveable and immoveable property, was for declarations that (i) the Mutts of Tiruppanandal and Benares are subject to the control of the plaintiff and his successors at Dharmapuram; (ii) the plaintiff and his successors are entitled to appoint and send Tambirans to manage the Mutts in question; (iii) the succession of the defendant was unlawful in that he was not a Tambiran of the Adhinam at Dharmapuram and was not appointed by the plaintiff and the will of the late Tambiran in his favour was invalid; (iv) the defendants should [377] deliver to the plaintiff, or a Tambiran appointed by him the properties of which he was in possession as Tambiran of the Mutt.

The defendant, Komarasami Tambiran (now represented on the record by the respondent), set up the following defence to the suit in his written statement :—

"The Mutts at Tiruppanandal and Benares and the properties belonging thereto are wholly independent of the Dharmapuram Mutt. The Tambirans thereof have acquired and managed properties on their own account in various parts of India; some in their own names and some for specific charities. They have never accounted to the Pandara Sannadhi of the Dharmapuram Mutt in respect of the properties so acquired.

"The order of succession in the case of the Tiruppanandal Mutt is as follows :—

"The Tambiran of the Tiruppanandal Mutt for the time being usually nominates a Tambiran to act as second or junior Tambiran who takes part in the management of the property during the life-time of the senior Tambiran and succeeds on the death of the senior to his position. Upon the death of Ganapathi Tambiran in November 1853, the then Pandara Sannadhi of the Dharmapuram Mutt, attempted to get possession of the property of the Tiruppanandal Mutt and claimed the right to nominate the successor. Ramalinga Tambiran, who had been nominated second Tambiran and successor by an instrument in writing, dated November 5,

1853, signed by Ganapathi Tambiran, asserted his right to the said Mutt and the properties belonging to it. The then Pandara Sannadhi of the Dharmapuram Mutt proposed to nominate one Ulaganadha Tambiran to be the senior Tambiran in succession to Ganapathi Tambiran, which claim was resisted by the said Ramalinga Tambiran.

"Prior to the death of the said Ramalinga Tambiran he made two appointments of junior Tambiran as successor in 1864 and again in 1867; the said Ramalinga Tambiran by instruments in writing signed by him nominated one Subramanya Tambiran, the second Tambiran and his successor after his death.

"The said Subramanya Tambiran died in the year 1874, and on the 6th June 1880 by an instrument in writing signed by him, the said Ramalinga Tambiran nominated the defendant to be second Tambiran and his successor. Upon the death of the said Ramalinga Tambiran in 1880, the defendant accordingly became [378] the head of the said Tiruppanandal Mutt and took possession of all the properties of the said Mutt; and the immoveable properties belonging to the said Mutt in the district of Tanjore have been registered in his name."

The Dharmapuram Adhinam is an ancient religious institution governed for many generations by a succession of Pandara Sannadhis. About 300 years ago, a disciple of this Adhinam founded a Mutt at Benares, and at the beginning of the eighteenth century, Tillanayaka, another disciple of the Adhinam, founded a Mutt at Tiruppanandal. Tillanayaka was at the time Tambiran or Manager of the Mutt at Benares, his predecessors in which office are mentioned in paragraph 9 of the judgment; in the capacity of Tambiran of his new Mutt at Tiruppanandal, he was succeeded by the persons, whose names are given in paragraph 10 of the judgment. The persons who have occupied the office of Pandara Sannadhi of the Adhinam at Dharmapuram, since the foundation of the Tiruppanandal Mutt, are enumerated in paragraph 31 of the judgment.

The manner of succession to the office of Tambiran of the Tiruppanandal Mutt was one of the main points at issue with special reference to the will or deed of appointment made by Ramalinga, the last incumbent of that office, in favor of the defendant, and impugned in the plaint. That such deeds of appointment were usual was held by the High Court to be proved by the evidence considered in paragraphs 20 and 21 of their judgment; but the case for the plaintiff was that only Tambirans of his Adhinam were eligible, and that in any case the appointment was subject to confirmation by the head of the Adhinam. The question was raised about the time of Ramalinga's succession, and in 1853 he executed an agreement (filed as Exhibit H), in which he admitted his subordination to a nominee of the head of the Adhinam, and the subordination of his Mutt generally to the Adhinam. This Exhibit H is recited in paragraph 48 of the judgment. In the following year the head of the Adhinam brought a suit (Original Suit No. 3 of 1854) against Ramalinga to establish his right of appointment to the office of Tambiran of the Mutt, &c., but that suit was compromised by the document filed in the present suit as Exhibit H 19, which is set out in paragraph 49 of the judgment. Sometime after this compromise Ramalinga attempted without success in a suit which was decided by the Privy Council, *sub nom. Kashi* [379] *Bashi Ramling Swamee* v. *Chitumbernath Koomar Swamee* (20 W.R. 217), to get possession of the Benares Mutt on the grounds that it was subordinate to his Mutt, and that its Tambiran was merely his agent; but his claim was rejected partly on the presumption that the newer Mutt at

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Tiruppanandal was subordinate to the older establishment at Benares. Ramalinga died in September 1880 and the present suit was instituted on the 15th October 1881. The Subordinate Judge held that the Mutts at Tiruppanandal and Benares were independent institutions, and that the head of the Adhinam at Dharmapuram was neither their owner nor entitled to interfere with their management or with the succession to it and accordingly dismissed the suit.

The plaintiff preferred this appeal against the decree of the Subordinate Judge on the grounds set out at length in paragraph 4 of the judgment. The documents indicated in the grounds of appeal consisted for the most part of reports and letters (see paragraph 77 of the judgment), on which the High Court recorded the findings that there existed between the establishments in question no relation of principal and agent, but only the general relation described in paragraphs 32 and 70 of the judgment. Of the other documents relied on by the appellant—the nature of Exhibits H and H 19 has been already shown; Exhibit R 18 is recited and in part set out in paragraph 22 of the judgment and was relied on as an early (1836) assumption on the part of the Pandara Sannadhi of the Adhinam to appoint the Tambiran of the Mutt.

Mr. *J. H. Spring Branson*, Mr. *Norton*, *Rama Rau*, *Ramasami Ayyangar*, and *Thiruvenkatacharyar* for the appellant argued that the finding of the Subordinate Judge was not justified by the evidence.

The Acting Advocate-General (Hon. Mr. *Shephard*), *Subramanya Ayyar*, *Bhashyam Ayyangar Kalianaramayyar* and *Pattabhi Rama Ayyar* for the respondent argued that even if the finding of the Subordinate Judge was erroneous on the evidence, the suit was bad for want of sanction under Section 539 of the Code of Civil Procedure and for misjoinder of causes of action under Section 44 of the Code of Civil Procedure, and also that the suit was barred by limitation.

The further arguments adduced on this appeal appear sufficiently for the purposes of this report, from the judgment of the Court; of which, for convenience of reference, the following synopsis is given:—

[380] Paragraphs 1-3 state the case, the issues and the grounds of appeal.

Paragraphs 5-8 explain the order of succession in a spiritual family and the constitution of religious houses among Hindus, which subject is reverted to in paragraphs 30, 91 and 93 and the manner of initiation, &c., in the religious houses in question.

Paragraphs 9-67 deal with the history of the Adhinam and Mutt, the connection between which is summarised in paragraph 32. Paragraph 14 deals with the first period of the history of the Mutt from 1722 to 1798; paragraphs 15-32 with the second period from 1798-1841; paragraphs 33-67 with the third period from 1841.

From paragraph 68 the effect of the evidence is considered with reference to each ground of claim. Paragraph 84 records a finding that the first ground of claim cannot be supported, as the relation of principal and agent has not been shown to exist between Dharmapuram and Tiruppanandal. Paragraph 93 records the following finding as to the usage with regard to succession to management at Tiruppanandal:—

"We hold the managing Tambiran at Tiruppanandal is entitled to select his junior and successor, but subject to the condition that the selection should be made from the disciples of the Adhinam at Dharmapuram, that the Pandara Sannadhi is to invest the person appointed only when that condition is complied with, and that as the head of an affiliated

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Adhinam he is entitled to insist that the character of the Tiruppanandal Mutt as a disciple Mutt or centre of control is maintained in its integrity according to ancient and recognised usage."

Paragraphs 94 and 95 discuss the relief to which the plaintiff was entitled on the above findings.

Paragraphs 96-98 discuss the effect of the deed of compromise, Exhibit H 19.

Paragraph 99 deals with the question of limitation, also dealt with in paragraph 73; and paragraphs 101 and 102 with the objections that the suit was instituted without the consent of the Advocate-General, and that other causes of action were joined in a suit for the recovery of immoveable property. Paragraph 103 relates to an objection that some of the plaint properties were acquired by the Tambirans of Tiruppanandal on their own account, as to which a special issue is directed to be tried.

JUDGMENT.

[381] 1. This is an appeal from the decree of the Subordinate Judge of Kumbakonam, who dismissed the appellant's suit in regard to two Mutts, one situated at Tiruppanandal and the other at Benares. The suit was commenced on the 15th October 1881 by the plaintiff, now appellant, as, the representative for the time being of the religious institution called the Adhinam at Dharmapuram in the district of Tanjore. According to the appellant, the properties in suit are the endowments founded in support of the Mutts and various charities performed at Benares, Rameswaram and Chidambaram and in a few other places, and in the charge and under the management of the Tambirans or representatives of the Mutt called the Benares Mutt at Tiruppanandal in the same district. The last lawful manager of this Mutt was one Ramalinga Tambiran, and upon his death in September 1880 a dispute arose in regard to the right of succession to management, and it has led to this litigation. In his plaint the appellant prayed for a declaration that the Mutts at Tiruppanandal and Benares are subject to his control and that of his successors at Dharmapuram, that they are entitled to appoint and send Tambirans to manage them, that the respondent's succession was unlawful, as he was not a Tambiran attached to the Adhinam, at Dharmapuram and as he was not appointed by the appellant, and that the will executed by Ramalinga Tambiran in respondent's favour had no legal force. He prayed also for a direction that the respondent do deliver the properties in suit either to him or to a Tambiran whom *he* may appoint as Ramalinga's successor.

2. The appellant's case was (i) that the Mutts at Benares and Tiruppanandal and their endowments, together with the charities and their endowments administered by the heads of those Mutts, belonged to the Adhinam at Dharmapuram, and that the Pandara Sannadhi or the head of the Adhinam was their owner; (ii) that he was entitled to appoint Tambirans for those Mutts according to usage; (iii) that none but a Tambiran of the Dharmapuram Adhinam was eligible for such appointment; (iv) that the respondent's succession was contrary to the usage of the institutions, and that the will left in his favor by Ramalinga Tambiran was invalid. It was not denied that the respondent was the Tambiran of the Adhinam at Tiruvavadutorai at the date of his appointment, but it was contended that, notwithstanding that circumstance, his appointment was perfectly lawful. He pleaded that the Mutts in **[382]** dispute were independent institutions in no way subject to the appellant's control, that the Adhinam at Dharmapuram had no right

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whatever in connection with them, that, according to usage, each Tambiran at Tiruppanandal appointed another Tambiran as his junior during his life and as his successor after his death, that the succession to management was regulated only by such appointment, that Ramalinga Tambiran appointed him by will as his junior and successor, and that his appointment and succession were in accordance with the recognized usage of the institution:

3. He raised also several other objections to the claim set up by the appellant. They were—1st, that the appellant was not competent to maintain this suit; 2ndly, that it was barred by limitation; 3rdly, that parts of the properties in dispute belonged to Ramalinga Tambiran; 4thly, that a portion was not in the respondent's possession as alleged in the plaint; and, 5thly, that the appellant was not entitled to the relief claimed by him in whole or in part. The several questions arising for decision in this suit are indicated by the following issues framed by the Subordinate Court;—

i. Whether the plaintiff is entitled to maintain this suit as the Pandara Sannadhi of the Dharmapuram Mutt?

ii. Whether the Tiruppanandal and the Benares Mutts are or are not subordinate and appurtenant to the Dharmapuram Mutt, and whether the Pandara Sannadhis of Dharmapuram have any interest in or control over the property of the Tiruppanandal and Benares Mutts and of the Mutts belonging thereto or connected therewith?

iii. Whether, as admitted by the defendant, he having received kashayam from the Tiruvavadutorai Mutt, he became a Tambiran of that Mutt and could not validly be appointed to the Tiruppanandal and Benares Mutts without his becoming a Tambiran of Dharmapuram Mutt by receiving mantra kashayam from the Dharmapuram Mutt?

iv. Whether the right of appointing Tambirans for the Benares and Tiruppanandal Mutts does or does not belong to the Dharmapuram Pandara Sannadhi for the time being?

[383] v. Whether the appointment of the defendant by Ramalinga Tambiran was valid?

vi. Whether, if the appointment of the defendant was not valid, the plaintiff is entitled to any relief in this suit?

vii. Whether the plaintiff is entitled to recover the property sued for or any part of it?

viii. Whether the plaintiff is entitled to the declaration asked for in the plaint?

ix. Whether the property not admitted nor mentioned in the defendant's written statement is in his possession?

x. Whether the suit is barred by limitation?

xi. Whether the plaintiff is entitled to any, and what relief?

4. The late Subordinate Judge of Kumbaconam, who tried the suit, held that the Mutts at Tiruppanandal and Benares were independent institutions, and that the head of the Adhinam at Dharmapuram was neither their owner nor entitled to interfere with their management or with the succession to it, and upon that ground he dismissed it with costs without proceeding to consider the other issues framed for decision. From this decree the plaintiff has appealed, and his grounds of objection are—

i. That the decree is contrary to law and the weight of evidence;

ii. That due legal effect has not been given to the endowment deeds produced by the appellant, whilst undue weight has been attached to those produced by the respondent;

iii. That the numerous letters and voluminous correspondence on which the appellant relied to prove the subordination of the Tambirans of Tiruppanandal to the Pandara Sannadhi at Dharmapuram have not properly been considered;

iv. That Exhibits R18 and H19 have been misconstrued, and that Exhibits J, E15, M9, N9, and S4, and the documents filed in connection with exhibit S4, have not been noticed by the Subordinate Judge;

v. That there is no satisfactory evidence to support the finding that the agreement, filed as Exhibit H, was obtained by coercion and that it could not be and was not set aside by any Magistrate;

[384] vi. That the exhibits mentioned in paragraphs 43, 46, 47, 48, 50, 52, 53, 54, 55, 65, 67, 71, 72, 73, 76, 80, 81, 82, 86, 93, 94, and 98 of the original judgment have been improperly admitted as evidence against the appellant, and that undue legal effect has been given to them;

vii. That the exhibits produced to show that the appellant's predecessor appointed Ganapati Tambiran have not been noticed by the Subordinate Judge; and

viii. That the procedure prescribed by Section 204 of the Code of Civil Procedure has not been followed.

5. The Subordinate Judge has dealt with the appellant's claim on the merits and considered it unnecessary to decide the other questions at issue, and it is therefore desirable to see if his decision can be supported. The parties to this appeal are ascetics or hermits who profess to have renounced all family ties and all desire for wealth and women, and devoted themselves to religious study, contemplation and service in view to secure immunity from future births (to which, according to their faith, they believe they are liable,) and spiritual happiness. The class to which they belong has existed as a part of the social system obtaining among the Hindus from a very early period. In his Smruti, Yajnavalkya recognized this class, and adverting to it, the author of the Mitakshara has propounded a special rule which, in the absence of special usage, governs the succession to persons devoted to religion (1). The rule is that when a layman becomes an ascetic, devotes himself to religion, and adjures secular relations of life in the mode prescribed by usage, he passes from his natural into a spiritual family. He ceases to be a member of the former and becomes a member of the latter. As his heirs in his natural family are certain relations in the lines of descent and ascent, and, on their failure, certain collateral relations, so by analogy his heirs in his spiritual family are his preceptor, his disciple and his spiritual brother and associate in holiness. The author of the Mitakshara says, "the heirs to the property of a hermit, of an ascetic and of a student in theology are in order the preceptor, a virtuous pupil and a spiritual brother belonging to the same hermitage, and, on their failure, any one associated in holiness." In paragraph 4 he [385] explains what is meant by a virtuous pupil, and in paragraph 5 he states that a spiritual brother associate in holiness is one who is engaged as a brotherly companion, and who is also an associate in

(1) Mitakshara, Chap. II, S. 8. Stoke's Hindu Law Books, p. 450.

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holiness as belonging to the same hermitage. Though the term preceptor is not explained by him, it is generally understood to refer to the person who admits him to the order of ascetics and initiates him in its cardinal doctrine.

6. Having referred to the notion of a spiritual family as embodied in the Mitakshara law and to the special rule of succession applicable to the individual property of an ascetic, it is desirable to explain what is meant by a Mutt and by an Adhinam and by the terms Tambiran and Pandara Sannadhi.

If an ascetic or a hermit is a Brahman, he is called a Yati or Sanniyasi; if a Sudra, he is called a Paradesi, and if the Sudra is attached to an Adhinam, he is called a Tambiran, and if he is at the head of the Adhinam, he is called the Pandara Sannadhi. For the purposes of this appeal, it is necessary to refer to two Adhinams, the one at Dharmapuram, of which the appellant is the Pandara Sannadhi, and the other at Tiruvavadutorai, of which the respondent was a Tambiran prior to his appointment by Ramalinga to Tiruppanandal. The term "Adhinam" signifies the seat of the chief ascetic at the head of a religious association or brotherhood or a holy crowd, and takes its name from the village in which it is situated. The origin of the associations, their constitution and development form part of the history of the establishment and spread of the Brahminical systems of religious doctrine among the Sudra communities in Southern India. Originally, the ascetic, who renounced the world and devoted himself to religion, confined his attention to the study of theology, to imparting religious instruction to his disciples, and to complying with the ordinances prescribed for the guidance of his order. He then owned no property, except his cloths, sandals, religious books and the idol he kept for his personal worship and a few other articles of trifling value which were absolutely necessary(1). He had no fixed residence and moved from village to village, accepting such lodgings and food as were provided for him by pious laymen who were in their turn enjoined by the Shastras to honor and support him. This is the mode in which Brahman Sanniyasis live [386] even at the present time. In several villages pious laymen erected buildings for the residence of hermits when they visited their villages, and these were called Mutts. In its original and narrow sense, then, the term Mutt signified the residence of an ascetic, or Sanniyasi or Paradesi.

But when the Buddhists assailed the Brahminical religion and when Sankarachariyar, the founder of the Advaita or nondualistic school of philosophy, ultimately prevailed against them, he established some Mutts in order to maintain and strengthen the doctrine and the system of religious philosophy he taught, Sanniyasis being placed at the head of those institutions. After Sankarachariyar, the founders of the Vaishnava, Madhva and other schools of religious philosophy in this Presidency established Mutts for a similar purpose. In former times these institutions exercised considerable influence over the laymen in their neighbourhood, they became centres of classical and religious learning and materially aided in promoting religious knowledge and in encouraging religious and other charities. The ascetics who presided over them were held, owing to their position as religious preceptors and often also in consequence of their own learning and piety, in great reverence by Hindu princes and noblemen, who from time to time made large

(1) Mitakshara, Chap. II, S. 8, para 8. Stoke's Hindu Law Books, p. 450.

presents to them and endowed the Mutts under their control with grants of land. Thus, a class of endowed Mutts came into existence in the nature of monastic institutions, presided over by ascetics or Sanniyasis who had renounced the world. Thus, the ascetic who originally owned little or no property, came to own the Matam under his charge and its endowment, in trust for the maintenance of the Mutt, for his own support, for that of his disciples, and for the performance of religious and other charities in connection with it, according to usage. When the Brahminical creed and system of religious doctrine were adopted by Sudras in the Tamil districts, the order of ascetics and the practice of instituting Mutts as centres of religious study, instruction and charity, came into prevalence amongst them. Pious and learned ascetics among them, actuated by a desire to disseminate religious knowledge and promote religious charity, established Mutts in Tinnevelly, Madura, Trichinopoly, Tanjore and elsewhere. Among others, Giyana Sambandha Pandara Sannadhi established the original Mutt, which has since developed itself into the Adhinam now at Dharmapuram. The **[387]** distinction between an Adhinam and a Mutt as an endowed institution consists in the latter being an isolated institution, whilst the former is the central institution from which the chief ascetic exercises control and supervision over a group of endowed institutions and religious trusts committed to his management and subject to his jurisdiction as the responsible trustee. It will be remembered that the ascetic is prevented by the usage of his order from owning or managing property for personal enjoyment. The administration of a Matam endowment presided over by an ascetic was an exception to the rule recognized on the ground that such administration was in furtherance of the cause of religion. But among Sudras the administration of temple endowments, of endowments instituted for special services in Hindu temples, and of endowments founded for the support of religious and other charities either in particular places or on particular occasions, was also considered to fall under the exception. After Giyana Sambandha Pandara Sannadhi established the original Matam at Dharmapuram, several temples and their endowments and other endowments of the descriptions mentioned above came under the management of his successors. The endowments to be administered and the institutions to be managed in Tinnevelly and in Tanjore were so many and so far from each other, that it was long since found necessary to establish a subordinate Adhinam at Sivasilum in Tinnevelly and to place a junior Pandara Sannadhi at its head. The junior exercised co-ordinate powers, but he was always subject to the supervision and control of the senior at Dharmapuram. The Adhinam at Tiruvavadutorai was founded by a separate ascetic, and it has also a junior or subordinate Adhinam in the district of Tinnevelly. The endowments subject to its jurisdiction and control are of the same description and character, consist of Matam endowments, temple endowments, katlais or endowments for special services in particular temples, and other endowments in the nature of religious and charitable trusts.

It is necessary to describe next the procedure followed in the Adhinam at Dharmapuram in attaching Tambirans to it in order to form an idea of the mode in which the religious association is constituted. When a layman desires to become an ascetic, he is required to undergo a probation. On the commencement of the probation, he usually wears a red cloth called yattrai kashayam. After the probationer makes some progress in religious study, he **[388]** is taught a form of prayer

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called the samayam. At a later stage he is taught another form of prayer called the visesham. The duration of the probation depends on the discretion of the Pandara Sannadhi, and so long as the probation continues, the probationer is at liberty to change his mind and to return to his family. On the Pandara Sannadhi being satisfied with the probationer, the former summons the latter on an appointed day to the room in his Mutt which is set apart for the worship of his titular deity called Chokkalingam. There, in the presence of the idol, the probationer is formally asked if he gives up his family and his desire for women and land; and if he gives an answer in the affirmative, the answer is accepted as a solemn renunciation of the world. The Pandara Sannadhi then teaches him the mula mantram, or the distinctive doctrine of his order and of the Adhinam, invests him with a consecrated cloth and gives for his personal worship an idol made of sandal powder. The teaching of the mula mantram, or the distinctive text, is called upadesam or initiation. The cloth which is given on the occasion as the visible symbol of initiation is called mantra kashayam, or consecrated red cloth. The image of sandal powder which is given for worship is called the Partiva Puja. According to the appellant a ceremony is then performed. It is called the Dattam or gift. At this ceremony, the Tambiran or disciple solemnly makes a gift of his body, soul and wealth to the Pandara Sannadhi. It is in evident allusion to this ceremony that Tambirans speak of themselves and other Tambirans as the slaves of the Pandara Sannadhi. After his ordination, the Tambiran remains in the principal Matam and continues his religious study until he becomes a learned ascetic. He is expected also to study the history of the Adhinam, to visit its subordinate Mutts, to undertake pilgrimages and to advance to the best of his power the cause of religion and charity. The collective body of Tambirans, with the senior and junior Pandara Sannadhis attached to an Adhinam, constitute together the holy crowd or association of that particular Adhinam. From amongst them, the Pandara Sannadhi usually selects persons to administer local endowments and charities under his supervision and control, and when a selection is made he gives the nominee a special kashayam, or a superior red cloth, as a mark of distinction. It is alleged for the appellant that in the case of Tambirans appointed to the Mutts in Nepaul, at Benares, Tiruppanandal and [389] Achiram in Travancore, all of which are claimed in this suit as belonging to the Adhinam at Dharmapuram, special marks of distinction are conferred upon the nominee, such as some clothes and ornaments, &c., called sundaravadam, arukutti and a crystal lingam for worship called Odayavar Puja. Before Tambirans are deputed to important Mutts and charities, they are also taught a further form of prayer called dikshakurai, probably in view to raise their religious sanctity in the estimation of laymen.

7. Though a similar procedure is followed in the Adhinam at Tiruvavadutorai, there is considerable oral evidence to the effect that it differs in several minor particulars. Several witnesses say that the mula mantram, or the text taught at that institution, is not the same. It appears also that at Tiruvavadutorai a ceremony called Nirvana Diksha is performed, and it is not part of the procedure at Dharmapuram. In the former, the Tambiran makes a gift of his body, soul and wealth, *not* to the Pandara Sannadhi, but to God, and the titular deities worshipped in the two Adhinams are not the same. The external observances of the Tambirans also differ though in unimportant particulars.

8. In connection with the mode in which Tambirans are ordained at

Dharmapuram, our attention is drawn to the fact that none but the Pandara Sannadhi is at liberty to admit a layman as Tambiran. Though the respondent denied it and contended that every Tambiran was entitled to take a disciple, there is considerable oral evidence in support of the appellant's assertion. It is corroborated by the circumstance that a ceremony called Achariya Abhishekam is performed only in the case of Tambirans who are raised to the position of a senior or junior Pandara Sannadhi. It consists in anointing and bathing him as an achariya or preceptor, and consecrating him as such with the recitation of religious texts prescribed for the occasion. The belief with which it is performed is that unless a Tambiran is solemnly consecrated as a preceptor, he is not competent to initiate laymen in forms of prayer conducive to their spiritual happiness and to ordain laymen as Tambirans with efficacy. Having regard to the character of these associations as organized religious communities acting under the guidance of a chief ascetic in disseminating the religious doctrine of his school and Adhinam, the usage which is spoken to by the witnesses is not improbable. Again, there are several letters in evidence which show that probationers attached to the Mutt at Benares were sent **[390]** by former Tambirans at Tiruppanandal, with a request that the Pandara Sannadhi for the time being might be pleased to ordain them as Tambirans, and that the Pandara Sannadhi ordained some and did not ordain others. The weight of evidence appears to us to be in favour of a special usage by which the Tambirans of the appellant's Adhinam are ordained only by the Pandara Sannadhi at Dharmapuram.

9. It is conceded by the parties to this suit that the Adhinams at Dharmapuram and Tiruvavadutorai came into existence several centuries ago, and long prior to the institution of the Mutts at Benares and Tiruppanandal, which form the subject of the present litigation.

It appears that about 300 years ago, when one Masilamani Desigar was the Pandara Sannadhi at Dharmapuram, a Tambiran of his Adhinam called Gurupara Tambiran established the Mutt at Benares. This individual is reputed to have been an ascetic of great learning and merit, to have gone to Benares on pilgrimage, and acquired an extensive reputation in Northern India as a pious devotee. The case suggested by the appellant's oral evidence is that during his stay at Benares, Gurupara obtained considerable wealth, and on his return to the South, he placed his earnings at the feet of his preceptor, the then Pandara Sannadhi at Dharmapuram, in compliance with the religious obligation arising from the ceremony of gift or Dattam already mentioned, and according to which the property acquired by a disciple of the Adhinam belongs to the Adhinam itself, that the Pandara Sannadhi declined to accept the offer, but told Gurupara to take back the property to Benares, where it was acquired, to found a Mutt there, and to apply the property to religious purposes and charities. Thus, on the appellant's own showing, the Mutt at Benares was established by Gurupara with the aid of property acquired by him. That Gurupara was a disciple of the Dharmapuram Adhinam is not disputed. Though the appellant's witnesses profess to infer from what is reputed to have passed between Gurupara and his Pandara Sannadhi a surrender of his earnings by the former and a re-transfer by the latter, the fact is clear that the Mutt at Benares was not founded with the aid of funds supplied from the endowment of the Adhinam at Dharmapuram.

As Benares is considered by Hindus to be a sacred city both in Northern and Southern India, and as the existence of a Mutt there **[391]** for

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the purpose of executing religious and charitable trusts under the supervision of an ascetic devoted to religion was regarded as a great facility by those who desired to institute new charities in the sacred city, either for their own spiritual benefit or for that of their deceased ancestors, the Mutt founded by Gurupara gradually rose in importance and endowed wealth. The evidence shows that in the course of its history, the Mutt at Benares came to own several subordinate Mutts, both in Northern and Southern India, and among the rest, we may refer to the Mutts at Morangi in Nepaul and at Achiram in Travancore, at Chidambaram, Ramesvaram, Kumbakonam, and Trichinopoly. It shows also that it was the practice of its Tambirans to visit Hindu princes and noblemen, to inspire them with esteem and respect for their learning and piety, and then to induce them to found and endow charities at Benares, and to commit the endowments to their management and superintendence and that of their successors in the Mutt. The subjoined table indicates the course of succession at Benares until the early part of the last century, when one Tillanayaka Tambiran established the Mutt at Tiruppanandal (see Exhibit 17).

1
Kumara Gurupara Tambiran (the founder).
|
2
Chokkanadha Tambiran.
|
3
Arunachala Tambiran.
|
4
Ambalavana Tambiran.
|
5
Sadayappa Tambiran.
|
6
Tillanayaka Tambiran.

Seeing that there had been six cases of succession at Benares before the Mutt at Tiruppanandal came into existence, there was but one Mutt for the administration of the Benares charities for a period of 150 to 180 years, 25 to 30 years being taken to represent each generation on the average. Beyond the fact that these Tambirans were Dharmapuram men, and that there was an inscription on the Benares Mutt that it was the Dharmapuram Mutt, the **[392]** evidence affords no information as to the usage which regulated the succession. The first and the sixth Tambirans were admittedly Dharmapuram men, and in advertence to the ordinary mode in which the succession in a spiritual family is kept up, it would be reasonable to infer in the absence of evidence to the contrary, that the intermediate ascetics were also Dharmapuram men. As to the inscription, it is by no means conclusive in regard to the question of subordination or agency at issue. A disciple founding a Mutt would ordinarily designate it after the Adhinam to which he belongs; but it would be unsafe to infer from it without more that it was subordinate to the Pandara Sannadhi at Dharmapuram in regard to management and selection of successors. The name of the founder, Gurupara, appears also in the inscription, and

the words are—"Kumaraswami Mutt of the Dharmapuram Adhinam in the Kaidara Ghutt" (Benares). There is on this point the evidence of several witnesses for the appellant who saw the inscription (2, 4, 8, 9, 33, 34, 36, 48 and 55), and the witnesses 6 and 14 examined on commission at Tinnevelly, and there is no reason to think that it is not *bona fide*.

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10. In the time of Tillanayaka Tambiran, he conceived the idea of establishing a Mutt at Tiruppanandal in aid of the Benares charities. He probably believed that there were several pious rajas, zamindars and rich men in Southern India, who might be induced to substitute permanent endowments for contributions in money made from time to time, and to institute and endow new charities, and that the Tambiran at Tiruppanandal might better realize the income of the endowments which might be situated in the south. As appears from exhibit 1273, the Matam at Tiruppanandal was founded as a banking house or agency, in view to making collections from existing endowments, to receiving fresh offerings or contributions in money, and to accepting and managing new endowments which might be created in aid of new charities instituted at Benares. It is also in evidence that the Tambiran at Tiruppanandal issued hundis on the Mutt at Benares, and cashed hundis issued from Benares and charged a discount, creating thereby an extra source of income for the two Mutts. The appellant's averment was that Siva Giyana Desigar was the tenth Pandara Sannadhi at Dharmapuram, and that by his order Tillanayaka went to Tiruppanandal and established the Mutt there. The oral evidence on this point is that Tillanayaka is reputed **[393]** to have founded the Mutt under the orders of the Pandara Sannadhi. Seeing that the spiritual relation between them was that of a preceptor and disciple, it is by no means improbable that the institution was established in consultation with the Pandaram at Dharmapuram, but there is not a particle of evidence to show that any contribution was made from the funds of the Adhinam either towards the erection of the Mutt or towards endowing it. The presumption is that Tillanayaka, who came from Benares and who was then the Tambiran in charge of the Mutt there, built the Mutt at Tiruppanandal and purchased property for its benefit with the moneys he brought from Benares. The subjoined table indicates the course of succession at Tiruppanandal from the time of Tillanayaka to that of Ramalingam, who died in 1880:—

1
Tillanayaka Tambiran (the founder, 1720—56).
|
2
Kumara Gurupara Tambiran (1756—91).
|
3
Chitambaranadha Tambiran (1792—98).
|
4
Sadayappa Tambiran (1798—1836).
|
5
Ganapati Tambiran (1836—38).
|
6
Ramalinga Tambiran (1838—41).
|
7
Chokkalinga Tambiran (1841—52).
|
8
Ganapati Tambiran (1852—53).
|
9
Ramalinga Tambiran (1853—80).

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11. The appellant asserted in his plaint, 1st, that he was the owner of the properties in suit; 2ndly, that the right of appointing Tambirans to Tiruppanandal and Benares was vested in him; and, 3rdly, that no one but a disciple of his Adhinam was eligible for such appointment. We shall now give a brief account of the management of each Tambiran, and note the leading facts which [394] throw light on each ground of claim. As already observed, Tillanayaka was the first Tambiran at Tiruppanandal, and he was in management from 1720 to 1756. He built the Mutt, purchased lands and took mortgages from various persons in his own name. These transactions are evidenced by Exhibits 45 to 79, and they extend from 1740 to 1754, nearly Rs. 17,000 being invested by him in land during this period. Each document contains a clause that the land sold or mortgaged shall be enjoyed by the alienee and "his successors in the line of disciples." It appears that several villages were granted to him as endowments for charities instituted at Benares in his time. He obtained one village from the Rani of Tanjore in 1720 (Exhibit A), two villages from the Zamindar of Ramnad in 735 (Exhibit E51), three villages from the rulers of the Nayak Dynasty in 1725 (Exhibit 782), and one from the Zamindar of Torayur, in the district of Trichinopoly about the same time (Exhibit 1392). The grantee named in all these documents was Tillanayaka Tambiran and *not* the Pandara Sannadhi at Dharmapuram. In Exhibits A and E51 he is described as "a disciple of Dharmapuram," and "a disciple of the Pandara Sannadhi at Dharmapuram." In Exhibit 782, however, he is described as "the head of the Adhinam dispensing Benares charities." It is stated further in Exhibit E51 that the villages are to be enjoyed by the grantee and "his successors in the line of disciples." It is clear then that Tillanayaka had funds in his possession wherewith he was able to build the Mutt at Tiruppanandal and to invest about Rs. 17,000 in landed property, and that he procured grants of seven villages for the support of charities instituted at Benares and entrusted to his management. As regards the property purchased or taken in mortgage by him, his intention was that it should descend to his successors in the line of disciples. As to the charities and their endowments, Exhibit E51 stated in express terms that the succession to management was to be in the line of disciples, and though the other documents are silent on this point, the fact that the donors knew that the person to whose care they entrusted the charities and the endowments which they permanently instituted was an ascetic in the charge of a Mutt gives rise to the presumption that they intended that the right of management should descend in accordance with the law of succession applicable to it. It is no doubt true that in some of the endowment deeds, the grantee is described [395] as a disciple of the Adhinam at Dharmapuram, but there is nothing in those documents to indicate that they are more than words of description. In this connection, however, we should draw attention to Exhibit W52, which relates to a money grant of 3,000 pagodas as a permanent endowment for the performance of a charity newly founded at Benares as described therein. The document purports to be a joint undertaking or agreement executed in 1725 by the then Pandara Sannadhi of the Adhinam at Dharmapuram, by Tillanayaka Tambiran as manager of Kasi (Benares) charities, and by Kumarasami Tambiran of Benares in favour of the donor Chinna Muttu Chetti of Madras. The material portion of the document is this—"We, the Pandara Sannadhi of Dharmapuram, Tillanayaka Tambiran and his successors in the management of his Mutt and Kasi (Benares) charities, the subsequent karthas (owners) of the Adhinam and Kumarasami

Tambiran, *agent* of the Benares charities, bind ourselves to conduct the charity mentioned herein without detriment to it so long as the sun and moon shall endure."

There can be no doubt that upon the true construction of this document, the Pandara Sannadhi was a joint trustee with reference to this money endowment. Having regard to the fact that the undertaking was given by the Tambiran who was actually to execute the trust at Benares *as agent*, by Tillanayaka as the manager of the Mutt at Tiruppanandal and of the Benares charities, and by the Pandara Sannadhi as the head of the Adhinam, it is not unreasonable to infer that the Pandara Sannadhi and his successors were regarded by the donor as controlling rather than managing trustees. This document is further evidence of an admission on the part of the appellant's and respondent's predecessors to the effect that in Tillanayaka's time the Mutt at Tiruppanandal was the principal Mutt; that the Mutt at Benares was regarded as a mere agency, and that each of the trustees at Dharmapuram and Tiruppanandal had his own line of successors. It shows also that at that time there were cordial relations between the Pandaram at Dharmapuram and the Tambirans at Tiruppanandal and Benares, and co-operation on their part when required in guaranteeing due administration of particular charities.

12. The second Tambiran at Tiruppanandal was Kumara Gurupara Tambiran, who succeeded Tillanayaka about 1756. He was probably the Benares agent named in Exhibit W52 as he was also described in some documents as Kumarasami, but there is no **[396]** evidence to show the specific ground on which his succession rested except Exhibit 17, to which we shall presently refer. Like his predecessor he invested money in land and made purchases in his own name without any reference or allusion to the Pandara Sannadhi for the time being, and induced rajas and zamindars to add to the charities and their endowments at Benares under his management or superintendence. Exhibits 80 to 104 show what purchases and mortgages were made or taken by him, and they extended from 1755 to 1789, aggregating in value nearly Rs. 4,600 or Rs. 5,000. They also contained a clause which provided for the enjoyment of the property purchased by the purchaser and his successors in the line of disciples. In connection with the new charities established at Benares and in other places, he obtained four villages from the Rajah of Tanjore under Exhibits B and C, three villages from the Zamindar of Sivaganga (Exhibits Y43 and A47), and three villages from the Zamindar of Kalastri and the Jaghirdar of Mogarlapalayam in 1759 and 1763 under Exhibits 778 and 781. He obtained also another village from the Zamindar of Kalastri for the support of a charity at Ramesvaram under Exhibit 780 in the year 1785. The grantee named in all of them was Kumara Gurupara Tambiran, but in Exhibit Y46 he was described as the disciple of Muttukumara Desigar, the Pandara Sannadhi of Dharmapuram at that time. In Exhibits Z46 and A47, he and his successor were described as the disciples of Siva Giyana Sambandha Desigar or Giyana Sambandha Desigar of Dharmapuram. Exhibits 780, 781, Y46, provided that the succession to management was to be in "the line of disciples." In Exhibits 780 and 781, the grantee was described as "self-dependent," and, although considerable stress was laid on the expression at the hearing of this appeal on behalf of the respondent as being indicative of independence, it appears to us that the words were only terms of courtesy used in reference to pious ascetics who are considered to have subdued their passions and wordly desire and to have become on that ground self-dependent or self-controlled. During

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the period of the second Tambiran also there were money grants made as endowments of new Benares charities of the values of 1,800 and 2,400 pagodas by two wealthy men in the town of Madras. They are evidenced by Exhibits X52 and Y52, which were jointly executed in 1778 and in 1788 by the then Pandara Sannadhi at Dharmapuram, by Kumara Gurupara Tambiran as [397] manager of Benares charities, and by Kasi (Benares) Kandappa Tambiran to guarantee to the donors due administration of the endowments instituted by them. In terms they are similar to Exhibit W52. They show that the donor associated the three persons and their successors as joint trustees, that the Tambiran at Benares was regarded as an agent, whilst the Tambiran at Tiruppanandal was looked upon as the manager of Benares charities, that each of the responsible trustees was considered to have a distinct line of successors, and that the probable intention was to make the local Tambiran at Benares who was to execute the trust, the Tambiran at Tiruppanandal who was recognized as the manager and superintendent, and the Pandara Sannadhi to whom both owed allegiance as their preceptor and spiritual superior responsible for the efficient performance of the charities to which the money grants related.

13. Kumara Gurupara Tambiran died about 1790 and he was succeeded by one Chitambaranadha Tambiran. It is not clear what became of Kandappa Tambiran at Benares, who joined in the execution of Exhibits X52 and Y52. Chitambaranadha was in management at Tiruppanandal but for eight years and died in 1798. During this period two new charities were founded and were endowed with grants of 1,200 and 1,600 pagodas. These charities were instituted in the towns of Kumbakonam and Chidambaram in the districts of Tanjore and South Arcot, and documents guaranteeing their due performance were executed jointly by the Tambiran at Tiruppanandal and by the Pandara Sannadhi at Dharmapuram in 1791 and 1794 (Exhibits Z52 and A53). In both, the Pandara Sannadhi is described to have joined in their execution, and in the execution of Exhibit A53 alone Sadayappa Tambiran, the then Tambiran of the Benares Mutt, joined. It is not stated in terms in these documents that Chitambaranadhan was a Dharmapuram man; but it is by no means probable that the Pandaram at Dharmapuram would have joined in giving an undertaking if he had not been his disciple or a Tambiran of his Adhinam. Exhibit E53 suggests the inference that he was the first disciple who succeeded Kumaraguru Tambiran. Chitambaranadhan died in 1798, and he was succeeded by Sadayappa, who was the Tambiran in immediate charge of the Mutt at Benares.

14. Thus from 1722 to 1798, which we term as the first period of [398] the history of management at Tiruppanandal, there were three cases of succession, and in two the successor was the Tambiran in charge of the Mutt at Benares, who was regarded as the agent or junior of the Tambiran at Tiruppanandal. The same was probably the case also as to Chitambaranadhan's succession, although there is no conclusive evidence in regard to it. In Exhibit 17, however, the sixth Tambiran, Ganapati, stated in 1838, when there was no dispute as to succession, that each Tambiran appointed his successor, both prior and subsequent to the establishment of the Mutt at Tiruppanandal. It appears further that the Tambirans at that station built the Mutt, purchased lands for its support and obtained grants of villages for charities instituted at Benares, Chidambaram, Ramesvaram and Kumbakonam and in other places and committed to their management. The course of succession indicated as well by the endow-

ment-deeds as by the sale-deeds was the line of disciples. It appears further that they were all Dharmapuram men. The procedure of the Adhinam already mentioned, and according to which no one but the Pandara Sannadhi can appoint a Tambiran, affords *prima facie* ground for the inference that the Tambirans at Benares and Tiruppanandal must have been originally supplied by the Pandara Sannadhi or procured from Dharmapuram, though their subsequent elevation to the headship of the Mutts was the result of selection made by their predecessors.

15. We pass on to the second period in the history of management at Tiruppanandal extending from the time of Sadayappa, the fourth Tambiran, to that of Ramalinga, the sixth Tambiran. During this period from 1798 to 1841, we observe traces of an organized procedure in regard to management and succession. Like his predecessors, Sadayappa purchased lands for the Mutt for nearly Rs. 4,600 under Exhibits 105 to 151, and like them he also added to the charities and endowments administered from Tiruppanandal. Exhibits 774, 775, 776, 777, D53, and E53 show that six new charities were instituted at Benares, Ramesvaram and Kumbakonam, endowed with grants of villages by the Raja of Karvetnagar, in the district of North Arcot. Sadayappa was the grantee named in them all; in Exhibits 774-7, he was described as the superintendent or dispenser of Benares charities; and in Exhibit D53, he was described as the third disciple of Tillanayaka Pandaram, a disciple of the Dharmapuram Pandara Sannadhi; and in Exhibit E53, he was described as the second **[399]** disciple (in the order of succession) of Kumara Guruparа Tambiran. Exhibits 778 and 106 to 151 indicate that the succession contemplated by the donor and by the Tambiran was a succession in the line of disciples. Again Exhibit 786, which purports to be a copy of the order issued by the Collector of Tanjore in 1802, shows that the village of Virakkan was proved to have been granted as the endowment of a charity instituted at Benares. Whilst grants of land show that Sadayappa was the real grantee the two money grants made in 1798 were made on account of Benares charities on the joint undertaking of the Pandara Sannadhi, of the Tambiran at Tiruppanandal, who was described as the manager of Kasi (Benares) charities and of the Tambiran at Benares, that they will be duly administered.

16. Here we should also draw attention to a few documents which throw light on the nature of the endowment at Achiran in Travancore territory. Though it is not included among the properties now in litigation, documents relating to it and the correspondence which took place between the Tambiran there and the Pandara Sannadhi were referred to at the hearing in elucidation of the main question at issue. Although the original grants have not been produced, still Exhibits D to G, dated 1802 and 1837, which purport to be copies of accounts of measurement prepared by the Travancore Government, describe the endowment as made partly for the Mahesvara or Guru Puja in the Mutt at Dharmapuram, and partly in support of Benares charities and as standing in the name of the Pandara Sannadhi at Dharmapuram. In this connection we may also refer to two letters addressed to him by the Tambiran at Achiram. In exhibit B35, dated March 1833, he applied to Dharmapuram for an order that the title-deeds which were at Sivasilum with the junior Pandara Sannadhi should be transmitted to him for production before the Dewan who, it appears was then holding some inquiry in regard to grants made free of assessment. The title-deeds are mentioned as "those in our favour relating to the sarvamanyam (rent-free lands) of Sivagiyanapuram as well as *to other*

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lands here belonging to the Adhinam." The second letter, Exhibit C35, we refer to is the one dated May 1833, in which he protested against an order from Dharmapuram that he should first submit his accounts to a Karbar Tambiran and then forward them to Dharmapuram. In this, Chokkalingam, the local Tambiran, who became the Tambiran of Tiruppanandal [400] in 1842, said as follows: "You were not pleased to direct when I was appointed that I should act in accordance with the views of the Karbar Tambiran, and it was not usual to do so in the days of my predecessors. I shall submit my accounts direct to your Sannidanam and obey your orders only, but I will not submit them to the Karbar or any other Tambiran or act under his orders." Though we are not prepared to hold that as evidence of title the survey account prepared by the Travancore Government is more satisfactory than the survey accounts prepared by the British Government, yet this portion of the evidence taken together with the letters conveys the impression that the original grantee of the endowment at Achiram was perhaps the Pandara Sannadhi at Dharmapuram, that the grant was obviously made in part for the benefit of the Mutt at Dharmapuram and in part for the support of a Benares charity, that the local Tambiran submitted accounts to Dharmapuram and acted in subordination to the Pandara Sannadhi, and that orders were issued to him both from Dharmapuram and from Tiruppanandal. It is not, however, necessary to determine for the purposes of this appeal the relation of the Pandara Sannadhi in regard to so much of the endowments at Achiram as is administered from Tiruppanandal in aid of Benares charities, but it is sufficient to say that whatever may be that relation, it does not necessarily extend to the properties in suit.

17. We pass on to some letters which throw light on the relation between the Mutts at Tiruppanandal and at Benares. It will be remembered that they were in their origin two branches which had a common trunk, and that though the original Mutt was at Benares, yet the institution at Tiruppanandal was regarded as the principal or leading branch, and that at Benares as a subordinate branch both in the time of Tillanayaka Tambiran and Kumara Gurupara Tambiran. It is probable that the same relation continued in the time of Chitambaranadhan, for he appears to have been *raised* from Benares to Tiruppanandal. Though Benares was the seat of the original Mutt and the place where the charity was actually executed, yet Tiruppanandal was recognized since its foundation as the principal Matam, probably because the senior Tambiran who was usually regarded as the chief and responsible manager and as better fitted to exercise supervision, fixed it as his seat and as the centre of control. It is in evidence that about 1802 one Kumarasami reported to the representative of a zamindar, who [401] had instituted one of the Benares charities, that he was appointed to the Mutt at Benares by the former Tambiran by will, and that he made no allusion to the Tambiran at Tiruppanandal. It appears, however, that about 1820 Sadayappa accompanied Sorboji, Maharajah of Tanjore, who went to Benares on pilgrimage and then re-established his authority as the responsible and chief manager. When he returned to Tiruppanandal, he left the Mutt at Benares under the management of a senior and a junior Tambiran named Aiyarappa and Ramalinga, and ever since Sadayappa treated them as if they were his subordinates and bound to carry out his instructions. In December 1825 he called attention to certain complaints made to the Raja of Tanjore, and issued orders that the charities should be conducted as usual, that the grievance brought to notice should at once be redressed,

and that the matter should be reported to Tiruppanandal (Exhibit 924). In another letter written in the same month, he censured Ramalinga in terms of severity, calling him "the most stupid of the stupid" (Exhibit 922). In April 1827 he states that he had instructed Aiyarappa to proceed to Morangi in Nepaul, and to arrange for providing the Tambiran there with an assistant and for the efficient management of the charities in that place, and to leave Ramalinga in charge of the Mutt at Benares during his absence (Exhibit 937). In June 1828 he censured the Tambirans at Benares for contracting debts and called for detailed information regarding them (Exhibit 936). Ramalinga complained to Sadayappa against the character and management of Aiyarappa in several letters. Exhibit 921 is a letter addressed to Sadayappa by Alagia Tiruchitambala Tambiran, the manager of the Mutt at Morangi in Nepaul, and the latter asked the former to send a senior Tambiran and also a junior to manage a subordinate Mutt in a place called Vijayapur. He asked further for an advance of Rs. 2,000 to enable him to liquidate certain debts contracted for the benefit of the Mutt under him and promised to repay the loan in two years. The foregoing evidence leads to the inference that during Sadayappa's time, the Tambirans of the Mutt at Benares and Morangi recognized him as their superior and acted in subordination to him and under his supervision and control.

18. As to the relation between Tiruppanandal and Dharmapuram, it should be steadily borne in mind that the Pandara Sannadhi was the spiritual superior of Sadayappa as one of the [402] Tambirans of the Dharmapuram Adhinam. But the contention for the appellant is that there is the relation of master and servant or of principal and agent between them with reference to the administration of the Mutt at Tiruppanandal and its charities. The following are the facts which appear in evidence during Sadayappa's time :—

(i) In April 1823 Ganapati, the junior Tambiran at Tiruppanandal, paid Rs. 175 to the junior Pandara Sannadhi in Tinnevelly, to enable him to meet the expenses of Guru Puja in his Mutt (Exhibit E4). (ii) In September 1823 Ganapati, Sadayappa's junior, said to the Pandara Sannadhi at Dharmapuram in a letter, "I, your irrevocable slave, will do your bidding and nothing else." (iii) With reference to a village called Sethur, the letter states that it may not improve *our* income, but the village will become ours (Exhibit F4). (iv) In another letter written in reply to an application made from Trichinopoly for an expression of opinion or for some favour, Ganapati said, "The Pandara Sannadhi is the master and possesses the power of establishing and disestablishing things. Send all the letters you wrote to us to him. If we express an opinion, he may take offence." (v) Exhibits G52, H52, K52 and L52 show that the Tambiran at Tiruppanandal bought materials and repaired the Eastern and Western temples at Dharmapuram at his own expense. (vi) Similarly, the letters filed as Exhibits J4 and K4 prove that the kitchen at Dharmapuram was repaired under the orders of the Tambiran at Tiruppanandal. (vii) Exhibits G4 and H4 show that on one occasion Sadayappa sent some articles for use during a Guru Puja at Dharmapuram, and that on another occasion, when the junior Pandara Sannadhi was at Tiruppanandal, he arranged for his performing Guru Puja on a scale suitable to his high position as religious preceptor or Achariyar. It was suggested that these contributions and declarations indicate subordination. The allusion to Ganapati's position as an irrevocable slave has evident reference to the ceremony of Dattam or gift, according to which every Tambiran becomes, by reason of his ordina-

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tion, a slave of his Pandara Sannadhi in a spiritual sense. Guru Puja is the anniversary of the Pandara Sannadhi's Guru or preceptor, and it is an occasion when all his disciples are considered to be under a spiritual obligation to make contributions according to their means. The relation between preceptor and disciple [403] is in a spiritual sense analogous to that of father and son, and it may well be that the repair of the Eastern and Western temples and of the kitchen at the cost of the disciple was regarded as an act of filial piety or liberality. The declaration that the Pandara Sannadhi is the master and can do and undo things at his pleasure, is an extravagant mode of expressing his importance as the chief preceptor or head of the association of Tambirans. The allusion to the village of Sethur and the remark that if an opinion is expresed, the Pandara Sannadhi may take offence, may possibly refer to some act connected with management, but the letters are not sufficiently specific to enable us to see what particular matter the writer had then before his mind. However this may be, the weight due to those acts must be determined with reference to other acts done by Sadayappa in connection with his management at Tiruppanandal.

Amongst these, we shall first mention the transactions evidenced by Exhibits 582 and 583, which bear date June 1829. The first was a lease of some Adhinam land granted by the then Pandara Sannadhi to Sadayappa, and the second was a conditional sale of Adhinam property executed by way of mortgage. The last-mentioned document provides that "you (Sadayappa) should enjoy the purchase so long as the sun and moon last and in the line of your disciples." It must be noted here that this mode of dealing with each other is not compatible with the present contention that the Pandara Sannadhi is the owner of everything at Tiruppanandal or the sole responsible trustee, and that the Tambirans at Tiruppanandal are merely his agents, subordinates or servants.

19. Another matter which deserves to be noticed is the association of a junior with the senior Tambiran in management at Tiruppanandal. Judging from the papers before us, Ganapati was the first junior Tambiran at Tiruppanandal, and prior to Sadayappa's succession, the Tambiran at Tiruppanandal was on his death succeeded by the agent or junior in charge of the Benares Mutt. Probably the necessity for the services of a junior at Tiruppanandal was felt, because it would, on the one hand, give an opportunity to the senior to see whether the junior might be relied upon as a competent successor, whilst it would enable the junior to acquire experience before he became the head of the Mutt. It will also be borne in mind that in Sadayappa's time, Tiruppanandal [404] Mutt was not practically an isolated institution with some endowment, but an important centre of control exercised over several subordinate Mutts in Southern India, over the Mutt at Benares, and over the Mutts at Morangi in Nepaul and Achiram in Travancore. The evidence does not show that the Pandara Sannadhi had any thing to do with this modification of procedure at Tiruppanandal in regard to the agency for management.

20. We may here refer to the procedure introduced in regard to succession. From the time of Sadayappa we find that each Tambiran at Tiruppanandal left a will nominating his successor. Sadayappa made three wills (Exhibits 1 to 3), one on the 19th March 1818, another on the 8th September 1820, and the third on the 2nd February 1829. By every one of these he appointed his junior Ganapati as his successor and professed to do so in the exercise of a right vested in him. These documents

contain elaborate recitals of exclusive ownership and of an unqualified power to appoint a successor. As all the wills made from 1818 and on which reliance is placed for the respondent have been made nearly in the same terms, we deem it desirable to set out here Sadayappa's will in his own words.

No. I.

"MAY GOD VISWESWARAR HELP.

1818, *March* 9, *Iswara*, *Masi* 28.

Will executed by me, Benares Charity Sadayappa Tambiran, contemplating God Visweswarar of Benares and in the full possession of my faculties.

Ganapati Tambiran, who is second to me, has been appointed as my successor after my death. The said Ganapati Tambiran alone is to enjoy with full rights of ownership the servamaniam and shrottriem villages (granted by the rajas, noblemen and Brahmans of the different countries for the support of the various charities conducted under my direction in the territories extending from Benares and Nepaul to Cape Comorin, including temples, choultries, matams, water-sheds, flower-gardens, flights of steps constructed in rivers, &c.); and further he is to enjoy the miras villages which are held on payment of kist to the Circar, and various buildings and all the appurtenances belonging to the said lands. He is further entitled to all the sale-deeds, gift-deeds, debt-bonds, &c., standing in my **[405]** name, and to all the receipts, accounts, ready moneys, &c. He is to enjoy as owner, in the succession of disciples according to custom. He is to manage all affairs and conduct the charities without any prejudice to them. The respect shown to me by the different rajas and noblemen should be shown to him; and the Tambirans at Benares, Morangi, Rameswaram, and Cape Comorin should conduct themselves as usual towards him as they have been conducting themselves towards me. Besides Ganapati Tambiran, no one in the Sanniasi Asramam (ascetic order of life), or in the Grahasta Asramam (married order of life) has any connection.

Viswalingam Thunai (may Viswalingam help).

(Signed) Benares charity, SADAYAPPA TAMBIRAN.
(„) Temple Cash Accountant, Chinnappa. I know.
(„) Thiruppanandal Miras, Sadayappa Mudeliar. I know.
(„) Benares Charity Agent, Sankaran Aiyar. I know."

It is difficult not to be impressed on a perusal of the will with the belief that the testator had not the remotest idea of any property or right of appointment vesting in the Pandara Sannadhi, though we are not in a position to say whether the deprecatory clause at the close of the will was inserted merely by way of emphasizing his exclusive right, or, as a matter of precaution in anticipation of a possible effort on the part of a future ambitious Pandara Sannadhi to interfere with his independence. We must however add that up to this time all the

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Tambirans at Tiruppanandal had been Dharmapuram men, and to this extent, the usage is in favour of the appellant. These recitals acquire a special weight from their having been repeated at each succession during the period under consideration, and from their having then called forth no opposition nor comment from the Pandara Sannadhis, who lived at no considerable distance from Tiruppanandal, and who had by virtue of their position ample means of obtaining information as to what occurred at that place. It is also noteworthy that, notwithstanding such unqualified assertion of independence, the relation between Sadayappa and his Pandara Sannadhi was very cordial, and that as will appear from Exhibits R18 and W47, which were produced by the appellant and are certainly [406] evidence at all events against him, the Adhinam was considered to have lost by Sadayappa's death a liberal friend and disciple, whom it was not easy to replace.

21. Pursuant to the will made by Sadayappa, his junior Ganapati Tambiran succeeded him, and Ganapati's management extended only from February 1836 to June 1838. The only addition which he made to the Matam endowment was a small purchase made for Rs. 24, and it does not appear that any new charity was instituted in his time. It is the practice of the Revenue Department to keep a register of assessed lands in each Collectorate for administrative purposes, and as each landholder died, to alter the registry by inserting in the register the name of his successor. Exhibits 13, 14, 15, 16, 18, 19 and 20 relate to this proceeding, and show that the register was directed to be altered to Ganapati's name on the ground that Sadayappa was his senior, and that the junior was entitled to succeed the senior according to custom. It became also usual from Ganapati's time to report the death and accession of each Tambiran at Tiruppanandal to the Raja of Tanjore and some of the zamindars as the descendants of those who originally instituted part of the Benares charities, and to receive from them letters of condolence and congratulation. These letters of congratulation noted the succession of the writers, and expressed a hope that the charities would be efficiently administered as before, and they were usually accompanied with the present of a cloth or some other token of courtesy. Exhibits 387 and 403 are such letters from the Zamindars of Kalastri and Karvetnagar recognizing Ganapati's succession. In Ganapati's time, there was a complaint made to the Collector in regard to the distinction claimed between Matam and charity lands, and in reply to an inquiry, Ganapati submitted a representation, which has been filed as Exhibit 17. It stated by whom the Mutts at Benares and Tiruppanandal were founded, the course of succession, the usage in regard to it, and how lands were acquired by Ganapati's predecessors for the Mutt at Tiruppanandal and for Benares and other charities. It stated also that each Tambiran appointed his successor and contained no allusion to any private property belonging to the Tambiran as contradistinguished from that of the Mutt. It does not note the fact that all the Tambirans at Tiruppanandal were Dharmapuram men. To this omission, however, we do not attach weight, for it was not necessary to state it with [407] reference to the inquiry then made. The relation between Benares and Tiruppanandal was the same in Ganapati's time as in that of his predecessor. In April 1837, Aiyarappa and Ramalinga, the senior and junior Tambirans at Benares, wrote to Ganapati that they would act under his orders in the same way in which they acted under those of Sadayappa (Exhibit 1271). In this letter they also tacitly, if not expressly, recognized the practice of appointing a junior during the life of the senior and of

naming him as his successor, and said, if you direct either of us to come over there, we shall do so and perform such service as you may direct us to render.

Exhibit Q19, dated the 27th August 1838, is a letter which was written by the senior Tambiran in charge of the Mutt at Benares to the Pandara Sannadhi at Dharmapuram It shows that Ramalinga, the junior Tambiran at Benares, joined Ganapati and served as his junior at Tiruppanandal, that it was however Ganapati's intention at first to appoint Aiyarappa, the senior Tambiran at Benares, as his junior and successor, and send back Ramalinga to Benares as senior Tambiran of the Mutt at that station, and that Aiyarappa was told to proceed from Benares to Tiruppanandal; that before he did so, Ganapati became seriously ill and died after appointing Ramalinga, who was on the spot as his successor by his will, marked as Exhibit 4, which is in terms similar to the will left by Sadayappa Tambiran. It shows also that it was the Tambiran at Benares, from whom Ganapati sought advice, and that it was from thence that he selected his junior. Ramalinga's succession is the first in which the junior Tambiran at Benares succeeded to the Mutt at Tiruppanandal in supersession of his senior.

22. Before we pass on to Ramalinga's management, it is desirable to refer to two letters, Exhibits R18 and W47, to which both parties called our attention at the hearing of this appeal. It is by no means clear how those letters are evidence of reputation, or that their writers had special means of knowledge in regard to the usage of the Mutt at Tiruppanandal. Accepting them, however, as evidence on the ground that neither party objected to them in the Court below, we are not prepared to attach much weight to them. Exhibit R18 seems rather to suggest to the Pandara Sannadhi, from the standpoint of a partisan professing to be attached to him, how the Tiruppanandal Mutt and its charities might be subordi- **[408]** nated to the Adhinam at Dharmapuram, and what proceedings ought to be taken by the Pandara Sannadhi in order to effect that object, than to describe *bona fide* the reputed prior usage of the two institutions in relation to each other. After premising that Sadayappa was a sincere friend of the Adhinam, that the charities of the Mutt at Tiruppanandal form a very important branch of the Adhinam, that Ganapati Tambiran was old, and that one Ulaganadha Tambiran was most faithful to his (Guru) preceptor and most interested in the Adhinam at Dharmapuram, it suggests that the Pandara Sannadhi should appoint Ulaganadha as Ganapati's junior "without showing much concern, but without giving rise to discontent in others." It suggests further that Ganapati Tambiran should be sent for and consulted and spoken to as to the necessity for the appointment, and states that "if Ganapati should not agree to your wishes, the fate of the charities will be similar to that of Devastanams (temples)." It next alludes to Sadayappa's will in favour of Ganapati, but adds that the Government will not rocognize its validity. It then says that if all the Tambirans appointed by the Pandara Sannadhi to the several charities pertaining to their office conduct the charities well, they have only a right to continue in management to the end of their life, and that the Pandara Sannadhi has supreme power over all the charities. It goes on to advise the Pandara Sannadhi not to have any concern about past events or any misgivings regarding the writer. It then subjoins a copy of an arzi (petition) to be addressed to the Accountant-General.

"The arzi of Pandara Sannadhi of Dharmapuram Adhinam, to the Accountant-General, Madras.

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"Several rajas and rich gentlemen have left cash and sarvamaniam villages out of the proceeds whereof the affairs of chattrams built by them for feeding pilgrims at Benares, Ramesvaram, Chidambaram, Kumbakonam, Srirangam, and other places, and other charities there, are to be duly conducted. For the improvement of these funds and for the due performance of the said charities with the income thereof according to the scales fixed by them, Tambirans used to be appointed by the Pandara Sannadhis otherwise called Acharias, my predecessors in this Adhinam. In pursuance of the above custom, Sadayappa Tambiran and Ganapati Tambiran were appointed as senior and junior [409] Tambirans, respectively, for the management of the said charities; and for the last fifty years the said charities were conducted very satisfactorily. Now as the said Sadayappa Tambiran is dead, I have appointed Ganapati Tambiran, his assistant, to the vacant place as senior Tambiran, and Ulaganadha Tambiran as his assistant. I request, therefore, that the Company's bonds in the name of the said Sadayappa Tambiran be now transferred to the name of Ganapati Tambiran, and the interest thereon be paid as hitherto to the new nominee."

The letter then concludes with an expression of devotion to the Adhinam, and with the assurance that the writer's influence at Madras will be used in its favour.

Reading this letter and the draft petition in the light thrown upon them by the account already given of the prior usage as disclosed by the documentary evidence and the very peculiar statements which the former document contains, they appear to us to denote rather the right which the Pandara Sannadhi should, in the opinion of the writer, assert and contrive to acquire over Tiruppanandal without being overscrupulous as to what he said, than the relation which had actually subsisted between the two institutions prior to 1838. Exhibit W47 is in the same strain, though the bold suggestions it contains are not so elaborate as in the other. They are of value, however, as indicating the period when it was thought for the first time that the Pandara Sannadhi should, in the interest of his Adhinam, claim the right of appointing junior Tambirans, and assert a custom whereby the Pandara Sannadhis at Dharmapuram might be said to possess the power of appointing managing Tambirans at Benares and Tiruppanandal. There is no documentary evidence to show that the Pandara Sannadhi had any voice when Sadayappa selected Ganapati as his junior at Tiruppanandal before 1818, or Aiyarappa and Ramalinga as managing Tambirans at Benares about the year 1825, or when Ganapati directed Ramalinga to act as his junior in 1837 and ultimately appointed him as his successor. In this connection the counsel for the appellant referred to some oral evidence. As to Ganapati's appointment, he referred to the appellant's 53rd witness (Sadaya Pillai) and to witness Chokkalinga Pillai who was examined on commission, but neither had any personal knowledge as to Ganapati's appointment as junior. As to Ramalinga's nomination as Ganapati's junior, [410] the 53rd witness stated that Kandappa Desigar, the Pandara Sannadhi at Dharmapuram, appointed him, but that he was not an eye-witness of the fact. "When he was nominated," the witness said, "I went with others to receive him at the granary, and it was therefore I said that he was appointed at Dharmapuram. Ramalinga Tambiran was junior Tam-

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biran for one year." This witness is a disciple of the Pandara Sannadhi at Dharmapuram. Witness Chokkalinga Pillai deposed as follows :—" Ganapati Tambiran, who was the junior Tambiran of Sadayappa, was a Tambiran of Dharmapuram Adhinam. At first there was no one who served as junior Tambiran under Ganapati. The Dharmapuram Pandara Sannadhi sent for Ramalinga Tambiran from Benares, and asked him to go to and stop at Tiruppanandal. It was Talagnayar Pandara Sannadhi that did so." Ganapati, the witness added, sent for Ramalinga Tambiran to make him stay at Tiruppanandal as junior Tambiran. Talagnayar Pandara Sannadhi sent for Ganapati and Ramalingam to Dharmapuram, he gave arukattu and sundaravadam in the presence of (the Adhinam idol) Chokkalingasawmy, gave cloth and a palanquin, appointed him as junior Tambiran and sent him to Tiruppanandal. This witness was for forty years in service at Dharmapuram. He adds, however, that for ten years he was employed as the Maniyam of Talimaruthur village granted by the Zamindar of Ramnad to a former Tambiran at Tiruppanandal in connection with a Benares charity, that he was the subordinate of Ramalinga II, and that it was only to him that he used to send accounts, &c. Another witness, a Brahmin living at Dharmapuram (the 63rd witness for the appellant), deposed that Ganapati and Ramalinga were Dharmapuram Tambirans, and that the Pandara Sannadhi appointed Ramalinga as Ganapati's junior. He said he went there because Brahmins living at Dharmapuram were sent for. Another witness, Alagia Tiruchitambala Kavirayar, a native of Alvar Tirunagari in the district of Tinnevelly, stated that he saw Talagnyana Desigar appoint Ramalinga as Ganapati's junior (Exhibit B. 1529). This witness professes to be descended from Kumara Gurupara Tambiran, who founded the Mutt at Benares. At the commencement of the argument, the learned counsel for the appellant observed that he did not intend to rely upon the oral evidence but intended to rest his contention, mainly on documentary evidence, and we think in a case like this, in which the property in dispute is con-**[411]** siderable in value, and in which witnesses who are in a position to have had special means of knowledge are either servants or disciples of the rival claimants and the Adhinam to which they respectively belong, much weight cannot be attached to mere oral evidence. He referred however to the witnesses already mentioned during the hearing; but we do not consider it safe to rely upon their evidence, except so far as they are corroborated by documentary evidence. Their statement that Sadayappa, Ganapati and Ramalingam were Dharmapuram men is so corroborated ; but their evidence to theeffect that the Pandara Sannadhi appointed Ramalingam as Ganapati's junior is inconsistent with Ganapati's will (Exhibit 4), with Exhibit Q19 produced by the appellant, with the muchalka or agreement (Exhibit 10) taken by Ganapati from Ramalinga and with the Collector's takid or order (Exhibit 21). These show that Ramalinga was formally appointed by Ganapati as junior only on the 25th April 1838, and that he previously intended to send him back to Benares, and that he professed to make the appointment in the exercise of an exclusive right vesting in him. The oral evidence is that the Pandara Sannadhi appointed Ramalinga in the presence of Ganapati and before he began to serve at Tiruppanandal, and we do not consider it to be at all reliable.

This view is further strongly corroborated by Exhibits 952-5, 957-61, 964 and 1271.

Exhibit 952 is a letter, dated 31st March 1836, from Ramalinga at Benares to Ganapati at Tiruppanandal. Ramalinga said in this docu-

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ment, " I desire much to go on a pilgrimage to Pulney and to see you. I shall conduct myself according to your orders "

Exhibit 953 is a letter, dated the 8th April 1836, from Aiyarappa and Ramalinga at Benares to Ganapati at Tiruppanandal. In this they said, " In reply to your letter of the 5th March last, we both considered and wrote that either of us who might be ordered by you to come would come. You have again written that we both should consider and write. I, Aiyarappa, will come and conduct myself according to your orders. Ramalinga will, according to custom, look after the charity affairs at Benares."

Exhibit 955 is a letter, dated the 8th May 1836, from Aiyarappa to Ganapati. It said, " In your holy letter of the 26th April, it is mentioned that if Ramalinga Tambiran intends to come, a letter with his signature should be sent. It appears that that [412] Tambiran has no mind to come. If he is written to strictly that he should come, he would come. I wrote before that I would come. If a holy letter is received that I should come, I would come."

Exhibit 954 is a letter from Ramalinga to Ganapati, dated the 10th May 1836. "If Swami Avergal order that I should come, I would come."

Exhibit 957 is a letter from Ramalinga to Ganapati, dated the 25th August 1836. He says, "A day has been fixed for my starting, that is, 19th September 1836. I shall start then."

Exhibit 928 is a letter, dated the 30th September 1837, from Ganapati to Ramalinga. " You wrote that you reached Kollakundai (Karvetnagar Zemindari) on the 17th September, and that in four days you would go to Nimilapadi (Venkatagiri Zemindari)."

In Exhibits 959, dated the 3rd November 1837, and 960, under date the 24th November 1837, Ganapati gave certain directions about the affairs in the villages belonging to the Tiruppanandal Mutt which Ramalinga was visiting.

In Exhibits 960 and 961, dated the 24th and the 30th November 1837, Ganapati censured Ramalinga for delay and gave orders about certain villages.

Exhibit 964 is a letter written by Aiyarappa at Benares to Ramalinga at Tiruppanandal on the 29th September 1839. It suggests that a junior should not be appointed without actual trial and says, " Though you were doing business at Benares for the space of 15 years, you were sent for there and Ganapati Swami kept you with him for a year and wrote about you to this place and on deep consideration made up his mind."

Exhibit 1271 is a latter, dated April 1837, from Aiyarappa and Ramalinga, acknowledging that Sadayappa appointed them to management at Benares and that they acted under his orders, and promising to act in subordination to Ganapati.

Exhibit G30 is a letter written to the Pandara Sannadhi at Dharmapuram by Aiyarappa at Benares in September 1841. It says, "Ganapati did not like to have Chokkalinga for his junior, but sent for Ramalinga from Benares."

With these letters before us, it is not possible to treat either the oral evidence or Exhibits R18 and W24 relied upon for the [413] appellant, as showing that the Pandara Sannadhi at Dharmapuram appointed Ramalinga as Ganapati's junior, or the prior managing Tambirans either at Benares or Tiruppanandal as *bona fide*, though they were all no doubt Dharmapuram men.

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23. We pass on to Ramalinga's management, which extended from June 1838 to May 1841. In his turn Ramalinga added to the property of the Mutt at Tiruppanandal by new purchases, and Exhibits 153 to 159 show that the purchases aggregated in value about Rs. 4,000, and that they were made in his name and to be enjoyed after him in the line of disciples. As to endowments for new charities, Exhibit 1391 shows that a choultry, a tank, and a tope at Karuppur near Kumbakonam were bestowed in gift upon Sadayappa Tambiran by the Maharaja of Tanjore in 1832, that they since remained under Sadayappa's management and that of his successors at Tiruppanandal, that Ramalinga instituted certain legal proceedings in connection with that property, and that Ramalinga's successor, Chokkalinga, continued them and obtained a decree.

24. It appears further from letters which passed during Ramalinga's management and that of his successor, Exhibit Q4, dated March 1841, R4 dated April 1841, S18 dated 1841, and X7 dated 1850, that a certain charity was instituted at Benares by the Zamindar of Ettiyapuram at the instance of Kandappa Desigar, the Pandara Sannadhi at Dharmapuram, but that this charity was managed together with other Benares charities by the Tambirans at Tirruppanandal. They further show that this charity was maintained by the zamindar by periodical remittances, that those remittances were made, and that all correspondence in regard to them and to other matters relating to the charity passed through the Pandara Sannadhi at Dharmapuram. In Exhibit X7, which is a letter from Tiruppanandal in reference to this charity to Dharmapuram, it is stated, "as the charity was founded by Kandappa Desigar Sathya Guru, long ago, who had been there, if it (the remittance in arrear) cannot be collected by your holiness, his successor, your holiness may know that it cannot be got at all." It is clear then that this charity was founded at the instance of the Pandara Sannadhi at Dharmapuram, and that its management by the Tambiran at Tiruppanandal was presumably due to an arrangement made between the two institutions as a matter of convenience. But the charity has not been **[414]** permanently endowed, and it is not therefore necessary to dwell upon this part of the case further.

25. As to the ground of Ramalinga's succession, Ganapati's will (Exhibit 4) shows that he appointed Ramalinga as his successor, in the same manner that Sadayappa appointed Ganapati. This document describes Ramalinga as "my junior" in the same way in which Sadayappa's will described Ganapati as his junior. In Exhibit 10, Ramalinga said that he was *directed by Ganapati* to serve as his junior, and undertook to follow the arrangements made by *him* in regard to the management of properties appertaining to, or under the control of, Tiruppanandal.

Exhibit 21 shows that the Collector of Tanjore ordered the miras to be transferred to Ramalinga's name on the ground that Ganapati appointed him, and that Ramalinga was second to Ganapati.

Exhibits 348, 388 and 420 show that the Raja of Tanjore and the Zamindars of Karvetnagar and Venkatagiri recognized Ramalinga's succession as the representative of the founder of some of the important Benares and other charities managed from Tiruppanandal. In Exhibit 348 Ganapati is described as Ramalinga's "senior Tambiran," in Exhibit 388 Ganapati is referred to as Ramalinga's "elder brother," and in Exhibit 420 he is mentioned as "Ramalinga's senior."

26. As to the appointment of a junior to Ramalinga, Exhibits 964, 965, 11 and G30 relate to it.

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Exhibit 964 is a letter from Aiyarappa Tambiran at Benares to Ramalinga at Trippanandal on the 29th September 1839. It premises that Ramalinga intended to take as his junior Chokkalinga, who was then the Tambiran of the Mutt at Achiram, and suggests that he should be tried for some time before he is appointed.

Exhibit 965 is another letter written by Aiyarappa at Benares to Ramalinga at Tiruppanandal on the 16th October 1839. Adverting to the information that Chokkalinga had already come to Tiruppanandal, the letter states, "if it appears to you that he is a worthy man, arrange for some person for the Achiram Mutt; do not elevate Chokkalingam at once; keep him under you for some time and then make up your mind. You can then see what he is and decide. With respect to this matter, act as carefully as you ought."

[415] Exhibit G30, dated the 25th September 1841, which is produced by the appellant in evidence, throws light on what the Pandara Sannadhi at Dharmapuram did on this occasion. It is a letter which was written to him by Aiyarappa Tambiran in charge of the Mutt at Benares, and states, "the late Ganapati Tambiran, though he knew Chokkalinga Tambiran, was not willing to have him as his assistant and sent for Ramalinga Tambiran from here. Ramalinga wrote to me to say that he wanted to send for Chokkalinga and have him at Tiruppanandal. Your Sannidanam wrote to me that you did not like that Ramalinga should have with him Chokkalinga. I not only wrote to Ramalinga to act according to your Sannidanam's wishes, but also wrote to Chokkalinga to go back to Achiram or come over to Benares, where we might consider what might be done. In spite of this he stayed at Tiruppanandal. In a letter subsequently sent by your Sannidanam, you stated that, as there was no one at Tiruppanandal to assist Ramalinga, charities were not conducted properly, that you could think of no other but Chokkalingam, and asked me to write to Ramalinga to have Chokkalinga there. I wrote to Ramalinga Tambiran to that effect and intimated the same to you by a letter. In spite of my letter Ramalinga was hesitating till he died."

Exhibit 11 shows that Ramalinga took an agreement from Chokkalinga on the 4th May 1841, and it is to the following effect: "As I am directed to be your assistant in looking after your state and charity affairs, I shall conduct myself according to your orders. * * * Further, I shall go to Benares and other places wherever I am ordered to go." Exhibit 5 shows that Ramalinga appointed by his will Chokkalinga as his successor, and Ramalinga died in the same month. It appears then reasonable to conclude that the Pandara Sannadhi at Dharmapuram did not possess or exercise any right of appointment in connection with Tiruppanandal until Ramalinga's time. The contention that he had such right is negatived not only by the documentary evidence mentioned above, but also indicated by his own conduct. If he had such right, and if Ramalinga was a mere servant, why seek to influence Ramalinga through Aiyarappa with respect to the selection of Chokkalinga as junior. This procedure at Dharmapuram indicates a belief at that time that the right of appointing a junior was vested in Ramalinga, and that the Pandara Sannadhi could only seek to influence Ramalinga through another, [416] when he wanted to have at Tiruppanandal one who would serve the Adhinam at Dharmapuram.

27. We may next refer here to exhibits N4 and O4.

Exhibit O4, dated the 3rd November 1840, advises of the remittance of Rs. 10 from Tiruppanandal to Dharmapuram, and requests that

Abishekam and Nevediyam to the Adhinam deity. Chokkanadhaswami and "Mahesvara Puja" may be performed on the anniversary of the death of Kumara Gurupara Tambiran, who founded the Mutt at Benares. It next gives information as to the damage done to the crops on Tiruppanandal lands by floods, and concludes thus: "I fear there would be great loss (in this season). It has to be seen what would be the grace of Giyana Sambanda Swami in this respect." The terms Abishekam and Nevediyam refer to particulars of divine worship. Giyana Sambanda Swami (or Pandara Sannadhi as he is termed in the plaint) is the name of the founder of the Adhinam at Dharmapuram, and Chokkanadha Swami is that of the titular deity or image worshipped at that station.

The selection by Ramalinga of Dharmapuram for the annual ceremony to be performed for the benefit of his spiritual ancestor, Kumara Gurupara, and the invocation of the grace of the founder of the Adhinam to avert loss apprehended from flood, warrants the inference that Dharmapuram was regarded by the Tambiran of Tiruppanandal as his Gurupitam (the seat of his religious preceptor) and the founder of the Adhinam as his original Guru or spiritual ancestor. The allusion to the damage done to crops by floods might have an appropriate place in a communication either from a friend, or a subordinate, or a disciple, and we cannot attach any probative value to it as indicative of subordination in regard to management of endowments.

Exhibit N4, which bears date 4th October 1840, shows that the revenue authorities required the production of grants relating to sarvamaniam (rent free) and shotriam (assessed with a light quit rent) lands held on account of Benares charities, that Ramalinga produced them, and that he mentioned this circumstance in his letter. It refers also to a letter received from Dhurmapuram as an order. This document is referred to as indicating the status of a subordinate in regard to endowments. That the Tambirans at Tiruppanandal were in a spiritual sense the subordinates of the Pandara Sannadhis at Dharmapuram, there is no doubt. There [417] was the relation of preceptor and disciple. Its spiritual import, as denoted by the ceremony of Dattam or gift, to which we have already adverted, is that the tambiran (disciple) is his guru's slave. The footing on which they ordinarily correspond with one another is, according to the usage of the country, that of a slave and his master in a spiritual sense, and it is no matter for surprise, then, that in many letters produced in this case, terms of abject submission and adulation often take the place of expression of courtesy combined with self-respect, which should characterize communications between friend and friend and even master and servant. By virtue of the relation of preceptor and disciple, which, according both to law and usage, is analogous to that of father and son, the correspondence between them might appropriately refer to matters which affect really the exclusive property of one as affecting both and as of common interest. Inquiries and replies in regard to such matters are common as tokens of mutual regard, and might be found to characterize their correspondence, neither party contemplating however any adverse claim at the time. Having regard to these peculiarities suggested by the status of Tambirans and Pandara Sannadhis, we consider it unsafe to take mere words of subordination or occasional inquiries and replies in regard to matters affecting the charities at Tiruppanandal as safe tests of subordination. We consider it necessary to consider them together with other unequivocal acts and declarations and to determine their weight as a whole. Taking this course, we are not prepared to say that the inquiry

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and reply in regard to the production before revenue officers of title deeds relating to Benares charities indicate the existence of a legal right of control on the part of Dharmapuram.

28. We shall here notice a few letters, which show that Kandappa Desigar, who was the Pandara Sannadhi at Dharmapuram at this time, tried to influence the appointment of the junior made at Tiruppanandal, and took advantage of opportunities, which presented themselves, to initiate such interference. We observed already that Ramalinga was the first Benares Tambiran who succeeded to Tiruppanandal in supersession of his senior Aiyarappa.

Exhibit Q19 shows that Aiyarappa felt his supersession. It also shows that Ramalinga, soon after his elevation, forgot that he had been Aiyarappa's junior for fifteen years at Benares and asserted that he was Aiyarappa's master. Aiyarappa considered [418] that he was insulted, and that Ramalinga's conduct was incompatible with the spiritual relation that subsisted between them as senior and junior tambirans or brothers. He complained to their common spiritual superior, the Pandara Sannadhi at Dharmapuram, adding that "he did not like to do duty at Benares according to Ramalinga's directions, and enclosing Rs. 5 as a present to be placed at the feet of his guru (a token of reverence paid by a disciple to his guru), asked the then Pandara Sannadhi for instructions. Up to this period the Benares Tambiran and the Tambiran at Tiruppanandal acted in concert without reference to Dharmapuram, and the Benares tradition as to independence of management prevailed. Aiyarappa's supersession by Ramalinga produced discord between them and gave an opportunity to the Pandara Sannadhi to interfere. The reply, which the latter sent to Aiyarappa's complaint, is not before us; but we observe that Aiyarappa continued to serve at Benares until Ramalinga's death, that Ramalinga consulted him as to the appointment of Chokkalingam as junior, that the communications which passed between them were characterized by the sense of the relation of senior and junior brothers, that Aiyarappa at times forgot his position as a Subordinate as in telling Chokkalingam to go back to Achiram, and that Ramalinga did not openly resent it, though he pursued his own inclination. We also find that the Pandara Sannadhi wrote to Aiyarappa when he desired first that Ramalinga should not take Chokkalinga as his junior, but desired afterwards that Ramalinga should have him. These facts seem to indicate that the then Pandara Sannadhi interfered to restore harmony when the Tambirans at Tiruppanandal and Benares disagreed, and to influence the former through the latter in the selection of a successor to whom he had no objection.

29. Before we enter on Chokkalinga's career, it is desirable to summarize the course of management until Ramalinga's time. From the time of Tillanayaka to that of the succession of Sadayappa, there was but one managing Tambiran as well at Benares as at Tiruppanandal. The latter was the junior and the former the senior, but both belonged to the Adhinam at Dharmapuram. On the death of the senior, the junior succeeded, proceeded from Benares to Tiruppanandal, and exercised supervision and control from there. Exhibit 17 shows that the predecessor appointed the successor. Prior to the foundation of the Mutt at Tiruppanandal, [419] the one at Benares was the centre of supervision and control, and the managing Tambiran at that station was the recognized superintendent of charities and their responsible trustee. After the Mutt at Tiruppanandal was instituted, it became the ultimate centre of control, and the senior

Tambiran and the responsible superintendent or trustee lived there, the junior at Benares acknowledging himself to be his agent and acting in subordination to him. The peculiar feature then of this period consisted in the substitution of two centres of supervision for one, the ancient unity of control being preserved by the Benares Mutt being constituted into a subordinate centre of control, and the ancient course of succession being kept up by the appointment of the junior at Benares as the successor of the senior at Tiruppanandal. All the managing Tambirans, however, both at Benares and Tiruppanandal were Dharmapuram men and belonged to that spiritual family, of which the founder of the Adhinam at Dharmapuram was the original ancestor; but there was no other trace of affinity between the Mutt at Dharmapuram and the Mutt at Tiruppanandal and Benares.

From the time of Sadayappa to that of Ramalinga, we find that there were two managing Tambirans, both at Benares and at Tiruppanandal, a senior and a junior; and the peculiar feature of this period consisted in this double agency at each centre of control, which was probably due to a considerable increase in the number and value of endowments to be superintended. The junior at Tiruppanandal succeeded the senior, and the former was first nominated by the latter as junior and then as successor by a will which premised full ownership and an unqualified power to appoint a successor. The ancient course of succession was preserved by the appointment of the junior Tambiran in the centre of control. As before, both were Dharmapuram men and belonged to the same spiritual family. Judging from the evidence on record, Ganapati was the first junior at Tiruppanandal, who, on the death of his senior, succeeded him, but at the date of his succession he was also the senior Tambiran both at Benares and at Tiruppanandal, Aiyarappa and Ramalinga at Benares being his juniors. In the case of the second succession during this period, *viz.*, of Ramalinga, we notice that Aiyarappa, his senior at Benares, was superseded, but Ramalinga was nominated as junior at Tiruppanandal and then as successor.

[420] 30. We shall now compare the succession at Tiruppanandal with that indicated by the Mitakshara law, as applied to the property of a spiritual family. The course of succession prescribed by that law is that of the disciple, the preceptor, and the spiritual brother, who is a companion in religious study and associate in holiness, belonging to the same hermitage. As between spiritual brothers, the rule of preference is laid down in the following terms:—

> A spiritual brother and associate in holiness takes the goods of a hermit. A spiritual brother is one who is engaged as a brotherly companion [having consented to become so]. An associate in holiness is one appertaining to the same hermitage. Being a spiritual companion and belonging to the same hermitage, he is a spiritual brother associate in holiness.
>
> But, on failure of these (namely the preceptor and the rest), any one associated in holiness takes the goods, even though sons and other natural heirs exist.

Though in Smritichandrika, Madhaviya and Sarasvativilasa, the expressions "spiritual brother" and "associate in holiness" are differently explained, two conditions are mentioned in them all as indispensable, *viz.*, that the successor must have the same preceptor or belong to the same

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hermitage or spiritual family, and that he must be an associate in religious study or work (1).

The succession at Tiruppanandal then must at all events in part be referred to the special constitution of the Adhinam.

First, the succession of a disciple in its primary sense is not possible, for, as already observed, none but the senior and the junior Pandara Sannadhis of Dharmapuram are consecrated as achariyas or preceptors, and without such consecration, no one in this Adhinam is competent to appoint and attach a Tambiran to it, and the result is that every Tambiran had a Pandara Sannadhi at Dharmapuram for his spiritual preceptor. Next, the succession of the preceptor was not possible, for, the usage which obtained indicates that Kumara Gurupara, though he was a Dharmapuram man, was recognized as the real founder of these mutts, from whom succession had to be traced, and from Tillanayaka's time a [421] Dharmapuram man associated with the managing Tambiran as junior in the administration of the same religious charity and service has been appointed as successor. The ground of succession, as stated in the wills and orders issued by Collectors and in letters of recognition received from the representatives of founders of charities, was the relation as junior and senior in the Mutt at Tiruppanandal or as spiritual brothers and associates in holiness. Still, they as well as the deeds of purchase speak of succession in the line of disciples of the managing Tambiran at Tiruppanandal. The word disciple is a religious term and refers to a spiritual relation. Its recognized foundation is the tie between the person who initiates and the person who is initiated in the mula mantram or the fundamental text of the order of Tambirans. The power to initiate in this Adhinam being confined to Pandara Sannadhis, the relation of preceptor and disciple in the above primary sense is not possible as between the Tambirans belonging to the Adhinam. The only spiritual relation that is possible as between them is that of senior and junior brothers. Seniority, as recognized among ascetics, depends not on age, not on eminence for piety or learning, but on the duration of time during which he has been in the holy order.

It is here necessary to advert to another peculiarity in the constitution of the Adhinam. Its founder was the original spiritual ancestor and achariya or guru or preceptor, and all his successors as Pandara Sannadhis represented the line of achariyas or preceptors. As between them and mere Tambirans, the rule of seniority has no application, for, by reason of his status as guru, a Pandara Sannadhi, however young and however illiterate, whatever may be the duration of his life as ascetic, is the Tambiran's spiritual superior. As between the Tambirans themselves, the rule of seniority appears in a double aspect. The senior and the junior may have the same Pandara Sannadhi for their guru or preceptor, or they may have different Pandara Sannadhis belonging to successive generations for their gurus. It is usual, therefore, for a senior Tambiran to speak of a junior in common parlance as his disciple when he is to succeed him as belonging to a later generation or as a junior in the Asramam. It is in this sense that the terms junior and disciple are applied at Tiruppanandal to successors. This is also expressly referred to by Chokkalinga and Ganapati II in Exhibits 28, 29, 38, 389, and in 405. In this sense they call their predecessors "elder brothers" and "seniors."

(1) Smritichandrika, chap. XI, Sections vii. ii; Madhaviyal, para. 48; Sarasvativilasa, Foulkes' translation, Section 623.

[422] There is considerable oral evidence to show from what Pandara Sannadhis at Dharmapuram each of the managing Tambirans received his mantra kashayam from the time of Ganapati, there is documentary evidence that all the managing Tambirans were Dharmapuram men, that is, Tambirans who received their mantra kashayam originally from some Pandara Sannadhi at Dharmapuram. The Pandra Sannadhi, however, though their religious preceptor, was never the managing trustee at Tiruppanandal. The endowment deeds in regard to some of the money grants and documents executed by Talagnayar to Sadayappa in 1829 (Exhibits 582 and 583) and the course of succession that has obtained show that each had his own line of successors.

31. The subjoined table shows the course of succession in the line of Pandara Sannadhis at Dharmapuram from the time of Tillanayaka Tambiran.

1
Sivagiyana Desigar.
|
2
Muthukumara Desigar.
|
3
Talagnayana Desigar.
|
4
Kandappa Desigar.
|
5
Masilamani Desigar.
|
6
Sachidananda Desigar.
|
7
Manikkavasaka Desigar.

It should be observed here that there were a senior and a junior Pandara Sannadhi at one and the same time, and that the junior succeeded the senior unless dismissed for misconduct, and that a will was left at times by the senior Pandara Sannadhi appointing his junior as his successor. This indicates probably the source from which the course of succession at Tiruppanandal was originally derived.

32. As to the Pandara Sannadhi's connection with Tiruppanandal and Benares, we find, in the first place, that the managing Tambirans at those stations were the disciples of his Adhinam; **[423]** secondly, that the first three Pandara Sannadhis joined the managing Tambirans at Tiruppanandal in guaranteeing the due administration of money grants for some Benares charities; thirdly, that certain payments were from time to time made from Tiruppanandal for religious services and for guru puja at Dharmapuram from Sadayappa's time, while full independence in regard to the administration of endowments and of appointment in regard to succession were openly asserted at each succession at Tiruppanandal, but not challenged at Dharmapuram; fourthly, that on the death of Sadayappa, who, as a pious disciple, was liberal in his contributions to the Adhinam and warm in his attachment to the Pandara Sannadhi, a

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Tambiran and a layman suggested in 1836 to the then Pandara Sannadhi the desirability of asserting a power of appointment; fifthly, that no action was however taken immediately as suggested; sixthly, that when Ramalinga desired to take Chokkalinga as his junior, the Pandara Sannadhi wrote to Aiyarappa to inform Ramalinga that Chokkalinga was not worthy of being chosen by him; seventhly, that he again desired Aiyarappa to mention to Ramalinga that he (Pandara Sannadhi) considered that Chokkalinga was the fittest person available in the south; and, eighthly, that Ramalinga however appointed Chokkalinga as his successor by a will, which asserted his ownership as to endowments and power of appointment as to succession. It appears, further, that in Kandappa Desigar's time a charity was instituted by the Zamindar of Ettiyapuram, and that though it was entrusted to the management of the Pandara Sannadhi, it was in fact ever since managed with his consent and approval by the Tambirans at Tiruppanandal, and that the Pandara Sannadhi exercised no functions, even in regard to this charity, other than being the medium of communication between Tiruppanandal and Ettiyapuram. As to the endowment at Achiram, it was designed partly for the benefit of Dharmapuram and partly for that of Benares charities, and the Tambiran there submitted also accounts to Dharmapuram, though he was appointed by the Tambiran at Tiruppanandal. The result of the foregoing retrospect is that until Ramalinga's time the Pandara Sannadhi did not possess or exercise the power of appointing Tambirans at Tiruppanandal or interfering in the management of those tambirans.

33. The next or third period in the history of management is that of Chokkalinga and Ganapati II, both of whom were [424] employed under the Pandara Sannadhi prior to their succession at Tiruppanandal, and were in a position to be influenced in their relation to Dharmapuram more by the recollection of their former position as subordinates than by Benares traditions as to independence of management. Chokkalinga was the first of this class.

Prior to his succession at Tiruppanandal, Chokkalingam was the Tambiran in charge of the Mutt at Achiram, and before he proceeded to Achiram, he was employed in the store house at Sivasilum in Tinnevelly under the junior Pandara Sannadhi. He was however taken first on trial by Ramalingam, and continued on that footing for nearly two years before he was appointed junior and successor under Exhibits 5 and 11.

The ground on which Chokkalingam rested his succession was his appointment by Ramalingam as his junior and the continuance of his relation as such when the latter died. In Exhibits 23 and 24, he stated, "My senior Kasivasi (residing at Benares) Ramalinga Tambiran appointed me to manage all his affairs, and whilst I was so doing, he died of illness on the 4th May, 1841."

By Exhibits 26 and 27, the registry in the Collector's books was transferred to the name of Chokkalingam from that of Ramalingam. They show that the relation as junior and senior was regarded by the then Sub-Collector as the basis of Chokkalingam's title. In Exhibit 27 it is said, "Whereas Chokkalinga Tambiran who was nominated by him (Ramalinga Tambiran) during his lifetime is entitled to everything, and no objection or claim was made though notices inviting the same were duly published, we have signed the miras register or list."

Chokkalingam's succession was intimated to, and approved by, the representatives of some of the influential founders of charities under the management of Tiruppanandal (Exhibits 389 and 405, 422 and 456). In

Exhibits 389 and 405, Ramalingam is referred to as "your (Chokkalingam's) predecessor or elder brother," and in 404 and 422, as "your senior."

We have already adverted to Ramalinga's will (Exhibit 5) which describes Chokkalingam as "my junior," and declares that "Chokkalingam alone is to be the full owner after my death of the properties, &c., belonging to me" . . . . . .

34. In connection with this succession, it was contended that the Pandara Sannadhi at Dharmapuram was the person who [425] appointed Chokkalinga Tambiran, and our attention was drawn to Exhibits X41, M, L, G30, and H2.

Exhibit X41 is a cadjan, which purports to have been addressed by the Pandara Sannadhi at Dharmapuram to Chokkalingam. It says, "As Ramalinga Tambiran, Dharmakarta of Kasi (Benares) Mutt, died on the 24th instant (Chittarai month, 4th May), you are appointed this day the 25th instant as the dharmakarta of the said charities, and are, therefore, directed to conduct the customary charities of feeding, &c., in the sacred places of Benares, Ramesvaram, and without any deviation from the fixed scale and in accordance with the established usage." The genuineness of this document is denied for the respondent and we shall presently consider the evience in regard to it.

Exhibit M is a letter written on the 28th May, 1841, by Aiyarappa at Benares to the Pandara Sannadhi at Dharmapuram. It refers to a letter addressed by Ramalingam, informing Aiyarappa of Chokkalingam's appointment by him as junior. Ramalinga is alleged to have said that "having been very ill for the last fifteen days, he felt that his life was uncertain, *received (obtained) your (Pandara Sannadhi's) order* and reported the same to the Collector and others, and arranged for the due conduct according to usage of the Benares charity by Chokkalingam." It refers next to a letter from the Pandara Sannadhi received after Ramalingam's death, and states, "I learned from your letter that on account of the illness of Ramalingam you went with the holy crowd (disciples) to Tiruppanandal on the night of the 24th at 9 P.M., and that on the morning of Wednesday, the 25th, you gave Chokkalingam parivattam (head cloth) and did everything necessary, and that you appointed him." The letter next contains a request and says, as Chokkalinga is a new man, as Benares is an important charity, and as he has no experience of this place, I request that *you will direct Kumarasamy Tambiran, who comes from here to be with him as assistant and do business.*"

Exhibit L, dated the 19th October, 1840, was written by Aiyarappa to Masilamani Desigar, the Pandara Sannadhi at Dharmapuram. It refers to the death of Kandappa Desigar in August, 1840, and throws light on the conduct of the new Pandara Sannadhi in regard to Chokkalingam's appointment by Ramaligam as junior. It states that the new Pandara Sannadhi was in favor of Chokkalingam's appointment, that "the neighbouring [426] men who were attached to the Adhinam" petitioned the Pandara Sannadhi to keep Chokkalingam at Tiruppanandal, that he asked for Aiyarappa's opinion, and that Aiyarappa said, "I also consent to it, if it is to your liking, appears agreeable to Ramalingam, and is consistent with the proper conduct of the charities. I agree to your appointing such a person to the management of the other places attached to the Benares charity as to you in consultation with Ramalingam seems meet."

Exhibit G30 is a letter from Aiyarappa to the Pandara Sannadhi, dated the 25th September, 1841. It stated that the liabilities of the Mutt at Benares amounted to Rs. 50,000, whilst the amount due

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to it was limited to Rs. 15,000, and that he sent word to Chokkalingam through Kumarasami Tambiran to arrange for discharging the debts due at Benares. It next referred to Chokkalingam's appointment by the Pandara Sannadhi with apparent reluctance. It next recited the contents of a letter addressed from Benares to Chokkalingam at Tiruppanandal, and complained of the latter's silence as an act of discourtesy. The contents as set forth therein are, "On the death of Ramalinga Tambiran his sannidhanam went there (Tiruppanandal) and made you the head of the mutt there, what did you place at the feet of sannidhanam on prostrating before him? How much did you spend in connection with the funeral ceremonies of the late Tambiran? What balance was left in the treasury? You must write to me on these matters. Some Tambirans are coming from here and you must take Kumarasami Tambiran, who is one of them, as your assistant." The letter then dwells on the necessity of the head of the Mutt at Tiruppanandal acting in harmony with the head of the Mutt at Benares, and on the previous usage according to which Sadayappa, Ganapati, and Ramalinga, it was said, wrote to Benares on every transaction that took place at Tiruppanandal. It concludes with a request that the Pandara Sannadhi "will, to avoid any misunderstanding between them, decide the matter, and that he will order Kumarasami to remain at Tiruppanandal and assist Chokkalingam in management." There is nothing before us to show what passed since between Aiyarappa and the Pandara Sannadhi, but Kumarasami was not taken as junior, and the misunderstanding between Tiruppanandal and Benares resulted in a quarrel. It appears next that as Ramalinga's senior, Aiyarappa urged that he was lawfully entitled [427] to the Mutt at Tiruppanandal, that he appointed Kumarasami as Ramalinga's successor, and that he addressed a petition to the Collector to that effect, and that Chokkalinga made a representation that Aiyarappa and his predecessors were appointed by the Tambirans at Tiruppanandal, and that the former acted under the orders of the latter (exhibit 600). In this document Chokkalingam stated that the tambirans in Benares Rameswaram, Chidambaram, Achiram, and Morangi were appointed from Tiruppanandal and acted in subordination to it. It is further in evidence that, assisted by some of his friends, Kumarasami endeavoured to effect a forcible entry into the Mutt at Tiruppanandal and create a disturbance, that the Collector of Tanjore interfered and protected Chokkalinga's peaceful possession which extended to two years, referring Aiyarappa and his nominee to a civil suit (exhibits 787 and 788). With Aiyarappa's death in July 1843 the cloud that hung over Chokkalingam's position as the Tambiran at Tiruppanandal cleared away.

These violent proceedings suggest the probable inference that the Pandara Sannadhi did not aid Aiyarappa or favour the introduction of a Benares man as Chokkalingam's junior.

35. The Pandara Sannadhi does not appear however to have interfered with Chokkalingam's management. It is not shown that either Chokkalingam or his predecessors or his successors ever accounted for their management to Dharmapuram. It was Chokkalingam that was regarded not only as the ostensible but also as the sole responsible trustee by the representatives of the founders of charities. It was to him that the Raja of Venkatagiri wrote in 1850 about the repair of his choultry at Benares (exhibit 421). Again, it was Chokkalinga who was called upon by the Collector of Tanjore in February 1852 to explain where and by whom the charities founded at Benares by the Raja of Tanjore were managed

(exhibits 603 and 604). Exhibit 457 shows likewise that one Varada Pillai of Madras addressed Chokkalingam in regard to the charity at Srirangam managed from Tiruppanandal. We further find from the letters numbered 351 and 356, dated January and November 1844, that the representatives of the Raja of Tanjore considered the Tambiran at Tiruppanandal as solely responsible for the due administration of the charities at Benares and the Tambiran at Benares as his nominee and agent. [428] They also show that it was Sadayappa Tambiran of Tiruppanandal, who appointed Aiyarappa to Benares.

36. Apart from the external recognition of Chokkalingam as the real trustee, his own declarations and acts indicate independence in his capacity of managing Tambiran at Tiruppanandal. Like his predecessors he made purchases in his own name, for himself and his successors in the line of disciples, and these extended from January 1842 to December 1851 (exhibits 160-175).

Exhibit 1336 shows that he hypothecated in 1851 two villages belonging to Tiruppanandal in his own name and raised thereon Rs. 9,560.

Exhibits 1392 and 1399 show that he instituted legal proceedings in his own name in regard to endowments and other properties under his control.

Exhibits 1273-6 prove that nearly Rs. 60,000 set apart in his will by one Pachayappa Mudaliar at Madras for certain charities at Benares were made over to Chokkalinga in 1851 under the order of the late Supreme Court, as a fund from the interest of which the charities indicated by the testator were to be administered by the tambirans at Tiruppanandal.

In exhibit 1273, the petition addressed by Chokkalingam to the late Supreme Court on the 24th July 1848, he stated that the business at Tiruppanandal "was carried on by a principal and a deputy tambiran, the deputy being from time to time chosen and elected by the principal; that upon the death of the principal tambiran, he is succeeded by the deputy, who proceeds to elect and choose a deputy to supply his place; that previous to the election of such deputy the principal tambiran usually takes upon trial the person whom he proposes to elect as a deputy, and keeps him for some time on trial before he appoints him to the office of deputy; that he and his predecessors have had the *sole management* of the funds bestowed by charitable individuals in Southern India, and have from time to time remitted the amount of such contributions to agents at Benares, who under his directions distributed the funds so remitted and accounted to him for the same; that such agents were always entirely under the management and control of himself and his predecessors and were liable to be removed with or without cause, and that in fact himself and his predecessors have always been, since the establishment of the [429] Mutt at Tiruppanandal, *the only persons responsible* to the several charitable persons for the due application of the funds bestowed by them in aid or support of charities." Though the final order on this petition was made in 1851, it does not seem that the Pandara Sannadhi at Dharmapuram chose to come forward on this occasion and assert his ownership to or control over the Mutt at Tiruppanandal, though an advertisement was published in the local newspapers at Madras, inviting all persons who desired to claim the fund to prefer their claim.

37. As regards the tambirans concerned in the local superintendence of endowments, Chokkalingam appears to have appointed them of his own authority. About this time the Mutts at Benares, Morangi in Nepaul, Achiram in Travancore, and Ramesvaram, acted in subordination

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to Tiruppanandal. As to Benares, Aiyarappa died in July 1843, and Chokkalingam directed Saminadha Tambiran at Morangi to proceed to Benares and take charge of the Mutt there. Exhibit 972, September 1843, shows that Saminadha reported his arrival at Benares and entered on his duty as directed by Chokkalingam. Exhibit 356 proves that the Raja of Tanjore declined in 1844 to notice a communication from Saminadha Tambiran at Benares, because he did not say that he was appointed by Chokkalingam, and that Sadayappa appointed Aiyarappa and gave him arukattu and cloth. Exhibit 987 shows that Chitambaranadha, who was appointed to succeed Saminadha, was Chokkalingam's subordinate, and that the former brought to the notice of the latter the embarrassment caused by the creditors of the Mutt at Benares and asked Chokkalingam to come there and to make some arrangement. See also exhibits G5 and W5.

Exhibit 642, dated March 1848, shows, that the Tambiran at Ramesvaram applied to Tiruppanandal for instructions as to feeding certain persons in the choultry in his charge.

Exhibit 999, dated March 1850, shows that Chokkalingam was asked to send a tambiran to serve as junior at Benares, and that Chitambaranadha proposed certain arrangements in regard to Morangi.

Exhibit 987, under date September 1848, proves that Chitambaranadha, the senior Tambiran at Benares, asked Chokkalingam at Tiruppanandal to remit Rs. 25,000 and thereby put an end to the annoyance arising from the pressure put upon him by the creditors of the mutt at that place.

[430] Exhibit 1000, dated May 1850, shows subordination, and that orders were asked for in regard to Benares and Morangi.

Exhibits 964 and 965 prove that in September and October 1839 Aiyarappa asked Ramalinga to send a tambiran to Achiram in the place of Chokkalingam, when the latter was taken as junior at Tiruppanandal.

38. Passing on to Chokkalingam's relation with Dharmapuram, the first thing that attracts notice is that he was a disciple of Dharmapuram. In June 1845 he called the Pandara Sannadhi his "father" (exhibit J5); and in June 1851 he said the Pandara Sannadhi was the common guru of himself and of the Tambiran at Trichinopoly (exhibit E8). In letter Y5 addressed to the junior Pandara Sannadhi at Tinnevelly in June 1847, Chokkalingam said, "You ask whether it is proper for me to charge for small articles sent from Tiruppanandal, whilst I belong to the same Adhinam and I am treated well. This is true. Everything here is yours. Have you not taken to yourself my soul, my body, and my property when I became your slave." In exhibit W47, which we have already adverted to, Sadayappa Tambiran was praised as "the eldest darling and son of the Adhinam." Judging of filial piety by the total amount of contributions made to Dharmapuram from Tiruppanandal. Chokkalingam demonstrated his attachment far more actively than Sadayappa did. (1) Two Katlais or special services were instituted in the eastern and western temples attached to the Adhinam at Dharmapuram, and Rs. 3-14-0 a month was paid for daily midday service or puja in those temples, besides 1 rupee a month for Pradosha Katlai, or worship on the 12th day of every lunar fortnight. (2) There was another special morning service instituted to be performed in the month of Margali (December-January) every year. (3) Chokkalingam made frequent contributions on account of the expenses of guru puja at Dharmapuram, which is the annual ceremony performed for the spiritual benefit of the

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founder of the Adhinam and that of his successors. (4) There were also remittances made from time to time from Tiruppanandal to Dharmapuram on account of what is called Maheswarapuja, which is the annual ceremony performed for the spiritual benefit of the deceased Tambirans of Tiruppanandal. Guru puja, in which the Pandara Sannadhi is the chief actor, can only be performed where the Pandara Sannadhi is, whereas Maheswarpuja [431] may be performed at Tiruppanandal or preferably at Dharmapuram, which is the seat of the tambiran's guru. There is considerable oral evidence to show that the expenses of the guru puja at Dharmapuram were paid by the Tambirans at Tiruppanandal, and it is corroborated by the fact that payments were made on this account from the time of Sadayappa Tambiran. In May 1841 Chokkalingam sent Rs. 100 for Maheswarapuja to be performed on account of Ramalinga. In May 1844, he sent Rs. 200 for guru puja at Dharmapuram; Rs. 50 in August 1847; Rs. 100 in May 1848; Rs. 100 in April 1849; Rs. 30 in September 1849; and Rs. 150 in April 1842. Apart from these contributions, sundry articles were sent as presents in token or reverence for the Pandara Sannadhi or of pious devotion to the idols worshipped at Dharmapuram. We further find that the junior Pandara Sannadhi visited Tiruppanandal once in 1841 and again in 1846, that the Tambiran at Tiruppanandal not only received, entertained and honored him as a disciple should do, but also supplied to him a number of things for his use and money for the expenses of his journey to Sivasilam in Tinnevelly.

39. In addition to making these contributions, Chokkalingam showed great attachment to the Adhinam and interfered and interested himself in matters which specially related to Dharmapuram. In 1846 and 1847 he concerted measures to secure to Dharmapuram certain annual income from the Adhinam lands at Achiram. In October 1847 he advised how the management at Dharmapuram might be made efficient, as to what suggestion would add to the dignity of the Adhinam when the opinion of the Pandara Sannadhi was called for by District officers in regard to some administrative arrangements, and as to several other matters which it is not necessary to enumerate here. He also reported to the Pandara Sannadhi what went on at Benares and Tiruppanandal, as if the Pandara Sannadhi took an interest in Tiruppanandal matters. His communications were in the highest degree deferential in tone, so much so that he said in Exhibit J5, "It is beyond the power of my humble self to write your praise, when you, my father, have incarnated yourself simply because you had a desire to send millions of souls to heaven."

These contributions, payments, professions of attachment and the tone of abject adulation, which we have mentioned, may be referred to the spiritual relation that existed between the two [432] institutions. The account now and then given of Tiruppanandal and Benares affairs might appropriately have a place in letters written by a disciple to his guru, who is either believed, or deferentially assumed, to be interested in him.

In Exhibit J6, dated July 1847, Chokkalingam stated to the Pandara Sannadhi that he appointed one Saravana Tambiran *as directed* to the Mutt at Achiram. It is not shown why he took the order of the Pandara Sannadhi in regard to this appointment, unless it was that the Tambiran had also to manage the lands which as already shown were granted partly for the benefit of the Mutt at Dharmapuram.

With the same letter he forwarded also an account of receipts and disbursements in connection with his pilgrimage to the sacred places of

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Kuttalam and Papavinasam. It is not explained why this was done, but we observe that it was not an account in relation to his management at Tiruppanandal.'

There is also documentary evidence in this period, which shows how Tambirans were attached to the Adhinam at Dharmapuram.

Exhibit U4 shows that in July 1841 Chokkalingam asked the Pandara Sannadhi to ordain or give mantra kashayam to certain persons mentioned therein, in order that they might be deputed for service in the Mutts under Tiruppanandal.

Exhibit K5 proves that in July 1846 Chokkalingam wrote to the junior Pandara Sannadhi at Sivasilam to the effect that the senior at Dharmapuram gave mantra kashayam only to one of several persons named by him."

By Exhibit U7, dated September 1850, Chokkalingam asked the junior Pandara Sannadhi to send two Tambirans, who where then in Tinnevelly, in order that he might depute them to places under his supervision, Benares and Chidambaram.

In Exhibit C29, dated December 1846, the junior Pandara Sannadhi was asked to send several Tambirans, and the letter stated that there must always be Tambirans at Benares available for service in the cause of the charities, and that it was also the senior pandaram's opinion. In Exhibit C7, dated December 1848, he applied to the junior Pandara Sannadhi for a supply of Tambirans. Again, the evidence shows that it was Chokkalingam that sent Tambirans to Benares in August 1850 and directed that one Kumarasami Tambiran be deputed to Morangi in Nepaul. It is also shown that when Chokkalingam desired to assert his authority, **[433]** he sent back the Tambirans deputed by the Pandara Sannadhi at the instance of Chitambaranadhan, and sent to Benares others of his own choice belonging to Dharmapuram.

40. There is further oral evidence that the Pandara Sannadhis alone can ordain Tambirans. It is confirmed by the fact that they are alone consecrated or anointed as achariyas or preceptors, and that there is no power to ordain where there is no such consecration. The documentary evidence further supports it and conveys the impression that on the one hand Chokkalinga considered that the Pandara Sannadhi was alone competent to ordain Tambirans, and that he ought to employ Dharmapuram men, whilst on the other, he believed that the right to appoint them to serve in the mutts under the supervision of Tiruppanandal was vested in him.

41. We shall here refer to the disagreement which arose between Chokkalingam and Chitambaranadhan at Benares, and which in the result humbled both and led to the nomination of Ganapati II as junior at Tiruppanandal. It appears that, when Aiyarappa was in charge at Benares, he incurred a debt of upwards of two lakhs of rupees; and that out of this amount, nearly a lakh of rupees still remained to be paid, the interest due thereon forming a heavy charge on the income that ought to be devoted to the charities. Both Saminadha Tambiran and Chitambaranadha Tambiran brought to the notice of Chokkalingam that the creditors were growing impatient and troublesome, and that it was necessary to arrange for paying them. Though the endowments at Benares were thus overweighted, Chokkalingam, it was said, continued his career of ostentatious liberality and even failed to remit the collections made in the south to Benares punctually. This dereliction of duty on his part caused dissatisfaction and hampered the Tambiran at Benares to a considerable extent in duly

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executing the charities in that place. The Pandara Sannadhi at Dharmapuram heard of this state of things, and placing himself in communication with Chitambaranadhan, cautiously drew forth from him revelations, which seriously compromised Chokkalingam's character for efficient management. Masilamani Desigar, the Pandara Sannadhi at Dharmapuram, it is suggested for the respondent, interfered in Tiruppanandal ostensibly to place the Benares charities on a satisfactory footing, but really, as the result shows, to bring in Ganapati II, another subordinate of the [434] Adhinam in the south as the managing Tambiran at Tiruppanandal. We shall examine into the correspondence to see to what extent this quarrel affected the previous relation between Dharmapuram and Tiruppanandal.

By Exhibit S19, which refers to other confidential letters, Chitambaranadhan, Chokkalingam's subordinate at Benares, promised to send a letter to the Pandara Sannadhi, in order that the latter might show it to Chokkalingam and animadvert on his conduct in terms of severity. It concludes with the request that the Pandara Sannadhi would lecture Chokkalingam on his conduct, and refrain from giving cloth to any Tambiran as junior at Tiruppanandal until the writer came to the south as directed.

This document shows that Masilamani Desigar opened a secret correspondence with Chitambaranadhan, that Chitambaranadhan eagerly entered into it, that both wanted to humble Chokkalingam, that Chitambaranadhan desired to influence the appointment of a junior, and wrote as if he thought that the power of appointing a junior was vested in the Pandara Sannadhi.

Exhibit G 28 shows that Chitambaranadhan sent the letter which he promised to send, that it was shown to Chokkalingam, that he (Chokkalingam), pointed out that his conduct was all that might be expected in the circumstances in which he was placed and over which he had no control, and that the Pandra Sannadhi desired him to send a suitable reply to Benares enclosing therewith the letter received from Dharmapuram.

This indicates that Masilamani Desigar desired then to proceed no further, and was satisfied with his having interfered to demand an explanation and thereby used his power as the head of the Adhinam to call upon his disciple to account for apparent mismanagement and to restore cordiality between Tiruppanandal and Benares.

But the letter which Chokkalingam wrote to Chitambaranadhan shows that he took umbrage at the conduct of the latter. He said in it that "he did the business of thecharity at Tiruppanandal *under the orders of the Pandara Sannadhi at Dharmapuram*, while the Tambiran at Benares did business there under his (Chokkalingam's) orders." Our attention was drawn at the hearing to the expression "under the orders of the Pandara Sannadhi at Dharmapuram " as evidence of subordination. The circumstances in which the letter was written and the Pandara Sannadhi's position [435] as a spiritual superior are the only evidence in regard to the sense in which that expression was used.

That letter provoked an assertion by Chitambaranadhan of the independence of Tiruppanandal and of subordination to Dharmapuram. Exhibit P is the communication addressed by him to Dharmapuram with reference to it and we consider it desirable to set out at length certain statements which it contains and on which considerable stress is laid for the appellant. Chitambaranadhan said—" The statements made by

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Chokkalingam without remembering well-known and well attested facts are false, because when the first Gurupara Swami was made a Tambiran, the then Pandara Sannadhi ordered him to travel to the north and return after bathing in the Ganges; Gurupara accordingly proceeded to Benares, bathed in the Ganges, resumed his travels, acquired means of conducting some charity, and submitted to the Pandara Sannadhi an account of acquisitions made by him. Thereupon the Pandara Sannadhi ordered him thus: "Get for the Adhinam fame by going to the place wherein you acquired the means of conducting charity and by performing charity there. Do not mix up those charity funds with our resources." Accordingly Gurupara Swami got leave of his guru, came to Benares and began to perform charity. From that time to this date the charity has been conducted splendidly. In order that resources which could be collected there might not be wasted but duly realized and sent here, the predecessor in this Mutt visited Dharmapuram, and under the orders of the Pandara Sannadhi there built mutts at Tiruppanandal and in other places. One of the tambirans here was placed in charge of the Mutt at Tiruppanandal, and he was ordered to act in accordance with the wishes of the tambiran managing the charities at Benares. If the Tambiran at Tiruppanandal should happen to be a senior and the tambiran here a junior, the charity is not to be neglected by reason of this seniority; but keeping in mind that the Benares charity is the most important of all charities, the two tambirans conducted the charity in harmony, but with due regard to seniority. In accordance with this practice Ramalinga Swami, who went from here and managed the charities at Tiruppanandal, caused the Tambiran now at Tiruppanandal to be sent for, instructed him in all necessary matters and had everything done for him in accordance with custom. If forgetting all this the Tambiran at Tiruppanandal imagines that **[436]** the Mutt at Benares is his own and says it is under his control, is it not derogatory to your dignity?"

In Exhibit R, dated January 1850, Chitambaranadhan referred to a letter from Chokkalingam as containing a statement that "Tiruppanandal was omnipotent, and all other places were subordinate to it."

This phase of the quarrel in which both Tambirans, whilst contradicting one another as to the relation between them, acknowledged subordination to Dharmapuram, favoured the interference of Masilamani Desigar then at Dharmapuram.

It seems that he wrote to Benares expressing dissatisfaction with Chokkalingam, and with the regard shown by him to one Kutti Tambiran asking Chitambaranadhan to come to Dharmapuram, and promising to make a suitable arrangement for the due conduct of the charities and to appoint a proper person as Chokkalingam's junior (Exhibit R). In this letter Chitambaranadhan said that "the honor and the fame of the charity conducted at Benares belonged to the Adhinam at Dharmapuram, and that as a son of that Adhinam, he placed implicit faith in the Pandara Sannadhi and asked for a further assurance that he might come to the south in expectation of a satisfactory arrangement being made. Though this assurance was given, the Tambiran at Benares put off his journey to the south and made various excuses from time to time. Meanwhile Chitambaranadhan complained to some of the zamindars and to the Maharaja of Travancore that the collections made at Tiruppanandal were not duly remitted to Benares, and the latter threatened to resume the village granted

for the maintenance of a charity at Benares. This caused alarm at Tiruppanandal and at Dharamapuram, and for a time the *esprit de corps* influencing the heads of Adhinams, prevailed against every other consideration. Both the senior and junior Pandara Sannadhis censured Chitambaranadhan for making to outsiders revelations which are likely to stain the Adhinam in public estimation, and thereby checked disagreeable disclosures. Amidst these troubles Chokkalingam's health failed, and he also asked Chitambaranadhan to go over to Tiruppanandal. This softened Chitambaranadhan who wrote to the Pandara Sannadhi in December 1850 that in the event of Chokkalingam's illness proving serious, the Pandara Sannadhi should make some temporary provision for management at Tiruppanandal and invest a person with cloth [437] permanently after his arrival. But Chokkalingam's illness did not then take a serious turn as was apprehended, and Chitambaranadhan delayed his visit to the south until 1852. In the meantime Kumarasami Tambiram, whom Chitambaranadhan desired to see appointed as Chokkalingam's junior, died, and the senior Pandara Sannadhi proceeded on a tour to Tinnevelly. In September 1851 he wrote to Chitambaranadhan to the effect that he knew the history of Chokkalingam's management, the conduct of his agents and the opinions of the representatives of those who endowed the charities, that he obtained an explanation from Chokkalingam, that he consulted the Tambiran at Tirunallar as to what should be done to secure efficient management. and that he was in communication with Vaidilinga Tambiran at Trichinopoly belonging to the Dharmapuram Adhinam (Exhibit H2). In the same letter Chitambaranadhan said that Vaidilingaswami would do well as Chokkalingam's junior. This letter shows also that for the previous six months no remittances were made to Benares, and that Chokkalingam said, when he was addressed :—"What is to be done? The endowment founded by the Raja of Pudukotta and the Zamindar of Karvetnagar have been attached and remittances are being made to you direct from Travancore. The feeling of other endowers of charities is well known. Let things take their course according to the will of God." In addition to this imbecility on the part of Chokkalingam, the letter complained that Chokkalingam did not comply with a recent arrangement made, *viz.*, that a fixed sum was to be sent punctually to Banares and that Rs. 15,000 was allowed to fall into arrears. For this amount Chitambaranadhan drew on Chokkalingam, who after wavering for some time as to whether he ought to honor the draft, eventually borrowed and paid it. Chitambaranadhan asked again for an assurance from the junior Pandara Sannadhi that a proper arrangement would be made for ensuring efficient management before he made up his mind to proceed to Dharamapuram. In January 1852 he wrote to the Pandara Sannadhi at Dharmapuram expressing his satisfaction with the letter received from the latter that it had been arranged that Vaidilinga Timbiran should go to Tiruppanandal and manage the charities (Exhibit K2). In March 1852 Chitambaranadhan had an interview with Chokkalinga at Tiruppanandal. It was arranged that the past was to be forgotten and that they were to be friends again, that Chokkalingam was to act in accordance with [438] Chitambaranadhan's opinion, *viz.*, that Vaidilinga Tambiran was to manage the affairs at Tiruppanandal, that Chokkalingam was to be guided by him, and that not a pie was to be spent otherwise than with his consent. Chitambaranadhan reported this fact to the Pandara Sannadhi, who was then on his tour, and asked him to send Vaidilinga Tambiran to Tiruppanandal from Trichinopoly. To his surprise he got no reply. In his letter Exhibit N2

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he reminded the Pandara Sannadhi of the assurance he had given to induce him to come from Benares, spoke of the present indifference as a misfortune, and said he had to go back to Benares on the 10th April. In June 1852 he acknowledged the receipt of a letter asking him to go to Dharmapuram in order that the Pandara Sannadhi might settle in consultation with him what was to be done in regard to Tiruppanandal matters. He excused himself and said that he had written to Chokkalingam that the latter should come with Ganapati Tambiran to Dharmapuram, and requested that the Pandara Sannadhi would order Ganapati to do business at Tiruppanandal as junior. Exhibit O2 shows that shortly after Chitambaranadhan's return to Benares, he heard that Chokkalingam died and Ganapati succeeded him and wrote the letter Exhibit P2 to the Pandara Sannadhi thus: "Your Sannidhanam has invested Ganapati with cloth. Give him such advice as may be necessary and protect him."

42. We shall here consider what advance was made by Dharmapuram in regard to the nature of its relation to Tiruppanandal. It will be remembered that Exhibits R19 and W24 indicated in 1836 what that relation ought to be in order that the influence and interests of Dharamapuram might prevail at Tiruppanandal. There was then no opportunity for interference and no action was apparently taken.

Aiyarappa's supersession and Ramalingam's self-assertion created the first opportunity. Kandappa Desigar told Ramalingam not to deny the consideration due to his senior and to act in harmony with him. This was the first form of interference. This interference paved the way for frequent communications between Aiyarappa and Dharmapuram, and he showed a readiness to advise Ramalingam as suggested at Dharmapuram in regard to the appointment of Chokkalingam as junior. There is ground for the belief that in Kandappa Desigar's time the spiritual senior was kept well in hand and played off against his spiritual junior and [439] official superior. This made both look to support from Dharmapuram and increased its influence at Tirruppanandal.

A further step was made when Ramalingam died. Masilamani Desigar proceeded to Thiruppanandal, and though Ramalingam had died before he arrived after appointing, according to custom, Chokkalingam as his successor, the Pandara Sannadhi remained to attend Chokkalingam's installation. On that occasion he presented to Chokkaligam a cloth. This act may be regarded by a disciple as a token of blessing and congratulation, and Chokkalingam appears to have treated it in this light. But the Pandara Sannadhi appeared to look at it as a present made by him to a Tambiran when he gave him an appointment. In his letter to Aiyarappa he spoke of his having appointed Chokkalingam.

When Chokkalingam showed attachment to the Pandara Sannadhi and Aiyarappa's services were no longer needed, his suggestion that Kumarasami of Benares should be Chokkalingam's junior did not receive support from Dharmapuram, and it was not acceded to. When Aiyarappa began to assert his right as senior to appoint Ramalingam's successor, the Pandara Sannadhi left him to shift for himself.

The quarrel between Chokkolingam and Chitambaranadhan created another opportunity for Dharmapuram. The gain from it was this, *viz.*, (i) that Ganapati, another former subordinate of Dharmapuram, was appointed to Tiruppanandal; (ii) the giving of cloth was repeated for the second time; (iii) during the controversy both the Tambirans at Benares

and Tiruppanandal acknowledged that they were subject to the orders of the Pandara Sannadhi at Dharmapuram; (iv) the Tambiran at Benares frequently spoke of giving cloth as equivalent to appointment and treated the power to appoint a junior as vesting in Dharmapuram; and (v) Ganapati was practically, if not formally, appointed by Dharmapuram.

The Pandara Sannadhi himself appears to have formulated the character of his interference in his letter of the 19th May 1852 to Chitambaranadhan. Exhibit O2 shows that the latter was told that if he went over to Dharmapuram it would be arranged with the Tambiran at Tiruppanandal, first, how much of the money was to be remitted to Benares for the performance of charities; secondly, how much of it was to be applied in liquidation of **[440]** debts due at Tiruppanandal and Benares; and, thirdly who should be appointed as junior Tambiran at Tiruppanandal.

43. We shall now consider the relation between Tiruppanandal and Dharmapuram during Ganapati's management which commenced on the 25th July 1852 and extended to the 10th November 1853.

There is no reason for doubting that like his predecessors Ganapati was also a Dharmapuram Tambiran. Both Chokkalinga and Ganapati stated that they were elder and younger brothers, and this description implies that they were disciples of the same guru or attached to the same Adhinam. On the day Chokkalingam died, Ganapati remitted Rs. 50 to Dharmapuram and prayed that "Mahesvarapuja and Abhishekam and Nevediyam to Chokkanadha and Giyana Sambanda Swami might be performed for the benefit of Chokkalingam." Special service to the idol at Dharmapuram and to the image of the founder of the Adhinam there on the occasion of a Tambiran's death is an indication that Dharmapuram was the seat of his spiritual family and ancestor. In June 1853 he stated in Exhibit E9 that the Pandara Sannadhi asked for an explanation for his failure to attend the "Gurupuja" performed at Dharmapuram about that time, that he gave an explanation and that it was accepted as satisfactory. This discloses the consciousness of a duty to attend the Gurupuja at Dharmapuram, which points to the relation of disciple and guru. We may conclude, then, that the customary spiritual relation of disciple and preceptor continued to subsist in Ganapati's time between the Pandara Sannadhi at Dharmapuram and the Tambiran at Tiruppanandal.

44. As to his relation to the properties appertaining to the mutt and charities at Tiruppanandal, there was also no change. Though the will said to have been made by Chokkalingam is not produced, Exhibits 38 and 616 show that one was considered to have existed at that time. However this might be, Chokkalingam stated in his petition to the Collector (Exhibit 28) that no one but Ganapati, who was nominated by him as junior and associated with him in the administration of the affairs of his mutt, had any connection with his estate, and with whatever was due by or to him. Ganapati's conduct until his death in buying lands for him and his successors in the line of disciples points to the same conclusion.

[441] 45. As to the basis on which Ganapati's succession was rested, there was also no difference. Both Chokkalingam and Ganapati referred, as the cause of succession, in Exhibits 28 and 29, to the spiritual relation as elder and younger brothers, to the appointment of Ganapati by Chokkalingam as his junior and to Ganapati's association as such in the administration at Triuppanandal according to custom. In his letter,

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dated the 19th June 1852, Chokkalingam said :—"After consulting Chitambaranadhan we sent for Ganapati Tambiran who was managing the affairs of the mutt belonging to us at Chitambaram, so that he might manage the charity affairs well, as our junior, and gave him cloth on the 5th June, and he has accordingly been looking after the affairs relating to this place. We therefore wrote to Chitambaranadha Tambiran who had come there to visit the Maharaja who fills the position of a parent in regard to this place, and he has made known these facts to the Maharaja." For the purpose of altering the registry in his books, the Collector recognized Ganapati's succession in October 1852, and stated that no objection was raised to it though notices were published inviting the same. It appears from Exhibits 372 and 1449 that the then Maharaja of Tanjore, whose ancestors founded some of the important charities at Benares and were regarded as the patrons of the mutt from their position as former rulers of the province, recognized the succession and sent to Ganapati some presents as customary tokens of congratulation. The former states : "We are very glad to learn from your letter that during the lifetime of Chokkalinga Tambiran you were appointed to manage all his affairs in his stead, and that you having moved with the senior Tambiran who was very pious and of good conduct, were liked by him, and as a reward for your good behaviour you have succeeded to his high position." In a letter from the Tanjore Palace, Ganapati's appointment by Chokkalingam as junior is referred to in these terms :—" Such a person (Chokkalingam) has chosen you and appointed you for this high place." Thus the ground of succession, which was publicly stated at Tiruppanandal as being in accordance with custom and accepted by the Collector and Maharaja of Tanjore, presumably with the knowledge of the Pandaram at Dharmapuram and without any protest from him, was the appointment of a spiritual brother by Chokkalingam as his junior and the association of such nominee in the administration of endowments at Tiruppanandal during Chokkalingam's life. [442] Although wills were made, they invariably declared the junior appointed by the senior during his life and associated with him in management as lawful successor, and confirmed his succession.

46. In connection with the power of appointment claimed by the appellant, reliance was placed on three letters, two from Chitambaranadhan, the Tambiran at Benares, and one from Chokkalingam himself.

In Exhibit O2, dated 7th June 1852, Tanjore, Chitambaranadhan said as follows :—

"It was written in your letter the 9th of Vyasi that I had been sent for on account of the Tiruppanandal affairs, that if I come soon it will be arranged with the Tambiran at Tiruppanandal in respect of the Benares affairs, what money was to be remitted for the Benares charity and what was to be paid annually towards the debt here and there, and that I may go to Benares on a junior being appointed according to my mind after consideration. It was stated in your letter of the 20th Vyasi that the Gurupuja fell on the 27th Vyasi and the Maheswarapuja on the next day, that I should conclude my business here and come there in order that the Tiruppanandal affairs might be considered and settled according to my mind. But I am detained here by the Maharaja and I am unable to come. I shall perform the Gurupuja in the place where I am, as it would be done when I was at Benares. It will not be auspicious to appoint a junior to Tiruppanandal in the month of Ani and I will not come before the commencement of the month. If you invest Ganapati with arukattu and sundaravadam and make him conduct the affairs

at Tiruppanandal within this month, I shall come afterwards and make an arrangement as suggested by you in regard to receipts and disbursements and about what has to be done hereafter. I have written to Chokkalingam who is at Tiruppanandal on the strength of the promise made by you. He will come with Ganapati to Dharmapuram. I beg you will have mercy on the Benares charities and on me who came to see you, and you will appoint as mentioned above the said Tambiran to conduct business holding the junior place at Tiruppanandal."

Exhibit P2 is another letter addressed by the same Tambiran to Dharmapuram from Benares three months later, on the 11th September 1852. It refers to Chokkalingam's death and a letter from Ganapati, and goes on to say "as your Sannidhanam has [443] invested Ganapati with cloth, I pray you will give him such advice as may be necessary and guide him."

Exhibit H28 is a letter from Chokkalingam to the Pandaram at Dharmapuram on the 19th June 1852, twelve days after the date of Exhibit O2, and on the same day on which the letter filed as Exhibit 1248 was addressed to the Maharaja of Tanjore. It states "As I and Chitambaranadhan who has come from Benares have on consultation sent for Ganapati Tambiran with a view to appoint him as junior Tambiran at Tiruppanandal, and have sent the said Tambiran to your Sannidhanam with the prayer that you will, according to custom, invest him with arukattu and cloth, I also pray that the charities at Benares, Rameswaram and other places may be properly protected by your Sannidhanam."

Exhibits O2 and P2 should be considered in continuation of the correspondence relating to Chokkalingam's mismanagement, and the necessity that existed for securing a sufficient and punctual remittance to Benares in order that the charities there might be duly administered, and for making an arrangement for the liquidation of the debts which had been contracted both at Benares and Tiruppanandal. The appointment of an efficient junior, and an understanding with the senior that he was to be guided by his advice, was considered to be the appropriate remedy. The name of the Tambiran at Trichinopoly was first suggested by the Pandaram at Dharmapuram and agreed to by Chitambaranadhan, who obtained after his arrival in Tanjore the consent of Chokkalingam to the proposal and wrote to the Pandara Sannadhi; but the Pandaram sent no reply to his letter, and Chitambaranadhan wrote again complaining of the indifference as a misfortune. Exhibit O2 was written on the receipt of certain letters in May from the Pandara Sannadhi whilst Chidambaranadhan was in communication with the Maharaja of Tanjore. Exhibit 1448 shows that two days before Exhibit O2 was written Chokkalingam in consultation with Chitambaranadhan appointed Ganapati as his junior and gave him cloth. No allusion is made to this fact either in Exhibit O2 or in Exhibit H28. The entire correspondence which took place on this occasion shows that Chokkalingam in consultation with Chitambaranadhan appointed Ganapati on 5th June and communicated the fact through Chitambaranadhan to the Maharaja of Tanjore, and sent Ganapati on the 19th June to be invested by the Pandara Sannadhi with arukattu and sundara-[444]vadam, without mentioning that he was already appointed as junior at Tiruppanandal. Having regard to the sequence of events, the investiture by the Pandara Sannadhi followed the appointment previously made by the Tambiran at Tiruppanandal. Having regard to the declarations of Chitambaranadhan in letters Exhibits P2 and O2, the power of appointing a junior vested in the Pandara Sannadhi. Having regard to

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Chokkalingam's letter, it conveys the impression that he did not wish that the Pandara Sannadhi should know that Ganapati had been previously appointed at Tiruppanandal without reference to him. Chokkalingam's reticence was possibly due to a fear that he might give offence to the Pandaram and render his position worse than it was. Chitambaranadhan's declaration was possibly due to the belief that unless he imputed power to the Pandara Sannadhi, he could not invoke his interference in cases of necessity and seek to control the administration of his official superior at Tiruppanandal. We consider it safe to rely on the sequence of events in preference to declarations made by parties who might be influenced by interested motives or by fear. As to the prayer that the Pandara Sannadhi may invest Ganapati with arukattu and sundaravadam according to custom, the documentary evidence shows that only on one previous occasion the Pandaram at Dharmapuram gave cloth, &c., that that was on the occasion of Chokkalingam's installation, that Chokkalingam had been appointed junior previously, and that Ramalingam had died after making a will in Chokkalingam's favour prior to the Pandaram's arrival at Tiruppanandal. On that occasion also the giving of cloth followed the appointment made by Ramalingam at Tiruppanandal according to custom.

47. In connection with Ganapati's management we are referred to certain letters as indicating his subordination to Dharmapuram.

In Exhibit U8, dated 4th November 1852, Ganapati acknowledged a letter from the junior Pandara Sannadhi, and stated that that letter and the order of the Collector in regard to the transfer of miras reached him at the same time. He dwelt on this coincidence as propitious and as a token of "your Sannidhanam's favour towards me as your humble servant." He promised to write to Achiram to send to the junior Pandara Sannadhi Rs. 130, and added that he had written to the Tambiran at that place to remit the income of the property there so as to meet the expectations of the Pandara Sannadhi.

[445] In Exhibit W8, November 1852, Ganapati referred to the state of the season, to the balance of Rs. 2,000 which he had to remit to Benares, and to a cloth which he sent to one Sundara Pillai as a token of courtesy, being refused and returned. In Exhibit X8, dated the 12th December, 1852, Ganapati interceded with the junior Pandaram and asked him to overlook shortcomings on the part of the Tambiran at Achiram, adding that provision might be made for better management. It went on then to give some information about two persons, *viz.*, Sadaya Pillai and Apatharana Pillai. In Exhibit Y8, dated the 30th December 1852, he referred to the state of the season and stated that he sent one Ambalavana Tambiran to the Kasi Mutt at Chitambaram. He next referred to a sum of Rs. 80 due upon account to the Tambiran at Benares and asked the junior Pandaram to arrange for its recovery. Exhibit Z8 is another letter from Ganapati, dated 21st January 1853. In this he stated that the Raja of Karvetnagar exempted certain lands in his possession from assessment, and that endeavours were being made to obtain a similar exemption from the Raja of Puducotta. It gives information as to the visits of the Raja of Cochin to Benares, to his having sent hundis to meet the expenses at Benares, and as to the price of paddy at Tiruppanandal. Ganapati then asked for information in regard to the collection of the debt due by Muttapa Kristnaien.

Another group of letters pressed upon us as evidence of subordination consists of Exhibits A9—N9.

In Exhibit A9, dated 7th March 1853, Ganapati advised the Pandaram at Dharmapuram of his sending Rs. 3½ and some articles of small value as a present in connection with the Sivaratri festival, and concluded it, as was common with many other letters with the sentence "I await your commands as to how I should conduct myself in future as your servant." This we may add is an ordinary form of etiquette observed when a person writes to a spiritual superior who is entitled to reverence from him.

Exhibit B9, dated 26th March 1853, referred to Achiram. Ganapati advised the junior Pandaram to obtain as much as he could from the Tambiran at that place and promised to carry out his orders to the very letter. He then stated that he was borrowing money to pay hundis from Benares, that his creditors at Madras were demanding payment, and that his hope of obtaining a loan from Vydisvaran Kovil, which is a temple under the [446] management of Dharmapuram, was not likely to be realized. He then gave information about the visit to Dharmapuram of the Tambiran at Tirunallur and the affairs of an Adhinam temple in French territory and of the temple at Tirubuvanam.

In Exhibit C9, dated the 30th March 1853, Ganapati reported to the junior Pandaram that the Tambiran at Vydisvaran Kovil was invested with arukattu and sundaravadam by the Pandara Sannadhi and Dharmapuram, and then referred to the violent storm which visited Tanjore and to the damage done by it.

Exhibit D9 is another letter dated 26th April 1853. It states that the Tambiran at Achiram reported the remittance to the senior Pandaram of Rs. 150. It then proceeded to give news regarding his visit to the Tanjore Palace, the investiture of the Tambiran at Valur, and the appointment of one Arumuga Tambiran to the Katlai at Sheali. It then advised of the despatch of a Gauri Sankam, a peculiar kind of shell used in worship, and concluded with sentence "I am awaiting your commands as to how I should conduct myself as your servant."

Exhibit E9 is a letter dated 12th June 1853. Ganapati referred to a dispute in regard to some irrigation channel between him and the raiyats at Painkattur, and said that he was putting an end to it by purchasing nine velis of land belonging to his opponents. He also animadverted on the inefficiency of the Tambiran at Achiram, and stated that he duly wrote to Benares about matters at Tiruppanandal. He alluded to the repair of the kitchen at Sivasilam and stated that he had written to Achiram to send Rs. 200 to the junior Pandara Sannadhi.

The next letter we are referred to is Exhibit F9. Ganapati noted a letter from the junior Pandara Sannadhi, intimating that the latter was dissatisfied with the management of the Tambiran at Achiram, and intended to proceed there and dismiss him and appoint another in his stead. He said by way of deference that he was not going to raise his voice against that of the junior Pandaram, but then added that the Tambiran's errors might be pardoned that time, offering to stand responsible for the payment due from him. He then stated that he sent to Benares the Pandaram's order and the account of Muttukristnayan of Tenkasi.

In Exhibit G9, dated the 4th July 1853, Ganapati reported to the junior Pandara Sannadhi that Ramalingakutti Tambiran left Benares about the 28th March.

[447] He referred next to Ambalavana Tambiran at Chidambaram, to his desire to go back to Tinnevelly and to his actual departure from the former place. He added: "I sent some one at once to take charge of the

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property there. I had allowed Ambalavana Tambiran to dismiss three men on the establishment at Chidambaram and to employ new men as he thought proper. I think he was destined to receive only so much from me." He then noted a letter from the junior Pandara Sannadhi declining to accept Rs. 200 which was offered to be sent. and remarked: "I do not know if you refused it as it was the money of a sinner or only naturally. But be it as it may, as it is your duty to protect me, I have little concern about it." It then refers to the rain, and to the price of paddy in Tanjore.

Exhibit H9 is another letter from Ganapati to the junior Pandara Sannadhi, dated the 6th August 1853. He noted the remittance of Rs. 340 to the junior Pandara Sannadhi for certain charities to be performed in connection with the bones of the then deceased Zamindar at Ettiyapuram when they are deposited in the Ganges. He noted also that the Tambiran at Achiram was told by the junior Pandaram to send Rs. 200 to Tiruppanandal, because Ganapati undertook to pay the balance, and authorized the Pandara Sannadhi to take Rs. 200 out of the Ettiyapuram remittance. He referred to a few other matters and stated that Ramalinga was in the Mutt at Chidambaram, and that he was suffering from a boil in the leg, adding that he would send him over to Tinnevelly as soon as he arrived at Tiruppanandal.

The next letter to which we are referred is Exhibit J9. It repeated the promise to send over Ramalinga Tambiran as soon as he arrived, and then said: "I learned the contents of that piece of paper enclosed in your Sannidhanam's order with directions that no others should look into it." Ganapati referred next to the debts due by the junior Pandara Sannadhi, to the payment of a portion by Palaniyappa Tambiran of Tiruvalur, and added that there were debts to be paid at Tiruppanandal, that the Tambiran at Benares drew upon him, and that he could not remonstrate with him in any way for incurring additional and improper charges. He concluded with a promise to pay Rs. 300 in addition to Rs. 200 which he had already asked the Tambiran at Achiram to remit.

Exhibit K9 is another letter, dated the 7th September 1853, [448] Ganapati forwarded a letter to the junior Pandaram from Chitambaranadhan at Benares and asked for a reply saying that Chitambaranadhan desired him to send the reply. The letter next stated that Ganapati purchased four velis of land in a village called Vadapati in order to get rid of the annoyance caused by co-mirasidars in that village.

Exhibit L9 is another letter, dated the 16th October 1853. In this Ganapati referred to the payments due from Achiram and to those already made. He referred next to a letter which he wrote to Benares to induce the person that carried the bones of the late Yettiyapuram Zamindar thither to make a favourable report about the choultries at Benares to the then zamindar.

He then referred to his own illness and said that he ordered Rs. 25 to to be remitted for performing Abhishekam to Chokkalingaswami at Sailapur, and Maheswarapuja for his benefit and for sending the holy ashes to him.

He said next that Ramalinga Tambiran suffered from fever on three occasions and was then getting better under medical treatment, and concluded with the remark—"*I shall send him over there as soon as I am perfectly recovered.*"

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In connection with Ramalingam we were referred to two other letters, Exhibits M9 and N9. Their genuineness was denied by the respondents, and we shall refer to them in connection with Ramalingam's appointment as junior.

There is another group of isolated letters to which also it is necessary to refer.

Exhibit D23 is a letter dated 1st January 1853, from the Tambiran at Achiram to the Pandara Sannadhi at Dharmapuram. He remitted Rs. 100, noted an order received from Dharmapuram, sent accounts for a few months, promised to send other accounts, and stated his estimate of the produce which might be realized under Pannai and Purakudi systems of cultivation.

Exhibit E23 is another letter from the same Tambiran, dated the 16th January 1853. It contained a request that men might be sent to assist him in harvesting the matam lands at Achiram, and asked for instructions as to whether the harvest was to be conducted under the amani system, or whether the yield was to be estimated beforehand and the Purakudis were to be left to cut the crop.

Exhibits F23, G23 and H23 are similar reports about harvest, [449] about the sale of paddy, about the probable income, and about several other matters connected with the management of the Adhinam villages. In the first document the Tambiran said: "Need I tell you that ever since I was sent to Achiram I have been fairly managing the affairs of Sannidanam." In the second document he said: "I am always ready to act up agreeably to the instructions of your holiness and crave your forgiveness for shortcomings, and I am always deeply plunged in the meditation of your holiness' feet." In the last document he said also: "It is just and proper that the holy Sannidanam should put up with the faults of his subordinates and protect them."

Now, the foregoing letters, save those from Achiram, disclose no unequivocal traces of agency or subordination. As to those from Achiram they no doubt show subordination. It must, however, be remembered that Dharmapuram had lands at Achiram distinct from those allotted to Benares charities, that the Tambiran at Achiram managed the lands of both institutions, and that though he acted under the immediate orders of the Tambiran at Tiruppanandal and was appointed by him, he acted as the subordinate and agent of Dharmapuram in respect of Adhinam lands. In this connection we may mention that in Chokkalingam's time an agreement was taken from the Tambiran at Achiram that he would annually remit a definite income from the Adhinam lands to Dharmapuram every year (J6). As to the Yettiyapuram charities, we have already mentioned that all communications in regard to them and all remittances on their account passed through Dharmapuram on the ground that those charities were originally instituted at the instance of a former Pandara Sannadhi though managed by Tiruppanandal together with other Benares charities.

As to management the Tambiran at Tiruppanandal did not render any accounts to the Pandara Sannadhi at Dharmapuram at stated periods. Nor did his letters state what income was realized, how much was spent and how much was saved or otherwise applied. Nor do the letters note how each charity was progressing, how each temple festival was performed, and how different subordinates behaved. Nor do they seek for instructions. Their contents contrast in a striking manner with the letters and reports from agents, especially with those sent by Ramalingam when

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he managed the affairs of the Adhinam at Dharmapuram during the absence of the Pandara Sannadhi in Tinnevelly between 1871 and 1874, with the letters from Achiram to Dharmapuram [450] in regard to Adhinam lands in Travancore and from Benares to Tiruppanandal. They refer to matters and contain declarations which do not necessarily suggest agency, and which may appropriately find a place in communications from a disciple to a spiritual superior. Ganapati's declaration that "It is your duty to protect me and I shall act according to your orders" is referable to the spiritual relation. His remittances may also be payments made by a disciple to his guru, and his allusions to Tiruppanandal matters and matters connected with Dharmapuram, Sivasilam and other places under their control may find a place in correspondence conducted on the courteous supposition that as members of a common spiritual family or of the same brotherhood, they took an interest in the institutions under each other's management. We are not prepared to hold that the letters mentioned above support of themselves the contention that the relation of principal and agent subsisted between Dharmapuram and Tiruppanandal in regard to the management of Benares charities.

48. The most important matter in connection with the management of Ganapati II is the appointment of Ramalingam as his junior and successor. The dispute and the litigation which ensued and their final adjustment have a material bearing on the question at issue, and we shall proceed to give a brief account of them. At this time Sachitananda Desigar was the junior Pandara Sannadhi in Tinnevelly and Ramalingam was his sister's son. The latter was about 21 years of age, and he had been in the mutt at Benares and employed at Morangi in Nepaul. If Chitambaranadhan could be relied upon, Ramalingam was a domineering young man and did not behave satisfactorily in Nepaul (Exhibit R2). It appears from letter marked Q2 that Chitambaranadhan sent him to the south in April 1853 by the desire of Sachitananda Desigar. We have already seen that Ganapati informed the junior Pandara Sannadhi that Ramalingam had arrived at Chidambaram and then at Tiruppanandal, and that Ganapati would send Ramalingam to Tinnevelly after his own recovery from his illness. It will also be remembered that when Ramalingam was at Chidambaram, Ganapati received a piece of paper from the junior Pandara Sannadhi with the remark that no one else should see it (letter marked J9, dated 13th August 1853). On the 5th November, Ganapati made his will whereby he appointed Ramalingam as his junior and successor and died on the 10th November. The Pandara Sannadhi at Dharmapuram addressed a petition to the [451] Sub-Collector that Ganapati himself was appointed by him to the mutt at Tiruppanandal, according to custom, that at the instigation of one Arunachala Tambiran an attempt was being made by Ganapati to appoint a young man as his successor by the name of Ramalingam, and that an order should be issued to forbid the infringement of the custom. Thereupon the Sub-Collector issued an order to the Tahsildar to see that no breach of the peace occurred and to arrange for preventing it. The Deputy Tahsildar saw Ganapati, who alleged that he was appointed by his predecessor Chokkalingam, that on the 5th November he appointed Ramalingam as his successor in the same way in which Chokkalingam appointed him, that Ramalingam was looking after the affairs of the mutt since his appointment, and that the appointment was in accordance with the custom of the institution. Thus the recognized usage of the place in regard to the appointment of the managing Tambiran at Tiruppanandal

was the point in issue between the parties (Exhibits 31 and 32). On the 10th November Ganapati asserted his unqualified power to name his own successor and applied to the Sub-Collector for protection, adding that the Pandara Sannadhi arrived at Tiruppanandal the previous night in company with the Tambiran of Vydisvaran Kovil and contemplated mischief (Exhibit 32). On the same day Ganapati died, and on the 12th idem the Tahsildar of Kumbakonam had a muchalka taken from Ramalingam to the effect that he would be responsible for the properties at Tiruppanandal. Ramalingam applied to the Collector for the transfer of registry to his own name and referred to his appointment by Ganapati as his junior. He denied the claim of the Pandara Sannadhi to appoint the Tambiran of Tiruppanandal, and charged the Tahsildar of Kumbakonam with being under the influence of the latter and carrying away twenty of his agents (Exhibit 33). The Collector forwarded Ramalingam's application to the Sub-Collector for disposal, and when it was pending before the Sub-Collector, Ramalingam executed the document marked H on the 21st November 1853. It purports to be an agreement in favour of Masilamani Desigar, the Pandara Sannadhi of Dharmapuram, and it states: "As Ganapati, who had been appointed to the management of the charities of the Benares mutt at Tiruppanandal, which is attached to the said Adhinam, has breathed his last, and as Ulaganadha Tambiran has been appointed as the senior and myself have been appointed as [452] the junior Tambiran by the Pandara Sannadhi, and as I have been invested with arukattu, sundaravadam and cloth according to usage and placed in the said appointment, I shall act properly and continue to do so, according to the orders of Ulaganadha Tambiran, who is appointed as senior, and also according to the orders of your august presence and the usage of the Adhinam." The Tahsildar then recommended that the registry of Tiruppanandal lands be altered in the Collector's books from the name of Ganapati II to that of Ulaganadha Tambiran. On the 3rd December 1853 Ramalingam represented to the Sub-Collector that the Tahsildar of Kumbakonam, the Pandara Sannadhi, and Ulaganadha Tambiran entered the mutt at Tiruppanandal with 50 peons, ill-treated him, and thereby obtained documents from him and took away the keys from him, and that from the time the said mutt came into existence, it had been the invariable custom for the presiding Tambiran to appoint his successor if he had no hope of living and to make a will that the successor do acquire all rights, and for the Government to accept such will. Ramalingam supported this representation by a mahazarnama from certain mirasidars of the taluks of Kumbakonam and Kuttalam (Exhibit 35), which in describing the usage stated that the unvaried custom had been for the Tambiran at Tiruppanandal to appoint as his successor either the Tambiran of Benares or the junior Tambiran at Tiruppanandal and to make a will in his favour (Exhibit 36).

On the 27th December 1853, the Sub-Collector passed an order in favour of Ramalingam stating that from the previous proceedings on his record it appeared that since 1836 each Tambiran at the place used to nominate a person as his junior, and that that had been the custom also before 1836. In this order a petition is said to have been addressed by Chitambaranadhan of Benares, and Ganapati is stated to have described Ramalingam as his younger brother. The order characterized the Tahsildar's proceedings as strange, stated that the document marked H was alleged by Ramalingam to have been obtained by force, and that its contents were at variance with the custom of the institution (Exhibit 38). The miras

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was transferred to Ramalingam's name. Ulaganadha Tambiran was displaced and he and the Pandara Sannadhi were ordered not to interfere with Ramalingam (Exhibits 39, 40, and 43). These proceedings before the Revenue authorities were followed by litigation and three suits were instituted, one by the [453] Pandara Sannadhi, another by his nominee, and the third by Ramalingam, and the question raised for decision was whether it was Ganapati's or the Pandara Sannadhi's nominee that was entitled to succeed to management according to the usage of the institution at Tiruppanandal. We pass over the statements then made by the rival claimants as they were made during the controversy between them, and observe that the litigation terminated in a compromise which was suggested by the junior Pandara Sannadhi at Tinnevelly, and accepted both by Ramalingam at Tiruppanandal and the senior Pandara Sannadhi at Dharmapuram.

49. The document marked H19 is the petition of compromise filed in Original Suit No. 3 of 1854, which was instituted by the Pandara Sannadhi at Dharmapuram against Ramalinga Tambiran, and as the record of the usage of the institution then accepted by the Pandara Sannadhi at Dharmapuram and the Tambiran at Tiruppanandal, it is a document of considerable importance. It is as follows :—

(Exhibit H19.)

TO THE DEWANY ADALUT CIVIL COURT OF KUMBAKONAM ZILLA.

Original Suit No. 3 *of* 1854.

Razinama presented by Muttusami Pillai, holding muktiarnama (power-of-attorney) from Giyana Sambanda Pandara Sannadhi at Dharmapuram Adhinam, plaintiff in the said suit, and Tiagaraja Mudali, holding muktiarnama from Kasivasi Ramalinga Tambiran of Kasi Mutt at Tiruppanandal, defendant in the said suit.

In this suit brought by the said Giyana Sambandha Pandara Sannadhi through his Muktiar agent to establish his right to appoint Tambiran to the Kasi Mutt at Tiruppanandal referred to in the plaint, and to have the miras of the nunja and punja lands attached to the said mutt registered in the name of the charity, the valuation of the suit being Rs. 76,874-8-6, we have entered into a compromise as follows :—

That as Kasivasi Ramalinga Tambiran who has been, according to custom, appointed to the Kasi Mutt at Tiruppanandal, under a will of the deceased Kasivasi Ganapati Tambiran, the late incumbent of the aforesaid mutt, has been invested, according to usage, with aru-[454]kattu, sundaravadam and cloth by the said Giyana Sambandha Pandara Sannadhi, the said Kasivasi Ramalinga Tambiran shall himself enjoy the said Kasi Mutt at Tiruppanandal, and the nunja, punja and other lands in dispute, as its owner, and as senior Tambiran with miras and all other rights appertaining to the same ; that, when the said Kasivasi Ramalinga Tambiran should be so disposed as to have a junior Tambiran to him, he should, according to custom, send for one, suited to his liking from among the Tambirans who have received kashayam (red cloth) from the said Dharmapuram Adhinam, execute a will, according to usage, in his name, and send him to the said Dharmapuram Adhinam;

that the Giyana Sambandha Pandara Sannadhi of the said Adhinam shall, according to custom, invest that Tambiran alone with arukattu, cloth, &c., and send him; that that Tambiran himself shall be the junior (Tambiran) of the said Kasi Mutt at Tiruppanandal as long as the said Kasivasi Ramalinga Tambiran is alive; that he shall then become the senior Tambiran and enjoy the miras and all other rights as those of the said Kasivasi Ramalinga Tambiran; that we shall always conform to and follow the said arrangement without deviation; and that each party shall bear his costs of this suit.5

October 1855.

(Signed) MUTTUSAMI PILLAI.
(„) TIAGARAJA MUDALI.
(„) SAMI SASTRI, Vakil.
(„) M. RANGAIENGAR, Vakil.
(„) Rama Iyen, Vakil, I know.
(„) Sundara Row. Vakil, witness.
(„) Somasundara Kavirayar, son of Subramania Kavirayar of Tirukadayur in Peralem Taluk, I know.
(„) Sundaram Pillai, son of Nagalingam Pillai, residing at Tiruppanandal in Kumbakonam Taluq, I know.

Filed 16th October 1855.

(Signed) J. SILVER,
Ag. Civil Judge.

[456] This document, it will be observed, negatives the ownership and the power of appointment claimed for Dharmapuram. It vests the succession in the senior who is duly appointed for Tiruppanandal, and recognizes Ramalinga's right to appoint a junior when he desires to have one, but declares it to be limited to the extent that it is obligatory on him to select a junior from Dharmapuram Tambirans. It states that when a junior is so appointed the Pandara Sannadhi should invest that person only and no one else with arukattu and sundaravadam. These provisions purport to be founded on the usage of the institution.

Both parties to this appeal now repudiate this document, for it is against the contention of both in part. It is against the respondent because he is *not* a Dharmapuram man; and it is against the appellant because it negatives the ownership and the power of appointment claimed by him. The ground on which it is impugned is that it was brought about by Sachitananda Desigar who desired to favour his nephew, but we consider this objection to be frivolous; for the senior Pandara Sannadhi knew of the relationship and was perfectly free to exercise his own judgment. It is far more probable that Masilamani Desigar believed that Sachitananda Desigar knew as well as he did what the real usage had been. The document is dated the 16th October 1855, and there was no attempt on either side to impeach it either during Masilamani Desigar's life or that of Sachitananda Desigar. We may here refer to the two letters marked W9 and Y9 as showing the spirit in which Sachitananda interfered to effect an amicable settlement. Exhibit W9 is a letter addressed by Ramalingam to the junior Pandara Sannadhi on the 25th April 1854, and it shows that the latter desired an amicable settlement to avoid scandal. Exhibit Y9 is another

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letter written from Tiruppanandal to Sivasilam. It states, "your Sannidhanam intends to allow every one his proper privilege, whilst the senior Sannidhanam is avaricious. If you bring the matter to an amicable conclusion, you will do a charitable thing, which will not be forgotten as long as the Adhinam exists, and lay me under obligation." There is no sufficient ground shown for the belief that the petition of compromise did not accurately formulate the recognized usage into reciprocal rights and obligations, and we shall recur to the question later on.

50. Before we pass on to Ramalingam's management, we shall refer to three documents on which considerable stress was laid. **[456]** *viz.*, Exhibits M9, N9, and H. Exhibits M9 and N9 purport to be letters addressed by Ganapati Tambiran on the 23rd October and on the 5th November 1853. The former is an application to the senior Pandara Sannadhi for the appointment of Ramalingam as junior Tambiran at Tiruppanandal, and the latter intimates the fact to the junior Pandara Sannadhi in Tinnevelly. They are relied on as showing that the power of appointing a junior is vested on Ganapati's own showing in the Pandara Sannadhi at Dharmapuram. We concur in the opinion of the Subordinate Judge that they are open to grave suspicion. Exhibit N9 is a post letter, and the Post office seals which it bears do not appear to be genuine. In Exhibit M9 Ganapati openly stated that the junior Sannidhanam was anxious to have Ramalingam appointed as junior, but seeing that junior Pandaram desired in Exhibit J9 that the piece of paper enclosed therein should be read by no one else, it is not likely that Ganapati would have supported his recommendation in Exhibit M9 by a reference to the junior Pandaram's wishes. Again, the contents of Exhibit M9 are inconsistent with the representation made in Exhibit 31 by Ganapati on the 8th November, or with the petition addressed by the Pandara Sannadhi protesting against Ramalingam's appointment. Nor are they consistent with the recitals in Ganapati's will, Exhibit 6, which was made on the 5th November, the very day on which Exhibit N9 was written. Even on the supposition that Ganapati wrote Exhibit M9 lest his spiritual superior might take offence at his not being consulted in regard to so important a matter, it is by no means probable that he would have proceeded to make a will before he heard from Dharmapuram. The appearance of the Post office stamps on Exhibit N9, the inaccuracy in spelling the name of the despatching station, and a comparison with genuine letters on record which were transmitted by post, induce us to think that it is altogether unsafe to rely on Exhibits M9 and N9.

51. As to Exhibit H, however, there is no doubt that it is authentic. It purports to contain an acknowledgment by Ramalingam that the Pandara Sannadhi appointed Ulaganadha as Ganapati's successor and Ramalingam as Ulaganadha's junior, and on this ground considerable stress is laid upon it at the hearing of the appeal. Adverting to it, the Subordinate Judge observed that it was eventually found by the Magistrate to have been coerced from Ramalingam, and that it was set aside and Ramalingam was **[457]** restored to the senior Tambiranship. It was urged in appeal that there was no satisfactory evidence to show that the document was obtained under coercion, that it was not set aside by any Magistrate, and that no Magistrate had power to do so. Exhibit 35 shows that on the 3rd December 1853 Ramalingam repudiated the document marked H and complained that he was ill-treated by the Tahsildar, and that he executed it from fear. The contents of the document show that he gave up his position as senior Tambiran, a position to which Ganapati raised him by

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his will on the 5th November, and consented to take up the position of a junior under the Pandara Sannadhi's nominee Ulaganadha, and they are obviously prejudicial to his interest. Having regard to the relative position of the parties at the time, we find that a young man of about 21 years of age had to contend against the head of his Adhinam who was backed by his disciples and was accompanied by the Tahsildar.

Again, Exhibit 38 shows that the Sub-Collector refused to recognize it on the ground that it was inconsistent with the previous practice of the institution as disclosed by his records, and to alter the registry in accordance with it. Further, Exhibit 32 indicates that on the 10th November even a Tambiran in the position of Ganapati apprehended that the Pandara Sannadhi who was then at Tiruppanandal contemplated mischief. These circumstances convey the impression that document H was executed probably under fear, and to that extent corroborate the oral evidence on that point.

The Subordinate Judge was no doubt in error in treating the opinion of the Revenue authorities in regard to document H as conclusive, but we are unable to say that the circumstances in which the agreement was executed do not lend weight to the suggestion that its execution was not voluntary if not coerced. However this may be, it was superseded by the petition of compromise, Exhibit H19, which, as the solemn act of the rival claimants adopted by a Court of Justice, must be taken to preclude the appellant now from falling back on document H. We pass on to Ramalingam's management.

52. Ramalingam succeeded Ganapati II on the 10th November 1853 and died on the 16th September 1880, his management extending over a period of nearly 27 years. When he rose to the responsible position of the superintendent of Benares charities and [458] of the representative of the Mutt at Tiruppanandal, he was a young man of about 21 years of age and designated on that ground Kutti Tambiran. He owed his position more to his uncle's influence with Ganapati II than to his position as an elderly Tambiran of recognized merit and piety. His career at Tiruppanandal opened with litigation with his own spiritual superior, but he had the sympathy and support of his uncle. In Exhibit T9, dated the 17th March 1854, Ramalingam said, whilst writing to his uncle, "I herewith return the three letters sent in by your Sannidhanam as directed. I remain fearless as I depend entirely on your Sannidhanam's holy feet." The litigation however terminated in a compromise, of which the provisions are embodied in Exhibit H19. Thus through Sachitananda Desigar's interposition, Ramalingam's position became secure and permanent.

53. The next event during Ramalingam's management is the death in January 1858 of his spiritual superior and opponent, Masilamani Desigar, who was succeeded by Sachitananda Desigar. Between 1854 and 1858 Ramalinga conducted himself so as to avoid further collusion with Dharmapuram. It will be seen from Exhibit S10 that when the senior Pandaram died, Ramalingam proceeded to Dharmapuram, worshipped his remains at the burial ground, though the ceremony of interment was over, and took part in the Maheswarapuja which was performed on that occasion. This document discloses an effort on his part, probably under the advice of his uncle not to withhold from his superior the customary token of respect due to him from a disciple. That document and the document marked T10 indicate that Ulaganadha Tambiran whom Ramalingam superseded, enjoyed the confidence of

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the Pandara Sannadhi and had much influence at Dharmapuram at that time.

54. In dealing with documents and transactions during Ramalingam's management to which our attention was directed, it is convenient to consider them with reference to six distinct periods. The first is the one already referred to, commencing with the succession of Ramalingam and ending with the termination of his litigation with Dharmapuram; the second is the period extending from the date of the compromise Exhibit H19, 16th October 1855, to the date of the death of Masilamani Desigar of Dharmapuram; the third period extends from the date of Sachitananda's succession to the end [459] of 1862, when the relation between Tiruppanandal and Dharmapuram was very cordial; the fourth period extends from 1862 to 1871, during which there was disagreement between the uncle and the nephew; the fifth period extends from 1871, when there was reconciliation to the end of 1877; and the sixth period extends from 1878 to the date of Ramalingam's death in September 1880.

55. During the second period Chitambaranadhan at Benares (i) asked the Pandara Sannadhi at Dharmapuram to forgive him for his past conduct, and promised to behave better for the future; (ii) referred to Ramalingam in terms of disparagement; (iii) asked permission to retain one Manikkavachaka Tambiran as his junior at Benares; (iv) sent persons to Dharmapuram to be admitted as tambirans; and (v) wrote about the necessity for a supply of Tambirans for service in Northern India. See Exhibits R2 (8th November 1856), S2 (23rd April 1857), T2 (10th February 1858). In R2 Chitambaranadhan referred to a letter received from Dharmapuram in which certain texts were cited to remind him of his past conduct, probably during the litigation, and says: "I behaved wrongly either intentionally, or unintentionally, the burden of training and advancing me lies on your Sannidhanam and those of another Adhinam and others have no interest in it. Therefore if you write to me as to how I am to behave hereafter, I shall do accordingly." Referring casually to Ramalingam's conduct whilst at Morangi, the letter says he appointed a stranger to be his successor without acting according to the wishes of those at Benares, and created dissensions which it took four years to pacify. The letter alludes next to the discharge of a portion of the debts at Benares and says: "Three-fourths of debts existing in Benares, Rameswaram and *places belonging to the Adhinam* have been paid off through the effect of the virtues of your Sannidhanam." It then suggests that "if you send more Tambirans, it will be good."

In Exhibit S2 Chitambaranadhan said that he sent one Vydilinga Tambiran and asked the Pandara Sannadhi to initiate him. In Exhibit T2 he complained that the Pandara Sannadhi did not care to send even one Tambiran to Benares and that Chitambaranadhan was alone there.

These letters are referred to as evidence of subordination. They no doubt show that it was the Pandara Sannadhi who initiated laymen and admitted them as Tambirans. They also show that Tambirans were sent from Dharmapuram for service. It should [460] be remembered, however, that as Tambiran Chitambaranadhan was Ramalingam's senior, though as manager of the mutt at Benares he was his subordinate. The letters show also that quarrel and litigation being over, Chitambaranadhan desired to ingratiate himself with the Pandaram at Dharmapuram by professing to act in accordance with his wishes. This fact has to be kept in view in determining their probative force as evidence of the subordina-

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tion of Tiruppanandal in management. As to Ramalingam's relation with Dharmapuram during this period, he desired to avoid friction, and on Masilamani Desigar's death, paid to his remains the respect due from a disciple to those of his guru or preceptor.

56. Passing on to the third period we find that the relation between Tiruppanandal and Dharmapuram became once more cordial, and that Sachitananda Desigar at Dharmapuram was guided by Ramalingam's advice in many matters connected with the administration of properties belonging to the Adhinam. It will be remembered that Ulaganadha Tambiran was the person whom the former Pandara Sannadhi desired to appoint as Ganapati's successor in preference to Ramalingam. So long as Masilamani Desigar was alive he confided in the former and was guided by his advice in managing the affairs of the Adhinam. Ramalingam's first effort was to get rid of him. He called Ulaganadha by the nickname of Perumal, accused him of extravagance and complained of his conduct in refusing to accept from him a contribution of Rs. 100 towards the expenses of Maheswarapuja performed on the death of Masilamani Desigar (T 10 and U10). In Exhibit E11 he advised the Pandara Sannadhi not to repose confidence in the opposite party, and in Exhibit M11 he characterized Ulaganadha as a wolf in sheep's skin. In the result Ramalingam displaced Ulaganadha as the trusted adviser at Dharmapuram and the latter stayed at Tiruvadutorai (Exhibit W11, 11th September, 1861).

57. Another event of this period is that Ramalingam became very influential at Dharmapuram and actively interfered in its management. He advised the Pandara Sannadhi to cancel a lease granted with respect to the Adhinam lands at Kumbakonam, sent men to give evidence at Kumbakonam, recommended a person for an appointment in the Adhinam, suggested that the Tambiran at Vydisvaran Kovil be not changed, and communicated with Dharmapuram in regard to various other matters which it is not necessary for the purposes of this appeal to enumerate.

[461] 58. In May 1858, Ramalingam remitted Rs. 100 for the Gurupuja at Dharmapuram (Exhibit Y10). In Exhibit A11 (21st January, 1859) he noted with pleasure the celebration of the festival in honour of the founder of the Adhinam on a grand scale. In Exhibit W11, dated 11th September 1861, he referred to the arrival of the junior Pandaram at Tiruppanandal and the performance of Puja and Maheswarapuja on a grand scale, and in Exhibit X11 he asked for a palanquin to be supplied for the use of the junior Pandara Sannadhi during his journey to Tinnevelly. In Exhibit A12, December 1861, he sent a silk cloth as desired by the Pandara Sannadhi at Dharmapuram, and with Exhibit C12, 12th January 1862, he remitted Rs. 200 as a contribution to a festival at Dharmapuram. Thus during this period Ramalingam's contributions and other acts as a disciple of Dharmapuram were similar to those of his predecessors.

59. As to the relation between Chitambaranadhan at Benares and the Pandara Sannadhi at Dharmapuram, the former wrote a long letter to the latter in January 1859, in which he gave a detailed account of past mismanagement at Tiruppanandal and of the measures taken by him to remedy it. He complained of short remittances made in Ramalingam's time and of his insolence, adding that the letter was confidential and that the writer intended to retire from his post (Exhibit X2). In December 1859 he asked the Pandara Sannadhi to send to Benares Subramania Tambiran if the latter were invested with mantra kashayam, and that a few more tambirans might be sent for service (Exhibit Y2). In July 1860

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he wrote to express his satisfaction with the appointment of Arulananda as junior Pandara Sannadhi, and prayed that he might be instructed to have regard for the Benares charities (Exhibit Z2). In Exhibits A3—J3 he reported the arrival of Subramania Tambiran, asked for a new arukattu and sundaravadam from Dharmapuram, advised of the despatch of cloths as presents, and asked for more tambirans. In Exhibit F3, dated 3rd October 1863, Chitambaranadhan, referring to a letter from Dharmapuram, accused again Ramalingam of waste and mismanagement, and asked for permission to come to the south in view to remedy it. Exhibit H3, dated 15th March 1864, shows that the Pandara Sannadhi complained of the conduct of Ramalingam, and that Chitambaranadhan intended to come to the south to arrange for the due performance of charities. Thus it appears that a disagreement arose [462] between the uncle at Dharmapuram and the nephew at Tiruppanandal in 1863, and that Chitambaranadhan at Benares sided with the former.

60. This disagreement continued from 1863 to 1871, and during this period no letters passed apparently between Tiruppanandal and Dharmapuram. The correspondence, however, between Benares and Dharmapuram throws light on its progress. It shows that the misunderstanding deepened into open hostility and led each party to seek to humble the other.

Exhibits J3 and K3, dated 31st July, and 24th August, 1864, show that Ramalingam caused a letter to be written to Chitambaranadhan by one Vridachella Mudali, that Chitambaranadhan did not send a satisfactory reply, that thereupon Ramalingam desired to go to Benares at once by sea and reduce Chitambaranadhan to submission, and that the latter was determined to thwart the former and carry out the wishes of the Pandara Sannadhi. But Ramalingam went to Benares, succeeded in obtaining from Chitambaranadhan the agreement marked 586 on the 15th November 1864, and returned in 1866. In the meantime Chitambaranadhan sent one Arunachella Tambiran to be initiated at Dharmapuram (Exhibit L3, 21st September 1865) and obtained a letter from the Raja of Vencatagiri that the lands placed under attachment would be made over to him (Exhibit M3, 27th June 1866). In July 1866, he forwarded a letter to Dharmapuram from one Subbaramayyar on the establishment at Tiruppanandal in regard to the management of affairs at that place, and reiterated his intention to visit the south, to arrange for its improvement, and in July 1866, Chitambaranadhan paid a visit to Scindia and promised to come to the south soon.

61. In view to check the interference contemplated by Chitambaranadhan in communication with the Pandara Sannadhi, Ramalingam instituted a suit against the former at Benares and led to the institution of another suit by the latter at Trichinopoly. In the former he asserted his right to manage as proprietor the mutt and the chattram affairs at Benares and the temple of Sri Kedareswarar, and to recover the properties belonging thereto, and rested his claim on his position as the mahunt and representative of the headquarters Mutt at Tiruppanandal. The Tambiran at Benares denied that he was an agent, and contended that the moveable property and the endowments were acquired by his predecessors, and that he was [463] the real proprietor in possession and occupation by right of succession to his ancestors. The first Court decreed the plaintiff's claim, but on appeal the High Court modified the decree, giving Ramalingam possession of certain chattrams and gardens built or purchased out of funds remitted from Madras, and declaring him entitled to an account of a sum

admitted to have been remitted from Tiruppanandal, but holding that Ramalingam failed to make out his claim to the possession of the mutt, temple or other property. From this decree Ramalingam appealed to the Privy Council, who held that Ramalingam had failed to establish either that he was the proprietor of the property at Benares or that the defendant was his mere agent, and that the High Court at Allahabad was right in limiting the relief to what was mentioned in the decree (1) The Judicial Committee observed that the original foundation was admittedly at Benares, that its object was to afford to persons either resident in Southern India or making pilgrimages to Benares, facilities for worship and the performance of religious duties there, and that those facts raised a presumption that the establishment at Tiruppanandal was subordinate to that at Benares, that though such a presumption might be rebutted by evidence, it was not so rebutted, and that even assuming that Ramalingam's account as to the establishment of the mutt at Tiruppanandal was correct, it would by no means follow that the tambiran who migrated from Benares to Tiruppanandal had power to alter the original constitution of the community, or to say that Tiruppanandal should thenceforward be its headquarters, and that the person in possession of the foundation at Benares should be the inferior or the mere agent of the Tambiran at Tiruppanandal, and that the change and the authority by which it was effected should have been distinctly proved. After referring to the evidence the Judicial Committee came to the conclusion that the then plaintiff failed to show either that he was the proprietor of the property at Benares or that the then defendant was his mere agent. They alluded to the representation made by Chitambaranadhan in support of Ramalingam's claim during the litigation between the latter and the Pandara Sannadhi at Dharmapuram, and considered it to embody what might fairly be inferred to be the true condition of things and the true account of the constitution and relation of the mutts at Benares and Tiruppanandal and their respective mahunts (tambi-
[464] rans). That representation was to the effect that, according to custom, when the tambiran of either mutt nominates a deputy or successor to himself, he is bound to secure the consent of that of the other as was done by Chokkalingam in connection with the appointment of Ganapati, and that he (Chitambaranadhan) sent a letter of appointment to Ramalingam on the 28th November 1853. In connection with that representation Ramalingam's admission that he received a deed of appointment as contained in his letter of the 16th December 1853 was referred to, and it was also observed that the correspondence then set out in the record began in 1843. A duty on the part of the tambiran of either mutt to secure the consent of the other whenever he nominated a junior was the only customary incident accepted as probable, and the relation of principal and agent was held not proved. The appeal was heard *ex parte* and decided on the 12th June 1873.

The Pandara Sannadhi at Dharmapuram was no party to this suit and the decree is not binding on him, but as between the Tambirans at Tiruppanandal and at Benares, who were parties to it and their successors, it is conclusive, although all the evidence now produced was not then adduced.

62. In 1869 Ramalingam gained over the Tambiran of the Rock Fort Temple at Trichinopoly, a subordinate of the Adhinam at Dharmapuram,

(1) Kashi Bashi Ramling Swamee *v.* Chitumbernath Koomar Swamee, 20 W.R. 217.

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and on the 23rd February 1869, the latter, asserting his independence, appointed the former as his successor. The Pandara Sannadhi at Dharmapuram was obliged to institute original suit No. 44 of 1869 in the District Court of Trichinopoly to obtain a decree declaring the appointment void and dismissing the Tambiran at the Rock Fort from office. On the 18th August 1870 this suit was dismissed on the ground that it was barred by limitation (Exhibit 1396). In the meantime the conduct of the junior Pandara Sannadhi in Tinnevelly was not considered to be satisfactory, and it engaged the special attention of the senior Pandara Sannadhi. It appears from Exhibit Y3, dated the 27th November 1871, that, acting on the view that whatever faults tambirans might commit, the Pandara Sannadhi should forgive them, he pardoned Ramalingam, and was disposed to show a similar indulgence to the Tambiran at Trichinopoly. Chitambaranadhan was not satisfied with the policy of reconciliation which the Pandara Sannadhi was inclined to initiate, but his remonstrance was not heeded. Whilst the disagreement continued and before the Pan- [465] dara Sannadhi became reconciled to Ramalingam, he obtained two agreements filed as Exhibits J and K, one from Chitambaranadhan on the 11th June 1870, and the other from one Vydilinga Tambiran on the 16th August 1870. The former purports to have been executed in order to mention what rights the Adhinam at Dharmapuram had in connection with the mutt at Benares. It declares that Chitambaranadhan was appointed by the Pandara Sannadhi's predecessor, that the Pandara Sannadhi was entitled to appoint a junior and successor to him, and to appoint the managing Tambiran at Morangi whenever it became necessary to appoint one. The latter is an agreement wherein one Vydilinga Tambiran acknowledged his appointment by the Pandara Sannadhi as Chitambaranadhan's junior, and undertook to act under his orders during his life, and to manage the mutt at Benares after his death according to the orders which might be issued from Dharmapuram. In connection with the agreement marked J, it is necessary to refer to four letters—U3, 31st October 1869; W3, 15th March 1870; X3, 9th July 1870, and Y3, 27th November 1871. They were written when the disagreement continued, and it will be remembered that there were heavy debts to be paid by the Tambiran at Benares, and that he was not in a position to expect remittances from Ramalingam in consequence of the litigation and quarrel with him. In Exhibit N3, Chitambaranadhan referred to a promise made by the Pandara Sannadhi to pay off the debt of Rs. 44,000 due by the former in four months, and thanking him for it, promised to act according to the wishes of the Pandara Sannadhi. It is evident from Exhibit W3 that he was in Tanjore in March 1870, and he states in that letter that he came from Benares with the intention of acting according to the views of the Pandara Sannadhi, that there was no doubt in regard to it, and that he was ready to act according to the orders which the Pandaram might give when he arrived at Dharmapuram. Exhibit X3, which is dated the 9th July 1870, shows that he had previously been to Dharmapuram and that he was then arranging for obtaining some documents in favor of the Pandara Sannadhi from the Palace of Tanjore to make out a strong case for the Pandara Sannadhi in view to a suit against Ramalingam which was then in contemplation, and the agreement filed as Exhibit J was executed during that visit to Dharmapuram. In Exhibit Y3, which he wrote after his return to Benares, he disapproved of the reconciliation with Ramalingam, but added, "I [466] remember the assistance rendered when I came there from a distant

country, and I must act according to the wishes of your Sannidhanam." He stated further that the Pandara Sannadhi and Ramalingam were then on good terms, and suggested that Ramalingam might be asked to write that he forgot the past and that an arrangement should be made about Benares. The foregoing letters convey the impression that agreement marked J was obtained probably as a price for the pecuniary assistance which was rendered to Chitambaranadhan from Dharmapuram, and when there was a desire to strengthen the Pandara Sannadhi's cause against Ramalingam, but that when the uncle and the nephew became reconciled, Chitambaranadhan also desired to become reconciled with Ramalingam.

63. In connection with the measures taken by Ramalingam during the period of disagreement, we may refer in this place to a few documents and letters. The first group consists of Exhibits 7, 8 and 12, and they relate to the appointment of one Subramania Tambiran by Ramalingam as his junior and successor at Tiruppanandal. Exhibits 7 and 8 are wills made in favor of the former on the 6th July 1864 and on the 18th March 1867, and Exhibit 12 is the agreement executed by him in favor of Ramalingam on the 6th July 1864. Exhibits 7 and 8 describe Subramania Tambiran as "our chief disciple," appoint him to be "the second to us during our lifetime and conduct himself under our orders," and declare that "after our death he is entitled to enjoy as full owner," and that neither "the tambirans who have been appointed by us and our predecessors and who are managing the charity affairs nor any other persons have any connection with our properties." By Exhibit 12, Subramania acknowledged his appointment and undertook to act in subordination to Ramalingam and under his orders during his life.

The next group consists of Exhibits 871, 1378, 1416, 1414, and 1514, which are letters written to and by Ramalingam in regard to Subramania's appointment as his junior and successor and in regard to Chitambaranadhan's conduct. They show that the appointment was made because Ramalingam intended to go to Benares, that Chitambaranadhan did not send accounts according to custom to Tiruppanandal, that remittances to Tiruppanandal from Travancore and Cochin were suspended owing to certain letters received from the Tambiran at Benares, and that Ramalin-
[467] gam proposed to inspect the charities at Benares and arrange for proper management. It is clear from documents 7, 8 and 12 that, according to Ramalingam, he was entitled to appoint his junior and associate him in management, and that the junior so associated in management was his lawful successor. To this extent the documents are not at variance with the terms of the petition of compromise (Exhibit H19). There is no allusion to investiture by the Pandara Sannadhi at Dharmapuram, and Subramania was designated as Ramalingam's "chief disciple." It is however in evidence that Subramania was a Dharmapuram man.

64. The next period is the one extending from 1871 to 1877. The events in evidence are (i) the reconciliation between Ramalingam and the Pandara Sannadhi; (ii) the latter's visit to Tinnevelly in connection with the conduct of the junior Pandara Sannadhi; (iii) Ramalingam's management of the affairs of the Adhinam at Dharmapuram during the absence of Sachitananda Desigar; (iv) the death of Chitambaranadhan, the Tambiran of Benares, and Ramalingam's visit to that station; (v) the dismissal of the junior Pandara Sannadhi and the appellant's appointment in his stead; (vi) the death of the senior Pandara Sannadhi and the appellant's succession to him, and (vii) the disagreement between Ramalingam and the appellant.

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65. We already referred to Exhibit Y3 in connection with the reconciliation. Ramalingam resumed his duties as a disciple of Dharmapuram in December 1870. Articles were supplied according to custom for the puja at Dharmapuram (Exhibit K12). In January 1871 he complained that the junior Pandaram did not reply to his letters (Exhibit L12). In January 1871 he advised a journey to Tinnevelly in connection with junior Pandaram's conduct, he sent to the Pandara Sannadhi a pair of silver batons and promised to see him at Karuppur on his way to Tinnevelly (Exhibits M12, N12 and O12). In January 1871 he remitted Rs. 100 out of Rs. 200 due for the festival in the Western Temple at Dharmapuram performed according to custom at the expense of Tiruppanandal and promised to pay the remainder (Exhibit P12). In Exhibit Q12, dated the 8th February 1871, he asked for information as to the balance due on account of the Uchchikala (midday) Katlai performed at the expense of Tiruppanandal.

Another result of the reconciliation was an endeavour to **[468]** arrange for a conveyance from Chitambaranadhan of the property and the mutt at Benares to Ramalingam. We have already mentioned the substance of the judgment of the Privy Council in the suit by the one against the other. It appears from Exhibit Q 12 (8th February 1871) that Chitambaranadhan sent a draft conveyance to Ramalingam, and thăt the latter forwarded it to Dharmapuram with the remark that it was drawn up "in deceitful terms." In Exhibit R12, dated the 13th February 1871, Ramalingam said "I do not think that in the affair of Benares, your Sannidhanam was an obstacle. It is impossible to make him (Chitambarânadhan) relent as he is a man of stubborn and mean disposition. It is his object to gain something for his expense at any cost to others." In the same letter Ramalingam alluded to his interference with the Tambiran at Trichinopoly in favor of the Pandara Sannadhi, and expressed his apprehension that that tambiran's conduct was fraudulent and that he might conspire with the Pandara Sannadhi at Tiruvavaduturai. This shows how the uncle and the nephew were at this time endeavouring to repair the injury done to one another by the litigation during the time when they had disagreed with each other and how Ramalingam regarded the Pandara Sannadhi at Tiruvavaduturai.

As to Sachitananda Desigar's visit to Tinnevelly, it ended in the dismissal of the junior Pandara Sannadhi, and Ramalingam was the confidential adviser of his uncle throughout the quarrel and even paid a visit to Tinnevelly. In his letter C13, Ramalingam alluded to the junior Pandara Sannadhi's remark about him, *viz.*:—"We had been trained in the same school," and explained it in the following terms: "I believe the only explanation possible is that the junior Sannidhanam, having been falsely informed by some intriguing gentlemen that I was taking measures calculated to excite their apprehensions, might have made that remark, meaning thereby that as we had the same guru (achariyar) he knew as much as myself and need not be afraid of me." It is not denied, and it is shown by Exhibit Z2 that Arulananda Desigar was a Dharmapuram man, and there is therefore no doubt that Ramalingam was also a Dharmapuram man, though the respondent denied in his evidence that such was the case.

As to Ramalingam's management at Dharmapuram, the letters from him to the Pandara Sannadhi show distinctly that it was **[469]** on behalf of the Adhinam and as the agent or subordinate of the Pandara

Sannadhi, but they do not necessarily prove that the relation of principal and agent extended also to Tiruppanandal.

The correspondence which took place at this time shows that Ramalingam was an able manager and exercised efficient supervision; and his reports (Exhibits T12, U12, W12, X12, Z12) show on what points and with what detail information was given and orders solicited by the agent to and from the principal.

As regards his relation to Benares and the misunderstanding between him and the tambiran at that station. In February 1872, Ramalingam desired to go to Benares, but was dissuaded from going, and he then sent Paramasiva Tambiran and a clerk to Benares to restore, as he said, order there (Exhibits J13 and 620). In October, 1872 the Maharaja of Travancore visited Benares and his choultry and temple; they were locked up at that time and the charities were performed in another place. Ramalingam feared that if this should come to the notice of the Maharaja, and if he should learn that there was misunderstanding between Tiruppanandal and Benares, he might put an end to Ramalingam's management. In Exhibit S13 he asked the Pandara Sannadhi to give strict orders to Chitambaranadhan and Paramasivan to open the Maharaja's choultry, to perform his charity there and to forbear to mention to him the existence of the disagreement between Tiruppanandal and Benares. It appears that there was an understanding between Ramalingam and Sachitananda Desigar as to what arrangements should eventually be made in regard to Benares and in his letter of 28th May 1873, J14, Ramalingam said to the Pandara Sannadhi, "Your Sannidhanam may recall to mind what we have agreed upon already after a discussion of the matter." In May 1873, Chitambaranadhan became seriously ill and Ramalingam went to Benares and made some arrangement (Exhibits J14, K14 and L14).

It appears from Exhibit 1523 that when Chitambaranadhan felt that he was in imminent danger, he sent for Paramasiva Tambiran, who was sent from Tiruppanandal, and placed him in possession and handed over the keys with the request that on Ramalingam's arrival they should be made over to him, and that Ramalingam arranged that Paramasivan should manage the affairs at Benares.

Chitambaranadhan died in 1873, and the senior Pandara Sannadhi died in 1874. We have already stated that the result of **[470]** Sachitananda Desigar's visit to Tinnevelly consisted in the dismissal of his junior at Sivasilam for immorality and extravagance, and in the appointment of the appellant in his stead. Ramalingam was in management at Dharmapuram until the appellant relieved him on the 1st June 1874. But Ramalingam's relation to him continued to be cordial, and letters between 1st June 1874, and 12th December 1877, show that he continued to make contributions, send presents, advise in connection with the management of Adhinam affairs and correspond as if he was on terms of intimacy with Dharmapuram. On the 22nd February 1874, Subramania Tambiran, who was appointed by Ramalingam in 1864 as his junior and successor, died, and from that time until respondent's appointment in 1880, there was no junior at Tiruppanandal.

66. In 1875, Arulananda Desigar, the dismissed junior Pandara Sannadhi, impugned the validity of his dismissal by Sachitananda Desigar, his senior, and disputed the appellant's right of succession at Dharmapuram. This dispute led to original suit No. 42 of 1875 on the file of the Subordinate Court of Negapatam, and the matter in contest was whether the senior Pandara Sannadhi was competent to dismiss his junior, and

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whether the plaintiff in that suit was guilty of immorality and extravagance and of conduct incompatible with his position as a tambiran and as junior Pandara Sannadhi. This litigation continued until October 1879, and both the Subordinate Judge and, on appeal, the High Court, held that the junior Pandara Sannadhi was properly dismissed, and that by reason of his misconduct and dismissal he forfeited his right of succession. During the progress of this litigation the cordiality between Ramalingam and the appellant was interrupted and replaced by a feeling of hostility to each other subsequently to 1877. The first step taken by Ramalingam during the litigation was to make his position at Benares perfectly secure. At the close of 1876, Paramasiva Tambiran, who was in management at Benares after the death of Chitambaranadhan, returned to Dharmapuram, and Ramalingam took advantage of this opportunity to place a layman named Kandadai Seshaiengar in management and took from him the agreement marked 624. This person is still in management, and the first matter in which Ramalingam disregarded the ancient and recognized usage of the institution was the substitution of a layman as the agent of Tiruppanandal in the room of a senior and a junior tambiran who used to manage, subject to [471] the supervision and control of the tambiran at Tiruppanandal. This change does not appear to have called forth any protest from Dharmapuram, probably because the senior Pandara Sannadhi's position was in danger on account of the litigation and he did not like to estrange Ramalingam from his cause.

The next step which Ramalingam appears to have taken to add to his own importance was an endeavour to obtain possession of the management of the temple at Tiruppanandal. It must be stated here that there is a temple at Tirruppanandal besides the Benares Mutt presided over by Ramalingam and his predecessors. From time immemorial the temple has been under the direct management of the Pandara Sannadhi at Dharmapuram, who deputed a separate tambiran from time to time to attend to its affairs, and the transfer of the management to Ramalingam appears to have been desired by him. There is oral evidence to the effect that the appellant declined to gratify his desire in this respect and to part with any of his Adhinam property, and this seems to have produced a coolness. The Pandara Sannadhi at Tiruvavaduturai assisted the plaintiff in original suit No. 42 of 1875 and gave evidence as his witness and in his favor, and Ramalingam, it is stated by several witnesses named by the appellant, went over to the other side and co-operated with the rival Pandara Sannadhi in assisting Arulananda Desigar. The coolness between Dharmapuram and Tiruppanandal ripened into hostility, and the ultimate failure of Arulananda in his litigation tended only to deepen it. As regards the Adhinam at Tiruvavaduturai, it seems to have acquired a reputation for learning under the present Pandara Sannadhi, for Exhibit J13 shows that Paramasiva Tambiran, who belonged to Dharmapuram, was studying there. It was also a rival Adhinam, for, in writing to Sachitananda Desigar on the 13th February 1871, about the affairs of the temple at the Rock Fort, Ramalingam said in his letter, Exhibit R12, that the Pandara Sannadhi at Tiruvavaduturai was to visit the Rock Mutt at Trichinopoly, that the tambiran of that mutt might conspire with the Pandara Sannadhi, and that it was necessary to send persons to ascertain what takes place there. There is also an allusion to this kind of feeling in Exhibit W11 of the 11th September 1861, in which Ulaganadha Tambiran, who was not then in favor at Dharmapuram, is reported to have been staying at Tiruvavaduturai. It is also in evidence

that so early as between 1830 and 1840 there was the same feeling of rivalry, and that the agents of [472] the Adhinam at Tiruvavaduturai endeavoured to obtain precedence for it in connection with a festival at Suchendram in Travancore.

But on the 21st December 1874 Ramalingam wrote to Dharmapuram requesting that a room at Tiruvidamarudur be made over to the Pandara Sannadhi at Tiruvavaduturai, who, he observed, "was the staunch well-wisher of us all." During his disagreement with the appellant he spoke of Dharmapuram Tambirans as inefficient men.

Arulananda's appeal to the High Court was dismissed on the 2nd October 1879, and in June 1880, Ramalingam became seriously ill and he appears to have desired to make Tiruppanandal an independent Adhinam.

67. On the 6th *idem* he made his will (Exhibit 9) in favour of the respondent, and it is in these terms: "As we are weak through illness, and as Subramania Tambiran, who was appointed second Tambiran by means of a will executed by us on the 18th March 1867, died on the 23rd February 1874, we have appointed now our disciple Kumarasami Tambiran the second Tambiran in our Adhinam. The said Kumarasami Tambiran is alone to be the full owner like ourselves of all the immoveable and moveable properties belonging to our Adhinam. He is to enjoy the said properties from disciple to disciple, and he is to conduct with all the privileges of ownership, like ourselves, after our lifetime, all the charities conducted by us." Comparing the wording of this will with that of the wills made from 1818, Exhibits 1 to 8, it will be observed that the expressions "and our disciple," "and our Adhinam" are new. By Exhibits 1, 2, 3, Sadayappa Tambiran appointed his junior as his successor. In Exhibit 4 (1838) Ganapati I termed his successor "my junior," and described the properties as belonging to him; in Exhibit 5 (1841) Ramalingam designated Chokkalingam as his junior and described the properties as belonging to him, and in Exhibit 6 (1853) Ganapati II designated Ramalingam as his disciple and junior, and the properties as belonging to him. In Exhibit 7, which is the first will made by Ramalingam, he designated Subramania Tambiran "as our chief disciple" and described the properties as belonging to our Adhinam, and in Exhibit 9 he designated himself Adhina Karta, and the respondent as his disciple, and described the properties as belonging to "our Adhinam." These new expressions are no doubt designed to convey the impression that Tiruppanandal was an independent [473] Adhinam in regard to succession and not a disciple Adhinam in the sense that the managing Tambirans are Dharmapuram men.

After the respondent was appointed, Ramalingam received letters of recognition from the Tanjore Palace (Exhibit 386) and from Sankara Chariyar (Exhibit 478) and the respondent received a letter of recognition from the Raja of Kalastri (Exhibit 412). There were also several letters sent to the Pandara Sannadhi that the respondent's appointment was contrary to custom, and Exhibit P37 stated that even the Pandara Sannadhi of Tiruvavaduturai, admitting that the appointment was contrary to the terms of the razinama and the custom hitherto prevailing, denied that it was done with his knowledge. Ramalingam died in September 1880, and the appellant brought the present suit in October 1881. During Ramalingam's time he purchased properties under Exhibits 183 to 336, which provided, as usual, that they were to be enjoyed by the purchaser and his successors in the line of disciples.

The foregoing is the summary of succession and management at Tiruppanandal and of its relation to Dharmapuram and the mutt at

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Benares from the time of Tillanayaka Tambiran, its founder, to that of Ramalinga Tambiran, who died in September 1880.

The evidence on record is voluminous, and there are more than 2,000 Exhibits and 150 witnesses. Most of this large mass of documents were admitted by the consent of counsel on both sides. Several of them are irrelevant and some are no legal evidence, and the Subordinate Judge has neither sufficiently set out the whole evidence nor discriminated between what is and what is not legal evidence, and he has disposed of it in a perfunctory manner. In stating the summary of succession and management, we have taken care to see that it rested on legal evidence and referred to the material evidence to which our attention was directed at the hearing of the appeal.

68. We now proceed to consider the effect of the evidence with reference to each ground of claim. It was stated in the plaint that the mutts at Benares and Tiruppanandal, together with the charities and the properties in dispute, belonged to the appellant's Adhinam. Those mutts and their endowments are described from time to time in the wills left by the Tambirans of Tiruppanandal as belonging exclusively to them. We may here observe that the ownership which is referred to is not to be understood in the sense **[474]** in which it is ordinarily used in connection with private property. It is intended to denote the legal relation of the head of an Adhinam to the Adhinam endowments under his supervision and control, and it is in this sense that both parties to this appeal have understood the averment in the plaint and proceeded to trial. What that relation is, to what extent it is that of a trustee, and in what respect the head of a mutt has a larger dominion over mutt endowments than an ordinary trustee, are explained by a Division Bench of this Court in *Sammantha Pandara* v. *Sellappa Chetti* (1). We take it then that the case suggested by paragraph 4 of the plaint is this, *viz.*, that the appellant is the superintendent and responsible manager or trustee of the mutts and the charities in suit, though with an increased dominion over the endowments of the mutts as explained in the decision cited above.

69. We may also observe that it is the case of both parties that the right of conducting the charities in dispute and of administering their endowments follows according to usage the right to manage the mutt at Tiruppanandal. It will be seen from the history of management already set out that such has been the custom from 1720 to 1880.

70. Adverting to the appellant's claim that he is the responsible manager or superintendent of the Benares charities and of the mutts at Benares and Tiruppanandal, the Subordinate Judge has found that he has failed to establish it, and in this opinion we entirely concur. As to the mutt at Tiruppanandal and its endowments there is no evidence at all which shows that any contribution was made from the funds of the appellant's Adhinam in connection with them. As observed in paragraph 11, it was Tillanayaka Tambiran who built the mutt at Tiruppanandal, presumably with the funds in his possession as the managing Tambiran of the mutt at Benares, and first purchased lands for its support to be enjoyed by him and his successors in the line of disciples. There is considerable documentary evidence on the record which proves that each of his successors made new purchases and added to the endowment from time to time. It was stated for the appellant that Tillanayaka Tambiran belonged to the Dharmapuram Adhinam, and that

(1) 2 M. 175 (179).

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he established the mutt at Tiruppanandal under the orders of Sivagiyana Desigar, the Pandara Sannadhi at that time. There [475] is no doubt oral evidence of reputation to that effect, and there is also documentary evidence to show that the former was a disciple of the latter. Assuming that there was such a consultation which was very probable by reason of the relation between them as guru and disciple, it does not follow from it that as between the Tambiran at Tiruppanandal and the Pandara Sannadhi at Dharmapuram, the mutt and its endowments belong to the latter and not to the former. As to the mutt at Benares the appellant's own case, as disclosed by the oral evidence adduced by him is that a Dharmapuram Tambiran, named Gurapara, an ascetic, renowned for his piety and learning, and Tillanayaka's predecessor at Benares, founded and endowed the mutt there with property which he acquired in Northern India.

71. The only apparent foundation then for the alleged trusteeship is the ceremony of Dattam whereby each Tambiran makes a gift of his soul, body, and wealth to his guru (preceptor). There is a great deal of oral evidence to the effect that such a ceremony is gone through by the Tambirans of Dharmapuram during their ordination, and it is corroborated by the allusions made to the spiritual slavery, which is an incident of that ceremony, by several managing Tambirans including Ganapati I for upwards of sixty years. Although this ceremony may perhaps be a pious motive for a gift and a reason for upholding it when it is completed and executed, still we cannot recognize it as a source of property or legal right in those cases in which the Tambiran acquiring the property either refuses to surrender it or devotes it to charity and thereby clothes it with a special trust, religious or charitable. It is provided by Act V of 1843, Section 3, that no person who may have acquired property by his own industry or by the exercise of any art, calling or profession, or by inheritance, assignment, gift or bequest, shall be dispossessed of such property or prevented from taking possession of it on the ground that such person or that the person from whom the property may have been derived was *a slave*. It is clear, then, that the agreement of a Tambiran to become the slave of his guru could have had no legal operation since 1843, and that adverse possession on the part of the Tambirans at Tiruppanandal from that year is fatal to any claim which the appellant may choose to found upon it. Nor is there any trace in the evidence of the properties in suit having been treated at any time either by the Pandara Sannadhis or the Managing [476] Tambirans at Benares or Tiruppanandal as legally vested in the Adhinam at Dharmapuram; for, from 1818, each Tambiran of Tiruppanandal openly declared in his will when he appointed his junior as his successor that none but himself during his life and none but his successor after his death had any claim either to the mutts at Benares and Tiruppanandal or to the charities under his management or to their endowments. Further, the clause in each sale-deed commencing from the time of the founder, Tillanayaka, and ending with that of Ramalingam II, *viz.*, that the property purchased shall be enjoyed by the purchaser and his successors in the line of disciples, is inconsistent with the consciousness of the legal import which the appellant now seeks to give to the religious ceremony. Exhibit 583, whereby the Pandara Sannadhi at Dharmapuram mortgaged some Adhinam property to Sadayappa Tambiran by way of conditional sale in 1829, contains a recognition that the then Tambiran at Tiruppanandal and his successors were capable of acquiring and owning

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property for themselves. His silence when registry was altered in the Collector's books on the death of each managing Tambiran and the recital in the petition of compromise, Exhibit H19, lead to the same conclusion. In the light thrown on the legal effect of the ceremony by the usage of the institution, we hold that it did not operate to convert the properties in dispute into those of the Adhinam at Dharmapuram. Furthermore, the ceremony was only designed to emphasize the solemn renunciation by Tambirans of all desire for wealth and to constitute it into a spiritual offence if they own property for personal indulgence and comfort. It was certainly not intended to prohibit the acquisition and possession of property in view to advance religious knowledge or charity for the promotion of which the religious association itself was constituted, and it could therefore have no application either to religious or charitable trusts founded or accepted by Tambirans.

72. As to the properties held by Ramalinga Tambiran on behalf of the charities at Benares and elsewhere, the question who is the trustee of those charities must depend for its decision on the intention of those who instituted and endowed them, as evidenced either by endowment deeds or by usage in regard to their management. The several endowment deeds set out in connection with the management of each Tambiran show that the grantee in each case, except in that of certain money grants which we shall presently [477] mention, was the managing Tambiran at Tiruppanandal for the time being, and the course of succession to management was, whenever specified, that of his successors in the line of disciples. We have also noted that in several of them the grantees are described as being the disciples of Dharmapuram, but as remarked by the Subordinate Judge, there is nothing in those documents to show that they are more than words of description. It was urged in appeal that the Subordinate Judge did not give due legal effect to the endowment deeds produced by the appellants, and our attention was drawn to Exhibits A, W52, E51, D53, B, C, E53, 778, A47, 781, X52, Y46, 780, Y52, Z52, A53, Z46, B53, C53, 774, D, E, F, G, J37, 775 and 776. On referring to them we find that, as already observed, the grantee is only said in several to be the disciple of Dharmapuram.

73. We find, however, that Exhibits W52, X52, Y52, Z52, A53, B53 and C53 relate to grants of money on account of certain Benares charities, and they purport to be documents executed jointly by the Pandara Sannadhis at Dharmapuram, and the Tambirans of Tiruppanandal and Benares undertaking for themselves and on behalf of their successors duly to perform the charities therein mentioned. These documents no doubt show that the Pandara Sannadhi was constituted a joint trustee in regard to some money endowments, but as remarked by the Subordinate Judge, there is no evidence to indicate that the appellant or his predecessors ever acted as a co-trustee or exercised any supervision with reference to those money grants; on the other hand the wills made by Tambirans of Tiruppanandal describe all the charities as having been under their exclusive management, and as no one else having any claim to them; and for more than 60 years, the Pandara Sannadhi and his predecessors have abstained from all interference with their administration. His present claim to management must therefore be considered to be barred by limitation. It was held by the Privy Council in *Balwant Rao Bishwant Chandra Chor* v. *Purun Mal Chaube* (1), that Section 10, Act IX of 1871, to which

(1) 10 I. A. 90.

Section 10, Act XV of 1877 corresponds, was applicable only to suits instituted to recover property to the trusts of the endowment, but *not* to suits brought to establish a personal right to manage or in some way to control the **[478]** management of the endowment. In the case before us there is no question of recovering these endowments for the trusts of the endowments, nor was it alleged in the plaint that they were used for any purpose other than the proper purposes of the endowments.

74. In this connection it is also necessary to refer to a charity conducted for the Zamindar of Yettiyapuram. There is documentary evidence showing that this charity was instituted at the instance of a former Pandara Sannadhi of Dharmapuram, that remittances were made to him by the zamindar from time to time in view to its performance, and that although this charity was conducted by the Tambiran at Benares under the supervision of the Tambiran at Tiruppanandal in common with other Benares charities, the correspondence in regard to the remittances which were made and the due administration of the charity always passed through Dharmapuram and there was no direct communication between Tiruppanandal and Yettiyapuram. It does not appear, however, that this charity has been endowed, but the special mode in which the founder and his representatives were communicated with in regard to it alone is suggestive.

75. It is also desirable to refer specially to the endowment under the management of the Tambiran at Achiram in Travancore. That endowment was founded partly for the benefit of the Adhinam at Dharmapuram and partly on account of Benares charities, but as it is situated in Travancore territory, it is not part of the property over which we have jurisdiction.

76. These circumstances undoubtedly suggest the inference that in conseqneuce of the relation of guru and disciple between Dharmapuram and Tiruppanandal, certain special arrangements were made in some cases as a matter of mutual convenience, and the Pandara Sannadhi, who was originally a co-trustee in regard to some money grants, forbore to interfere in their administration and left them under the sole management of the Tambirans at Tiruppanandal; but there is no foundation for the contention except in regard to the few money endowments mentioned above, that the endowment deeds constituted the Pandara Sannadhi either the sole or a superior trustee responsible for their due administration. The learned counsel for the appellant argued that because some grants made by the Zamindar of Ramnad to the Tambiran for the time being in charge of the Adhinam mutt at Tiruvarur were subsequently treated as entrusted to the management of the Pandara Sannadhi **[479]** at Dharmapuram, grants made to all the Tambirans of Tiruppanandal should likewise be treated as made to their spiritual superiors. The two mutts may not be in the same position, the one may be, as is alleged for the respondent, subordinate to the Adhinam and presided over from time to time by a Tambiran who is removable at the will of the Pandara Sannadhi, whilst the other may be independent of Dharmapuram in respect of management. In the one case the donor's intention may reasonably be presumed to have been to commit the endowments to the management of the responsible representative of the mutt, and not of a Tambiran who is a mere agent and whom the Pandara Sannadhi may remove at his pleasure, whilst in the other there may be no special ground for such presumption.

77. The material question then is whether, according to usage, the relation of principal and agent has subsisted in regard to management

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between Tiruppanandal and Dharmapuram. It is in connection with this part of the appellant's case that reliance is placed upon the voluminous correspondence in evidence, of which the substance, so far as it is material, has already been stated. In considering its value, it is convenient to adopt the classification or headings suggested by the learned counsel for the appellant, *viz.*, (1) Reports sent, (2) Advice sought, (3) Complaints made, (4) Remittances made to Dharmapuram for Uchikala Katlai, (5) Payments of the travelling expenses of the junior Pandara Sannadhi, (6) Management of the Adhinam at Dharmapuram by the Tambiran at Truppanandal, (7) Repairs, (8) Letters recognizing the Dharmapuram claim and referring to the origin of the mutts, (9) Conceded remittances through Dharmapuram, and (10) agreements executed by tambirans.

As to remittances it is no doubt true that contributions were made from Tiruppanandal to Dharmapuram or the junior Pandaram from time to time since 1823. They were made usually, (i) for the expenses of Gurupuja or the anniversary of the founder of the Adhinam; (ii) for Mahesvarapuja or the ceremony designed for the spiritual benefit of the deceased Tambiran of Tiruppanandal; (iii) for the expenses of Uchikala Katlai or midday services in the Western Temple built at Dharmapuram in honor of the founder of the Adhinam; (iv) occasionally on account of a festival in that temple; and (v) for morning worship in the same temple in the month of Margali (December-**[480]**January) every year. In addition to these remittances it appears that articles which were thought to be rare or fine, or beads which were considered to be sacred, were at times sent as presents either to the Pandara Sannadhi or for use in the Western Temple at Dharmapuram. It is also in evidence that materials were supplied on two or three occasions and repairs executed in 1820, 1822 and 1859 at Dharmapuram at the expense of Tiruppanandal, and that when a junior Pandara Sannadhi went to Tinnevelly from Dharmapuram, the Tambiran at Tiruppanandal received him whilst on his way with great respect, took him through the village of Tiruppanandal in procession, entertained him in a suitable style during his stay, and contributed articles for his use and money towards the expenses of his journey when he left for Tinnevelly. But the purposes for which contributions, payments and supplies have been made only imply the existence of the relation of disciple and guru between the Tambiran at Tiruppanandal and the senior and junior Pandara Sannadhis of Dharmapuram, and suggest that the Western Temple at Dharmapuram had been held in great veneration as one dedicated to the worship of their spiritual ancestor, the founder of the Adhinam, and that the mutt at Dharmapuram has been regarded with affection as the abode of the senior gurus or the primary hermitage of the Adhinam. But it is noteworthy that no remittance, such as an agent ordinarily makes to his principal, is to be found among the contributions, and that there was no surplus incomeor saving from the mattam endowments at Tiruppanandal ever remitted to Dharmapuram, either to be invested or for safe custody or to be devoted to fresh charity in furtherance of the object for which the mutt at Tiruppanandal was originally founded. Having regard to the character of the remittances and of the presents or contributions, we are unable to say that they prove more than the relation of disciple and guru has subsisted between Tiruppanandal and Dharmapuram.

78. Several important groups of letters relate to the management of the affairs of the Adhinam at Dharmapuram by the Tambiran at

Tiruppanandal when the Pandara Sannadhi needed such assistance on account of his age or of absence, or by reason of imperfect local knowledge or experience. The letters which form the first group extend from 1823 to 1835, and refer to the time when Sadayappa Tambiran, who was reputed, on account of his attach-[481] ment to the Adhinam, to be its "eldest son and darling" was the manager at Tiruppanandal. Their contents prove (i) that he made some enquiry and expressed an opinion in September 1823 in regard to the purchase of a village called Sethur (F4) : (ii) that in 1831 he gave instructions to the agents on the establishments at Dharmapuram in regard to the sale of Sambapisanam paddy at that place and payment of kist or assessment due to Government (G4) ; (iii) that in 1832 he gave directions in regard to arrangements to be made for the Gurupuja to be performed by the junior Pandara Sannadhi on his arrival at Dharmapuram (H4) ; (iv) that in 1833 and 1835, he executed repairs at his own expense and under his own superintendence to the kitchen at Dharmapuram (J4 and K4) ; (v) that he repaired the dome of the Western Temple and discussed the desirability of substituting an arch for the flat ceiling of a building near the Dakshanamurti Temple at Dharmapuram ; and (vi) that he made a remittance on account of a Mahesvarapuja (feeding of the Tambirans at the anniversary) for the spiritual benefit of his predecessor at Tiruppanandal, Chitambaranadha Tambiran (Q20). These only prove that Sadayappa and his predecessor were Dharmapuram men, that he assisted his guru in the management of the Adhinam affairs in some particular matters ; that he was attached to Dharmapuram and liberal in his contributions for the benefit of his spiritual superior ; and that his junior spoke in Exhibit F4, of the village which was intended to be purchased for the Adhinam, as "ours" as if he belonged to the Adhinam and as a disciple belonging to it would speak of it in his communications to his spiritual superior. But we cannot say that they prove agency as regards the management of the mutts at Benares and Tiruppanandal or of Benares charities.

79. Again, another large group of letters is pressed upon our attention in connection with the management of the Adhinam property at Dharmapuram by Ramalingam II during the absence of Sachidananda Desigar in Tinnevelly on account of the conduct of his junior, Arulananda Desigar. They show that Ramalingam was also a Dharmapuram man, that he spoke of the Adhinam as "ours," that his management was on behalf of the Pandara Sannadhi, that the latter reposed very great confidence in the ability and judgment of the former, that Ramalingam's relation to Dharmapuram at this period was extremely cordial, that his contributions were liberal, that mutual good will ordinarily subsist-[482]ing between a disciple and his guru gained strength in his case during this period on account of recent reconciliation with his uncle to whom he owed his position at Tiruppanandal, and by whom he was pardoned for all he did against the Adhinam during the period when there was disagreement between them from 1863 to 1871.

80. Another group of letters to which our attention is called relates to acts of interference in the management at Dharmapuram from 1858 to 1863 when Sachidananda Desigar had newly arrived at that place and when the relation between Dharmapuram and Tiruppanandal was marked on the one side by affectionate confidence in the ability and judgment of a nephew, and on the other, by attachment on the part of Ramalingam to his uncle and well-wisher. The next group of letters shows that Ramalingam assisted the appellant before us by continuing in management

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until the latter arrived at Dharmapuram from Tiruppanandal and by assisting in such management until 1875 by way of suggestion and advice. It must however be noted here that during the period extending from 1873 to 1875, the appellant was new to Dharmapuram, that as a Tambiran he was only a junior at Benares when Ramalingam was superintendent at Tiruppanandal, and that Ramalingam had assisted and advised his uncle in connection with the proceedings which were instituted against Arulananda Desigar, the junior Pandara Sannadhi in Tinnevelly, and which eventually resulted in the appellant's elevation first as the junior Pandara Sannadhi and shortly afterwards as the senior Pandara Sannadhi.

These intervals of management at Dharmapuram on the part of Tambirans at Tiruppanandal, and of active interference in management by way of confidential advice and suggestion, first between 1823 and 1835, again in the time of Chokkalingam as explained in the summary of his career, and lastly on three separate occasions during the time of Ramalingam II, show that as a religious institution and a centre of control, the mutt at Tiruppanandal was affiliated to Dharmapuram as a disciple Adhinam, that is to say, as a mutt and a centre of control managed by Tambirans who were disciples of Dharmapuram : and that as such disciples they looked upon the Adhinam as the original religious institution of the brotherhood or holy crowd to which they belonged and helped the Pandara Sannadhi from time to time in managing as his agent during his absence or interfering in particular matters and making confidential suggestions. They prove at the best that, as **[483]** disciples, Tiruppanandal men were eligible for the management of Adhinam property, but how do they prove agency in regard to management of the mutts at Tiruppanandal and Benares and of Benares charities? According to the three wills left by Sadayappa Tambiran in 1818, 1820 and 1829, he and his successors were absolute owners, and according to Ramalingam II, his management was independent. Whenever the latter quarrelled with Dharmapuram, he denied that Dharmapuram had any control over him as managing Tambiran at Tiruppanandal, and according to the terms of the compromise (Exhibit H19), the Pandara Sannadhi had no right to interfere at all with the management at Tiruppanandal or with the selection of a junior and successor by the managing Tambiran of that station, provided that he was a Dharmapuram man.

81. Passing on to the group of letters designated for the appellant as "reports sent," their contents fail likewise to satisfy us that the relation of principal and agent subsisted in regard to management at Tiruppanandal. The remarks which we have made in connection with the career of each Tambiran at that place and the letters set out as also those not set out relate (i) to hundies from and upon Benares; (ii) to matters which may find an appropriate place in communications between Tambirans and their spiritual superiors; and (iii) to the conduct, welfare and movements of particular Tambirans in whom the Pandara Sannadhi may be supposed to take an interest as the spiritual head of the association or brotherhood which consisted of them. Whenever allusions are made to management, they are made in general terms and differ in their character essentially from the communications which pass between agent and principal. For instance, (i) they relate to hundies drawn at the instance of the senior or junior Pandara Sannadhi who desired to oblige men of position and influence who had to remit money to Benares; (ii) to arrangements made for the convenience of pilgrims or persons who took the bones of deceased

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persons to be thrown into the Ganges; (iii) to Gurupuja and Mahesvarapuja: (iv) to Yettiyapuram charities; (v) to jewels presented to the Western Temple; (vi) to the state of the season; (vii) to damage done occasionally by rain or storm, and to loss from low prices; (viii) to the pomp with which the Pandara Sannadhi visited particular places; (ix) to Adhinam affairs which concerned the junior Pandara Sannadhi and Dharma-[484] puram men and to other matters of a general nature which have no material bearing on the question of agency. In this connection we may refer to the reports made by Ramalingam II as the Pandara Sannadhi's agent whilst in management at Dharmpuram as showing what matters are usually mentioned by an agent who really manages a mutt for another. No accounts of management were submitted from Tiruppanandal to Dharmapuram, and this omission is remarkable, when it is remembered that accounts relating to Benares charities were sent from Ramesvaram, Chidambaram and Achiram to Tiruppanandal. There is a temple at Tiruppanandal which is managed direct from Dharmapuram by an agent or a subordinate, and if the Tiruppanandal Tambiran were himself an agent there was no necessity for the employment of a separate agent in connection with that temple. Again, there are two distinct Mutts at Chidambaram, one existing on account of Benares charity under the management of Tiruppanandal, and the other on account of Adhinam charities under the management of Dharmapuram. Further, accounts were submitted from Achiram to Dharmapuram in regard only to the Dharmapuram endowment at that station. We find no instance in which the surplus income was paid to Dharmapuram or instructions were sought in regard to management, or reports submitted in detail at stated periods either at the time of cultivation or harvest. We cannot accept the letters under the heading of reports sent as proving agency in regard to management at Tiruppanandal.

82. As to the group of letters which, it is said, show that *advice was sought from, and complaints were made to,* Dharmapuram, they appear to be of no value as evidence of subordination with respect to the management of Benares charities Many letters in this group have no reference at all to Benares charities or their management. Several are news letters, several relate to remittances made for Gurupuja, to presents made to Dharmapuram, and to arrangements made for throwing the bones of deceased persons into the Ganges. Many relate to advice given *to the Pandara Sannadhi* in connection with his management of the Adhinam affairs, and to complaints made against persons who managed the Adhinam property, and they were written when Sadayappa Tambiran, Chokkalinga Tambiran, Ramalingam II and Chitambaranadha Tambiran of Benares advised the Pandara Sannadhi as their disciples and confidential friends in regard to matters connected [485] with the Adhinam. Several of the letters have reference to remarks made and instructions applied for by Ramalingam when he was in management at Dharmapuram, and with reference to Adhinam property. There is a series of letters which relate to the management of the Adhinam lands at Achiram, to the shortcomings of Vydilinga Tambiran and Saravana Tambiran who managed them for a time, and to the measures taken in view to ensure at least a remittance of Rs. 200 a year to Dharmapuram from the Adhinam endowments in Travancore. We have already observed that the Tambiran at Achiram managed there as well the Dharmapuram endowment as the endowment founded in connection with Benares charities. As to the former, the letters show that the Tambiran was the agent of the Pandara Sannadhi,

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and the solicitude shown by the junior Pandara Sannadhi and his interference in regard to it as compared with his indifference to the endowment on account of the Benares charities, indicate a belief on his part that he had no right to interfere with the management at Tirruppanandal. A few letters relate to a new charity founded at Ramesvaram by one Bacha Rao, a sheristadar, in communication with the Pandara Sannadhi. They show that the Tambirans at Tiruppanandal wrote to the Pandara Sannadhi in regard to the arrangement which was to be made for its management under their supervision. Some letters relate to Yettiyapuram charities, to which we have already referred as instituted at the instance of Kandappa Desigar, a former Pandara Sannadhi at Dharmapuram. Though there are a few letters and complaints which relate to Benares charities, they by no means prove agency as to their administration. As to Exhibit Q19, which was a complaint made in 1838 by Aiyarappa against Ramalingam I, it only shows that a senior Tambiran applied to the common spiritual superior when a junior Tambiran who was his official superior treated him with disrespect. There are several letters of complaints addressed by Chitambaranadhan of Benares first against Chokkalingam's management, and next against that of Ramalingam II. There are also similar complaints made against Chitambaranadhan's conduct both by Chokkalingam and Ramalingam. They were written when there was a disagreement or controversy between them; but as evidence of their precise relative position, according to ancient and recognized usage, they have no probative value. But they evidence the fact that the Mutts at Tiruppanandal and at Benares were managed by Tambirans [486] who were disciples of Dharmapuram, and who appealed to their common spiritual superior for interference in order to restore cordiality between them, and to suggest for adoption by them arrangements for the efficient administration of Benares charities.

83. There are again a few more letters which indicate that in the hour of difficulty or embarrassment, the Tambirans at Tiruppanandal appealed to the Pandara Sannadhi for advice and even active interference. We may refer to Exhibits 2, A and other letters which show that the junior and senior Pandara Sannadhis interfered to prevent Chitambaranadhan from complaining of mismanagement to outsiders. There is also Exhibit L8 which shows that Chokkalinga Tambiran sought the advice of the junior Pandara Sannadhi in regard to hundis drawn by Chitambaranadhan for Rs. 15,000 in connection with the expenditure at Benares. There is again Exhibit S13 in which Ramalingam II asked the Pandara Sannadhi to give strict orders to Chitambaranadhan not to reveal the misunderstanding between Tiruppanandal and Benares during the visit of the Maharaja of Travancore to the last mentioned city in 1872. Lastly, there is Exhibit X21 which proves that in 1870 Ramalingam sought the advice of the Pandara Sannadhi at Dharmapuram, when the Mutt at Benares and its endowments were advertised for sale for payment of debts contracted by Chitambaranadhan. But these are incidents referable to the Pandara Sannadhi's position as the head of the Adhinam and spiritual superior and friend interested in the efficient management of the charities by his disciples. But we cannot say that they indicate agency with respect to the management of the Benares charities at Tiruppanandal.

84. The next group of letters, it was urged, supported the appellant's claim and showed the origin of the mutts. They prove (i) that the charities of Yettiapuram were instituted by the desire of Kandappa Desigar, (ii)

that Chokkalingam said to the junior Pandara Sannadhi in 1851 that it was his concern to see that the affairs of all the Mutts from Benares to Ramesvaram were duly and properly conducted; (iii) that when the same Pandara Sannadhi returned some money sent from Tiruppanandal, Ganapati II said that though it was refused as the money of a sinner, it was the Pandaram's duty to protect him; (iv) that Chokkalingam referred in 1847 to his having made a "gift" of his soul, body and property when he became the Pandara Sannadhi's slave; (v) **[487]** that Chitambaranadhan said during his misunderstanding with Chokkalingam and Ramalingam that the Tambirans at Benares and Tiruppanandal and the Benares charities were subject to the jurisdiction and control of the Pandara Sannadhi; (vi) that he characterized Ramalingam's written statement in Original Suit No. 3 of 1854 as showing that he was faithless to his guru; (vii) that he gave an account of the reputed origin of the Mutts at Benares and Tiruppanandal, of the mode in which they were originally managed, and of their mismanagement in the time of Aiyarappa, Chockkalingam, and Ramalingam II; (viii) that all the Tambirans at Achiram, *viz.*, Vydilingam, Chokkalingam, Arunachalam, Vydilingam, and Saravana acknowledged that they were the agents and servants of Dharmapuram; and (ix) that in 1838 Chokkalingam repudiated any desire on his part to proceed to Tiruppanandal and assured the then Pandara Sannadhi that he would always remain under him. They also show that the Mutt at Benares is called the Kumaraswami Mutt of the Adhinam at Dharmapuram, and that Subramania Tambiran and Paramasiva Tambiran were Dharmapuram men. We fail to see how these letters prove that the Tambiran at Tiruppanandal was the agent of the Pandaram at Dharmapuram. Chitambaranadhan's declarations made in view to propitiate the Pandara Sannadhi and strengthen his position and authority against Chokkalingam and Ramalingam are not entitled to much weight. Nor could we accept allusions to the spiritual jurisdiction of the Pandara Sannadhi over every charity and every disciple connected with his Adhinam as proof of his status as the managing or controlling trustee of Benares charities. The conclusion to which we come, after a careful and elaborate analysis of the voluminous correspondence, and on consideration of the history of management for upwards of 150 years, is that the relation of master and servant or of principal and agent is not shown to have existed between Dharmapuram and Tiruppanandal, and that the first ground of claim cannot be supported.

85. The next question for decision is what has been the usage in regard to succession to management at Tiruppanandal, and whether the Pandara Sannadhi at Dharmapuram has any and what right in connection with it. In dealing with the right of succession to the office of a mahunt or the head of a religious establishment in Northern India, the Judicial Committee observed **[488]** in *Genda Puri* v. *Chhatar Puri* (1) that "in determining who is entitled to succeed as the mahunt in such a case as the present, the only law to be observed is to be found in custom and practice which must be proved by testimony, and the claimant must show that he is entitled according to the custom to recover the office and the land and property belonging to it." Again, it was held by the Privy Council in 1867 in *Greedharee Doss* v. *Nundo Kissor Doss Mohunt* (2) "that the only law as to these mahunts and their offices, functions and duties, is to be found in custom and practice which is to be proved by testimony." That was a

(1) 13 I.A. 105. (2) 11 M.I.A. 405 (428).

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suit instituted to establish the right of succession to the Mahunt of Akra, a religious institution wealthily endowed in the zilla of Burdwan, and to obtain investiture and possession of the mutt with its subordinate mutts and properties belonging to them. A similar opinion was expressed in 1882 by the Judicial Committee in *Srimati Janoki Debi* v. *Sri Gopal Acharjia* and others (1) and it was then held that when the plaintiff, a Hindu widow, claimed to succeed to a religious trust under the ordinary rules of inheritance applicable to private property, she must show that the usage as to succession had been in accordance with those rules. The material point for consideration is what has been the recognized usage of Tiruppanandal, first in regard to the power of appointing a successor to the office of managing Tambiran, secondly, as to the qualifications, if any, which render him eligible for the office, and, thirdly, with reference to his investiture or installation.

86. As to the power of appointing a successor, it is desirable to consider it as it existed at three different periods in the history of this religious institution. It has already been shown that the Mutt at Tiruppanandal was in its origin the offshoot of the Mutt at Benares, and that prior to, and after its establishment, the founder, Tillanayaka Tambiran, was the superintendent of all the Benares charities in Northern as well as in Southern India. The only evidence of usage as to the first or Benares period is to be found in Exhibit 17, dated the 11th March 1836, in which Ganapati I traced the succession at Benares and said that each Tambiran appointed his own successor. There is no evidence whatever that the power of appointment vested at Dharmapuram at all events during this period. There is, however, reason to think that all the [489] managing Tambirans were Dharmapuram disciples as explained in paragraph 9 of this judgment.

87. The next period includes in it three cases of succession, *viz.*, Kumaraguru Tambiran, Chitambaranadha Tambiran, and Sadayappa Tambiran. There is abundant documentary evidence to show that the succession was in the order mentioned above, and that the successor was the junior of his predecessor, but located at Benares It was already shown by reference to recitals in endowment-deeds and sale-deeds that they belonged to the Adhinam at Dharmapuram. The reputed usage as to the cause of succession during this period consisted, according to Ganapathi I, in the appointment made by the predecessor in office. Having regard to the evidence before us, there is no ground for saying that the Pandaram at Dharmapuram exercised any power of appointment during this period.

88. From the time of Tillanayaka there was a change in the centre of control. Prior to his time, there was but one centre, and it was the Mutt at Benares. From his time there were two centres, the subordinate and the principal, the former at Benares and the latter at Tiruppanandal. In some documents the Tambiran at the first mentioned place was described to be an agent of the Tambiran at the last mentioned station. However this may be, the senior Tambiran was at Tiruppanandal and his junior or spiritual brother was at Benares. Referring to this change and to its effect upon the relative position of the Tambirans at Tiruppanandal and Benares as principal and agent, the Privy Council observed in 1873, in the case of *Kashi Bashi Ramling Sawmee* v. *Chitumbernath Koomar Sawmee* (2) that even if the story of the plaintiff as to the first establishment of the Mutt at Tiruppanandal were correct, it would by no means follow

(1) 10 I.A. 32. (2) 20 W.R. 217.

that the mahunt (tambiran) who migrated from Benares to Tiruppanandal had power to alter the original constitution of the community, or to say that thenceforward, Tiruppanandal should be its head-quarters, and that the person in possession of the foundation at Benares should be the inferior or mere agent of the mahunt (tambiran) at Tiruppanandal. The Judicial Committee added that the change and the authority by which it was effected should have been distinctly proved, that the object of the original foundation at Benares was [490] to afford to persons resident in the south of India, or making pilgrimages to Benares, facilities for carrying on their worship and performing their religious duties, that it seemed to raise a presumption that the establishment at Tiruppanandal was subordinate to that of Benares, rather than that the ancient foundation became subordinate to that at Tiruppanandal, and that such a presumption might no doubt be rebutted by evidence of the facts, but that there was not sufficient rebutting evidence in that case. Seeing that there is a distinction in principle (1) between a deviation from the founder's intention as to the objects of the charity and a deviation from the directions as to management, which were no doubt originally meant to be governed by circumstances, the matter for determination in this case would be whether the appellant, who was not made a party to the former suit, has proved by clear evidence that the removal of the centre of control was in the special circumstances of the institution a change in furtherance of the object of the charity and not at variance with it.

89. We may here call attention to the numerous endowments and charities extending in value to several lakhs of rupees which are shown by the evidence before us to have been acquired subsequently to the removal of the centre of control to Tiruppanandal. Though the endowments were created on behalf of charities which were intended to be conducted at Benares, there is reason to think that those who instituted them knew well that the senior and responsible Tambiran resided ordinarily at Tiruppanandal, and that it was from there that he issued orders and exercised supervision and control. It is also in evidence that the considerable landed property owned as the endowment of the Mutt at Tiruppanandal was acquired from and after the time of Tillanayaka Tambiran. It appears further that the representatives of the Maharaja of Tanjore and of the wealthy zamindars in the south who founded important charities at Benares, never regarded the establishment of the centre of control at Tiruppanandal as a departure from the original intention as to the trusts of the endowments. We have also adverted to the fact that Sadayappa Tambiran accompanied the Maharaja of Tanjore in 1825 during his pilgrimage to Benares, and then appointed Aiyarappa and Ramalingam I to carry on the charities there, subject to his super-[491] vision and control. We may again refer to the fact that when Saminadha Tambiran wrote from Benares, the Maharaja of Tanjore declined to enter into correspondence with him until and unless he clearly stated that he was appointed by Chokkalingam. For upwards of 150 years the change of centre of control has been recognized as an incident of beneficial management. The object with which Tillanayaka is reputed to have made the change was (i) to enable him to further the causes of charity by residing at Tiruppanandal, visiting often the rajas and zamindars in the south, and inducing them to found new charities at Benares to be managed under his superintendence and that of his successors in

(1) Lewin on Trusts, ed. 8, p. 66.

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the south; (ii) by promptly collecting the income and remitting it to Benares; and (iii) by exercising supervision and control from there in order to see that it was duly applied. The addition since made to the mattam and charitable endowments shows that the change proved beneficial in the result. If all the evidence now before us had been before the Privy Council in the suit of 1867, and if the evidence as to usage had not been limited to the correspondence commencing, as it appears from the judgment of the Judicial Committee with 1840, the Judicial Committee would probably have come to the conclusion to which we are led by the evidence, *viz.*, that the removal of the head-quarters from Benares to Tiruppanandal was intended to promote and did promote the cause of Benares charities in regard to endowed wealth and considered for a century and a half to be an incident of beneficial management.

90. In the third period, there were five cases of succession, *viz.*, of Ganapati I, of Ramalingam I, of Chokkalingam, of Ganapati II, and of Ramalingam II. Each successor was his predecessor's spiritual brother, and appointed as his junior and associated during his life in management at Tiruppanandal. There was a will produced in each case except as regards Ganapati II, which referred to the successor's appointment as junior by the managing Tambiran at Tiruppanandal, to his association in management at Tiruppanandal, and declared his right as such to succeed to the senior after his death. We have pointed out that a similar will existed in regard to Ganapati II also, though it was not produced in this case. (ii) There were also muchalkas executed by some of the Tambirans appointed as juniors, as in the case of Ramalingam I and Chokkalingam acknowledging their appointment and undertaking to act in subordination to their senior Tambiran at **[492]** Tiruppanandal. (iii) The letters written to the Collectors and the orders issued by them in connection with the alteration of registry refer to the relation as senior and junior spiritual brothers, to the appointment by the senior as his junior, and association in management during the senior's life as the customary ground of succession. (iv) The letters of condolence and congratulation addressed by the representatives of some of the zamindars and others who founded and endowed several of the Benares charities lead to the same conclusion. (v) Chokkalingam's description of the usage of the institution in his petition to the late Supreme Court is in accordance with what is stated above. (vi) The petition of compromise, Exhibit H19, is framed on the same view of custom. Although wills were made, there was no instance in which they recognized any other mode of succession to management.

91. It will be seen that the usage, as disclosed by the foregoing evidence, differs from that of the prior period in two particulars. Prior to the time of Sadayappa Tambiran, there was but one managing Tambiran both at Benares and at Tiruppanandal, but in the third period there were two Tambirans at each place at one and the same time. For instance, Aiyarappa and Ramalingam were at Benares as senior and junior managing Tambirans at the same time, and so Ganapati I and Ramalingam I were senior and junior Tambirans at the same time at Tiruppanandal. This double agency is referable to the exigency of efficient management, arising partly from the number of charities and endowments which had to be managed, and partly from the age of the managing Tambiran which induced him to seek the help of a junior and a deputy, and we may safely take it that this variation is an incident of good management in furtherance of the objects

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of the endowment. The practice in the Dharmapuram Adhinam of there being a senior and a junior Pandara Sannadhi at one and the same time was the probable origin of the double agency. Another point in which there is difference is as to the place from which the junior was selected. In the last century, the junior appointed as successor was always the managing Tambiran at Benares. Ganapati I selected as his junior Ramalingam I in preference to Aiyarappa who was Ramalingam's senior at Benares. Both Ramalingam and Chokkalingam selected their juniors from the Dharmapuram Tambirans in the south. Ramalingam II was employed at Morangi in Nepaul before his uncle asked that he should be sent to [493] Tinnevelly, but when he was selected by Ganapati II as his junior, Ramalingam was not employed in any mutt. This variety may at first sight be perplexing, but when it is considered in connection with the ordinary rules of succession applicable to spiritual brothers in regard to the property of an ascetic, it is consistent with a well known principle recognized in spiritual families. In paragraph 5 we have already referred to the constitution of a spiritual family, and to Chapter II, Section 8, of the Mitakshara, and to Section 5 which explains what is meant by a spiritual brother and associate in holiness. An associate in holiness is said to be one belonging to the same hermitage, and if Dharmapuram, which is the seat or residence of the Guru or the Pandara Sannadhi, is regarded as the hermitage, every Dharmapuram Tambiran will be an associate in holiness. A spiritual brother is said to be one who is engaged as a brotherly companion, having, according to Subodhini, consented to become so. One who is both a spiritual brother and associate in holiness is entitled to take such property as a hermit is permitted to own (see also Section 8). By appointment as junior, the Tambiran became a spiritual brother or a brotherly companion, and by both the senior who appoints and the junior who is appointed belonging to the same Adhinam, they were associates in holiness. The only qualification that is necessary for one becoming a spiritual brother is that he must be an associate in holiness, that is to say, he must belong to the same hermitage or spiritual family. If the usage then disclosed by the evidence is compared with the rule applicable to the succession of a spiritual brother and associate in holiness, it is found to be in perfect accordance with it, the points in which it has varied being immaterial to the right of succession. The only difference observable in the last century, when there was but one Tambiran at Tiruppanandal and at Benares, consisted in that the association as managing Tambiran at Benares was considered to constitute the associate a spiritual brother, and in this there was no substantial discrepancy, as both were associated in the administration of same religious charities though one was in a subordinate, and the other in the superior centre of control.

92. As to the appellant's claim there is no trace of it in the documentary evidence until Ganapati's succession in 1838. In Exhibits R18 and W47 there was a new suggestion that the then Pandara Sannadhi should appoint a junior to Ganapati with his consent, and that the appointment of one Ulaganadha would be most [494] conducive to the interests of the Adhinam. But we have explained in paragraph 22 that they appear to suggest a new theory rather than describe the pre-existing usage. We have also shown that no power of appointment was asserted at Dharmapuram until Chokkalingam's succession, and that the oral evidence to which we were referred was untrustworthy. In connection with Chokkalingam's succession we referred to the documents

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relied on for the appellant in paragraph 34. As to the letter of appointment, Exhibit X41, we are unable to attach any weight whatever to it. It is on a plain cadjan and is inconsistent with Exhibits 5, 11, 23, 24, 26, 27, 389, 405, 422, and 456, which are admittedly authentic. These prove Chokkalingam's appointment as junior by Ramalingam and succession to him on the 4th May 1841 according to the recognized usage. Looking at the cadjan then, in the light of prior custom, it was not called for. Testing it by Chokkalingam's conduct at the time as shown by Exhibit G30, mentioned in paragraph 34, Chokkalingam treated the allusion to his appointment by the Pandara Sannadhi with contemptuous silence. Viewing it again in connection with Chokkalingam's subsequent conduct as evidenced by his petition to the late Supreme Court, Exhibit 1273, and by Exhibits 28 and 1448 set out in paragraphs 36 and 45, its existence was altogether ignored by him. Assuming for a moment that it is genuine, the then Pandara Sannadhi's omission to refer to it, when Chokkalingam described the customary mode of succession in Exhibit 1273 and in his letters 23 and 24 mentioned in paragraph 33 and when adverse claims were asserted, is strange. Having regard to the facilities which exist for fabricating a cadjan document like Exhibit X41 and to the value of the property in litigation, we considered it and the oral evidence in its support as unreliable. It appears however to be a fact that on the day Chokkalingam was installed, the Pandara Sannadhi attended the installation and gave him a parivattam or head cloth as shown by Exhibits L and M mentioned in paragraph 34, which corroborate the oral evidence for the appellant on that point. This is the first occasion on which, according to the documentary evidence, there was an investiture by the Pandara Sannadhi. Those exhibits show also that the Pandara Sannadhi and Aiyarappa affected to treat this apparent innovation as equivalent to an appointment by the Pandara Sannadhi, but the Pandara Sannadhi was an interested party anxious to create a right for himself. To his **[495]** statement, therefore, weakened as it is by his subsequent conduct and that of Chokkalingam, we are not prepared to attach weight. Aiyarappa's profession that Chokkalingam obtained his appointment from Dharmapuram is worthless, and, as stated in paragraph 34, he subsequently asserted his own right to appoint a Tambiran in his petition to the Collector. In connection with the next succession, *viz.*, of Ganapati II, we have shown in paragraph 41 that he was appointed on the suggestion made by the Pandara Sannadhi, that the investiture by the Pandara Sannadhi was repeated a second time, that he interfered on this occasion owing to the serious misunderstanding between Chokkalingam at Tiruppanandal and Chitambaranadhan at Benares, and that the character of his interference was shown by Exhibit O2. Judging of this interference in the light of letters which Chokkalingam wrote in connection with Ganapati's succession, he treated it as the interference of a common spiritual superior and friendly arbiter to which he voluntarily submitted under pressure of circumstances, but ignored it as part of the custom that obtained at Tiruppanandal in regard to succession. On the other hand, Masilamani Desigar and the Tambiran at Benares, Chitambaranadhan, affected to treat it as equivalent to a power of appointment. As to Chitambaranadhan's declaration, his character as revealed by a series of documents considerably lowers its value as evidence. Exhibits N2, O2 and P2 show that he treated at this time the power of appointing a junior and giving him a cloth as vested in the Pandara Sannadhi. The

judgment of the Privy Council (1) on appeal from the decision of the High Court at Allahabad shows that in the litigation of 1854, he colluded with Ramalingam against the Pandara Sannadhi and said that the power of appointing a Tambiran at Tiruppanandal was vested in himself. In 1856 he asked the Pandara Sannadhi to forgive him for what he did and promised to act for the future according to his wishes (see Exhibit B2, cited in paragraph 55). It will appear from the same paragraph that during the disagreement between Ramalingam and Sachitananda Desigar, he sided with the latter and professed subordination to him. Exhibit J shows that on the 11th June 1870 he executed an agreement, acknowledging that he was appointed to Benares by the Pandara Sannadhi and that the Pandara Sannadhi was entitled [496] to appoint Tambirans both to Benares and Morangi, whilst the letters mentioned in paragraph 37 show that the recitals contained in the agreement are not true. Again in May 1873 he gave up all the properties in his possession to Ramalingam II, and in 1864 when Ramalingam suddenly visited Benares he executed in his favor the document marked 576 which is inconsistent with Exhibit J. Thus it is evident that his declarations and acts were not consistent with due regard to truth but fluctuated from time to time according to his view of his own interest. As to the declaration of Masilamani Desigar, it was that of an ambitious and unscrupulous Pandara Sannadhi, who endeavoured to build up a right for the Adhinam. The next succession was that of Ramalingam II. In connection with it two letters marked M9 and N9 were relied upon, but they are shown in paragraph 50 to be open to grave suspicion. As to investiture, it was repeated for the third time when the agreement filed as Exhibit H was obtained from Ramalingam and in paragraph 51 we stated why we regard that document as of no avail. But at this succession the Pandara Sannadhi openly asserted his power of appointment to the exclusion of the Tambiran at Tiruppanandal. But Ganapati II and Ramalingam II denounced the claim as contrary to the recognized usage of the institution and this difference was adjusted by the compromise, Exhibit H19. That document contained an acknowledgment that Ramalingam's appointment by Ganapati II was in accordance with custom and that it ought to prevail against the appointment of Ulaganadha Tambiran made by Masilamani Desigar. Thus, the power of appointment asserted for the first time in 1841 was rejected in 1855 as not warranted by the ancient usage of the institution. As to the investiture of which the evidence discloses traces from 1841, that document stated that it took place according to usage, but it provided that Ramalingam should, according to custom, appoint a junior from among the Tambirans of the Adhinam at Dharmapuram, and that the Pandara Sannadhi should thereupon according to custom invest the one so appointed and no one else with arukattu and cloth. In effect the document recognized investiture by the Pandara Sannadhi as part of the custom, but treated it as a compliment and a mere form so long as Ramalingam appointed a Dharmapuram man as junior according to custom. In so far as Masilamani Desigar sought to build up for the Adhinam on the ceremony of investiture a right of appointment in competition with [497] the managing Tambiran at Tiruppanandal, his claim was discarded as an unwarranted innovation upon the ancient usage. In so far as he,

(1) Kashi Bashi Ramlinga Sawmee v. Chitambernath Koomar Swamee, 20 W.R. 217.

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insisted on the investiture for the purpose of enforcing the appointment of a disciple of the Dharmapuram Adhinam as junior and successor, the document treated it according to ancient usage not as a mere ceremony, but as a right vested in the Adhinam. We have no hesitation in saying that this document appears to be a correct record of the usage of the institution. The claim that the Pandara Sannadhi and not the Tambiran at Tiruppanandal is the responsible trustee or legal owner is negatived by the evidence before us and this document also negatives it. The appellant's claim to appoint a junior and successor is negatived by the evidence of usage and rests on a few recent acts of aggression committed by Masilamani Desigar during his administration and this the document condemned as an attempted encroachment and imposed a duty on the Pandara Sannadhi to invest the Dharmapuram man appointed as junior by the Tambiran at Tiruppanandal and no one else. Again, the evidence shows that, for several centuries, and from the time the Mutts at Tiruppanandal and Benares were founded, the managing tambirans have been Dharmapuram men and the document recognized the usage as limiting the power vested in the Tambiran at Tiruppanandal to the appointment of Dharmapuram men only and imposing on him an obligation to do so. As to the investiture, the document treated it as a compliment provided that the appointment made was in accordance with ancient usage. There is no foundation then for saying that Exhibit H19 did not contain a correct description of the previous usage. Ramalingam said to his uncle in Exhibit Y9 that the latter intended to allow, in the amicable adjustment he desired to bring about, his proper privilege to every one ; and the document appears to have done so. Again, Exhibit P37 shows that, on behalf of the Adhinam at Dharmapuram, the respondent's appointment was questioned so recently as on 14th June 1880 on the strength of Exhibit H19. In all probability the fact seems to be that because Ramalingam unscrupulously violated the terms of Exhibit H19, the appellant in his turn urged that he had rights which he did not possess either under that document or according to usage.

93. It is urged in appeal that Exhibits R18 and H19 were misconstrued and that the Subordinate Judge did not give due legal [498] effect to Exhibits J, E15, M9, N9 and S4. As to Exhibit R18, we do not consider that it contains a correct description of the usage for the reasons mentioned in paragraph 22 ; as to Exhibits M9 and N9 we regard them with suspicion for the reasons stated in paragraph 50, and as to Exhibit S4 we have referred to it in paragraph 38. As to Exhibit J, it is an agreement executed on the 11th June 1870 by Chitambaranadhan in favor of Sachitananda Desigar when the two were acting in concert to humble Ramalingam II, and we consider it as evidence made by them to serve the end which they had in view at that time. In paragraph 62 we stated the grounds on which we believe that it was executed, probably in return for a price paid. We may also observe that the recitals in it are at variance with Exhibits 988 and 989 (see para. 37.) Again, Sachitananda Desigar not only took no action upon it but he appears also from Exhibit J4 to have permitted Ramalingam to make his own arrangements with Chitambaranadhan in supersession of it. It is again at variance with the agreement given by Chitambaranadhan to Ramalingam during his visit to Benares in 1864. We are of opinion that the agreements filed as Exhibits J and K were not executed *bona fide* that no action was taken upon them by Sachitananda Desigar and that there is reason for the belief that after he was reconciled to Ramalingam, he treated them as evidence

made during a quarrel to serve a party purpose. The only document in regard to which the Subordinate Judge has fallen into error is Exhibit H19, which is dealt with by him in paragraphs 118 and 119 of his judgment. He states that it was a personal act or contract of Ramalingam which ceased to have force on his death. But this construction is obviously wrong. The subject dealt with by the document was the legal relation *inter se* between Dharmapuram and Tiruppanandal, and there is nothing whatever in the document to show that it was to have no operation beyond the life time of Ramalingam. It provides in terms which are unmistakeably clear that Ramalingam should according to custom appoint a junior and successor from among the Tambirans of the Adhinam at Dharmapuram, and it is wrong then to say that the appointment of the respondent who did not belong to the Dharmapuram Adhinam by Ramalingam was not an act intended to be governed by the document. Again, the Subordinate Judge observed that it was not competent to Ramalingam to make a deviation in the trust. Where was there any deviation when the [499] effect of the evidence is that all the Tambirans at Benares and Tiruppanandal have for more than 150 years been Dharmapuram men? The endowment deeds in evidence show in express terms that three out of four Tambirans of the last century were Dharmapuram men and the fourth was probably also a Dharmapuram man. The acts and the letters of each Tambiran until 1880 show, as set out above in the summary of management, that they were disciples of Dharmapuram. The usage disclosed by the whole evidence is that the course of succession was as already explained that of spiritual brothers and associates in holiness and that it is an essential feature of such succession that they should have belonged to the same spiritual family. There is further reason to think that all the Tambirans of the Mutt at Benares even prior to the establishment of the Mutt at Tiruppanandal were Dharmapuram men. The inscription at the Benares Mutt was, as stated by the Subordinate Judge and shown by the oral evidence, "Kumarasami Mutt of the Dharmapuram Adhinam." The special arrangements to which we referred in paragraph 76 imply a mutual belief that this relation of disciple and guru will continue to subsist between the Tambiran at Tiruppanandal and the Pandara Sannadhi at Dharmapuram. Some doubt was expressed by the learned counsel for the respondent as to whether Ramalingam II and Chokkalingam were Dharmapuram disciples. As to the former he stated himself that he and Arulananda Desigar had a common guru (Exhibit C13) and Chitambaranadhan said that the written statement filed by Ramalingam showed that he was faithless to his guru. As to Chokkalingam, he called the senior Pandara Sannadhi of his time his father, and an incarnation of God, designed for his salvation and that of others belonging to the Adhinam. He said also in one of his letters that he became the slave of the junior Pandara Sannadhi in evident allusion to the ceremony of Dattam or the gift of his soul, body and wealth. We do not understand how the Subordinate Judge came to characterize a provision made in Exhibit H19 in conformity to the usage which had prevailed for centuries as a deviation from the trust. His observation is contrary to the evidence on the record. Another remark made by the Subordinate Judge is that the deed of compromise did not operate to convert the properties of Tiruppanandal into those of Dharmapuram in case Ramalingam departed from its provisions. This is no doubt true, but he was in error in omitting [500] to notice that such a departure invalidated the respondent's appointment. Again, he spoke of Tiruppanandal as an independent Adhinam

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because the endowments and charities showed a distinct group of trusts and because their management was independent of Dharmapuram. He failed to go a step further and see if Tiruppanandal was affiliated to Dharmapuram as a disciple Adhinam, that is to say, an Adhinam the succession to which is confined by the immemorial usage of the institution to the disciples of the Adhinam at Dharmapuram. The bare existence of the spiritual relation of disciple and guru may not of itself be a legal basis of affiliation but where the recognized usage of the institution discloses a legal right in a class of persons to be selected for management, it is certainly a valid basis of affiliation and this distinction the Subordinate Judge has not apprehended. In *Kashi Bashi Ramlinga Sawmee* v. *Chitambernath Komar Swamee* (1), the Judicial Committee alluding to Chitambaranadhan's statement that the Tambirans at Benares and Tiruppanandal ought according to usage to obtain the consent of one another to the appointment of a junior, said that to that extent the two mutts were affiliated institutions. The conclusion to which we come is that the Subordinate Judge's view as to the effect of the compromise, Exhibit H19, cannot be supported and that it is a correct record of the recognized usage of the institution and that effect should be given to the rights and obligations which flow from it. It was urged for the respondent that each Tambiran is at liberty to give mantra kashayam to any one he likes. But the question is not to be treated in cases like this as an abstract question of theology, but it ought to be considered and decided with reference to the usage of the particular Adhinam concerned in litigation. There is abundant oral evidence that according to the usage of the Dharmapuram Adhinam, no one but the Pandara Sannadhi could ordain a Tambiran as of that Adhinam. It is corroborated by a series of letters asking from time to time for a supply of Tambirans from Dharmapuram, and intimating that particular persons are sent to be initiated by the Pandara Sannadhi. It is also corroborated by the fact that the Pandara Sannadhi is alone anointed as "Achariya" or guru. There is further considerable oral evidence which proves that if a Tambiran belonging to another Adhinam desires to become a Tambiran of the [501] Adhinam at Dharmapuram, he must receive his mantra kashayam *de novo* from the Pandara Sannadhi and be initiated by him. This is consistent with the probabilities of the case. As affiliation in the form of adoption is necessary before a person can be severed from one lay family and transferred into another, so a fresh initiation is in reason necessary to create the relation of spiritual father and son and to enable a person to pass from one spiritual family into another. As Ramalingam was a Dharmapuram Tambiran, he was not competent to select any ascetic he chose in defiance of the usage of his Adhinam, so as to give him the status of a Tambiran of that Adhinam. For these reasons we hold the managing Tambiran of Tiruppanandal is entitled to select his junior and successor, but subject to the condition that the selection should be made from the disciples of the Adhinam at Dharmapuram, that the Pandara Sannadhi is to invest the person appointed with arukattu and sundaravadam only when that condition is complied with, and that as the head or representâtive of an affiliated Adhinam, he is entitled to insist that the character of the Tiruppanandal Mutt as a disciple mutt or centre of control is maintained in its integrity according to ancient and recognized usage.

94. The next question for decision is what is the relief to which

(1) 20 W. R. 217.

the appellant is entitled upon the facts as found by us. In paragraph 4 of the plaint, the appellant asserted that the Adhinam was the legal owner of the properties in dispute and our finding is that this averment is not established. The relief which he claimed as an incident of that right was a decree in his favor for possession as the representative of the Adhinam. We must dismiss this part of the appellant's claim and confirm the decree of the Subordinate Judge in regard to it. In paragraph 5 of the plaint he asserted that according to custom he was entitled to appoint Tambirans to the management of the Tiruppanandal Mutt and their juniors and successors. Our finding is that this averment is also not proved to our satisfaction. The relief which was prayed for in the plaint consisted of a declaration in the decree that he was so entitled to appoint and an order for delivery of the properties in suit to a Tambiran who might be appointed by him in the exercise of such right. As to this part of the claim also, the suit must be dismissed and the decree of the Subordinate Judge must be affirmed.

95. In paragraph 11 of the plaint it was asserted that with the [502] view of defeating the superior right of the appellant's Adhinam and usurping the extensive properties now in litigation, Ramalingam executed an invalid will in favour of the original respondent and appointed him as his successor contrary to custom. Our finding is that the respondent's appointment and Ramalingam's will have no legal force and that the appellant is entitled as the head of the Dharmapuram Adhinam to see that a competent Dharmapuram man is appointed instead. The relief claimed in the last paragraph of the plaint is a decree declaring that the respondent's claim is invalid and setting aside his appointment as the managing Tambiran of Tiruppanandal on the ground that he belonged to a foreign Adhinam and he was not eligible for such appointment. To this declaration and this direction the appellant is entitled upon our finding, in the decree which we have to pass. The only relief prayed for in the same paragraph as a further incident or step was the delivery of possession to a tambiran whom the appellant may appoint. In advertence to it, we desire to draw attention to the 5th, 6th and 11th issues recorded by the Subordinate Judge with reference to the provisions of Sections 146 and 147 of the Code of Civil Procedure. The 5th issue relates to the declaration sought for and the 6th and 11th issues refer to the consequential relief to which the appellant may be entitled in the nature of the case. The last paragrpah of Section 146 directs that the Court shall proceed to frame and record the issues on which the right decision of the case appears to the Court to depend and Section 147 mentions the various materials in addition to the plaint on which the issues may be framed. The obvious intention is to provide against failure of justice upon technical rules of pleading, and with that intention the legislature makes it incumbent on the Court to frame issues on which the right decision of the case depends, and adds to the plaint other materials on which those issues may be framed. The appellant's right consists in seeing that a Dharmapuram Tambiran is appointed to management in supersession of the respondent who did not belong to the Dharmapuram Adhinam, and the appropriate remedy for its infraction consists in asking the Court to appoint on his suggestion a competent Tambiran of Dharmapuram, and to direct the transfer of possession to such Tambiran, whereas the prayer in the plaint was that possession might be transferred to a Tambiran who was to be appointed by him. The difference. then, was as to the precise form,—as to whether the person to whom [503] possession was to be transferred as an incident of the

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declaration that the respondent's appointment is illegal and of the order setting it aside on that ground, was to be appointed by the Court or by the appellant. The 6th and 11th issues were framed with reference to it, and the parties to this suit proceeded to trial as well upon those as upon the other issues. The variance, if any, was substantially cured at the first hearing and we are of opinion that no weight is due to the contention of the learned counsel for the respondent that this suit must be dismissed on the ground that the appropriate form in which the decree ought to be passed was not indicated with precision in the plaint itself though it is included in the issues which were framed under Sections 146 and 147 of the Code of Civil Procedure. In this connection we may refer to *Greedharee Doss* v. *Nundokissore* (1). The Judicial Committee quoted in that case with approval the remarks of the High Court in answer to the contention of the counsel for the appellant. "We can understand," they say, "a suit being brought to set aside the election of the defendant and to order the mahunts to make new election." They observed further that the suit before them was not a suit to set aside the election, but to put the plaintiff in possession of the whole estate. So it was in the case of *Gunga Das and another* v. *Tiluk Das* (2). In the case before us, the plaint prayed in clear terms that the respondent's appointment be declared to be invalid and that it be set aside, and we cannot therefore say that the suit from which this appeal arises was not, *inter alia*, a suit to set aside the respondent's appointment. The case last mentioned awarded the relief to which the party was entitled when the respondent's appointment was considered to be contrary to the usage of the sect. Our decree should therefore award the appellant the relief indicated above as due in the nature of the claim with reference to the 6th and 11th issues and as forming a part of the relief which was substantially, if not by a formal amendment, added to the plaint at the first hearing.

96. We have to consider next a few subsidiary and preliminary questions raised for decision in this appeal. It has been urged by the learned counsel for the respondent that the deed of compromise, Exhibit H19, created no right in the appellant's favour though it limited the right of the managing Tambiran at Tiruppanandal by **[504]** directing him to appoint his junior and successor from among the Tambirans of the appellant's Adhinam. But this objection cannot be supported either with reference to the provisions of Exhibit H19 or to the usage of the institution as proved by testimony. It must be remembered that neither party can arbitrarily vary the usage and that the compromise is binding on the parties to this appeal not simply because it is a valid agreement between their predecessors but also because its provisions are based on the usage of the institution which is the law applicable to this case. As to the document, it provides that both parties are to conform to and follow the arrangement embodied in it without deviation. It is clear then that the intention was to create reciprocal obligations in the nature of mutual rights and that their infringements would constitute mutual grounds of action. Again, it provides that Ramalingam shall be the lawful manager because he was according to custom appointed by will by his predecessor and because he was according to usage invested by the appellant's predecessor with arukattu, sundaravadam and cloth, the appointment by the managing Tambiran and the investiture by the Pandara Sannadhi forming together

(1) 11 M. I.A. 405 (431).

(2) 1 Sel. Rep. 309 = 6 I.D. (O. S.) 303.

the foundation for his title. It then provides that when a Dharmapuram man is appointed, the Pandara Sannadhi shall invest him. Thus, it creates a right in favour of the Tambiran at Tiruppanandal to an order directing the Pandara Sannadhi in case of refusal on his part to invest the person appointed if he is a Dharmapuran man. These two provisions, when considered together, show that the Pandara Sannadhi may lawfully refuse investiture without which there can be no lawful right of management or ownership as trustee when the person appointed is not a Dharmapuram man, and the last clause enables him to enforce compliance with the usage.

97. Independently of the instrument, the evidence shows that the founders of the Mutts at Tiruppanandal and Benares were Dharmapuram Tambirans, that the course of succession indicated by custom was the line of spiritual brothers appointed by them and their associates in holiness. This was also shown by reference to the Mitakshara to be a well-known rule of succession applicable to a spiritual family or to indicate a right created for the benefit of the Adhinam to which the Tambirans at Tiruppanandal belonged and of which the appellant is the head and representative for the time being. The power of appointment possessed by the managing [505] Tambiran at Tiruppanandal is a personal interest coupled with a trust in favour of the Dharmapuram Adhinam both according to Exhibit H19 and the proved usage of the institution.

98. Another contention for the respondent is that assuming that no lawful successor was appointed by Ramalingam, it would amount to a case of vacancy, that the razinama did not contemplate such a contingency and provide for it and that in the history of the institution, a similar event never occurred before and no rule of decision can be found in it. We do not consider that this objection either is tenable. The founders of the Mutts at Tiruppanandal and Benares intended that the institutions should exist for ever and the rule of decision necessary to give effect to that intention consists in the Court exercising, in accordance with usage, the power which Ramalingam failed to exercise in conformity to it. For this purpose, the representative of the Adhinam at Dharmapuram in favour of which a trust arises from usage is competent to maintain a suit and to put the Court into motion to fill up the vacancy.

99. The third objection for the respondents is that the appellant's claim was denied *in toto* by Ramalingam in Original Suit No. 3 of 1854 and that it is therefore barred by limitation. As to the claim to personal possession as responsible trustee and as to the right to appoint managing Tambirans, it may be that there is foundation for the contention, but as to the right to set aside the respondent's appointment and see a competent Dharmapuram man appointed, the claim is clearly not barred. The will in respondent's favour was made on the 6th June 1880, and he entered into possession on the 16th September 1880 when Ramalingam died, while the present suit was instituted on the 15th October 1881.

100. Another preliminary objection taken was that the appellant was not the lawful Pandara Sannadhi of Dharmapuram and that Arulananda Desigar, whose claim was finally rejected in Regular Appeal No. 108 of 1878, was lawfully entitled to that position. The learned counsel for the respondent intimated to us at the hearing that he abandoned that contention.

101. It was urged, however, that the suit could not be entertained without the consent in writing of the Advocate-General or proper Government officer under Section 539 of the Code of Civil Procedure. That section provides that in case of any alleged [506] breach of any

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express or constructive trust created for public charitable or religious purposes or whenever the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General acting *ex officio* or two or more persons having a direct interest in the trust and having obtained the consent of the Advocate-General in writing may institute a suit to obtain a decree for appointing a new trustee, &c. The words "or religious" were not in Act X of 1877 and introduced by Act XIV of 1882 whilst this suit was instituted in October 1881. *In Thangakaruppa Nadan* v. *Arumuga Nadan* (1), it was held by a Division Bench of this Court that the section did not apply to an endowment founded primarily for religious purposes. Apart from it, the cause of action in this suit is not an alleged breach of trust such as the diversion of the endowment from its original trusts, nor is the suit instituted by a person having merely an interest in the trust as a worshipper or an object of the charity contemplated. It is a suit to enforce a vested right to see that certain religious and charitable endowments are managed by a person entitled to manage them as being the member of a particular religious association or brotherhood. We do not attach weight to this objection either.

102. Another objection is that the present suit was instituted contrary to the provisions of Section 44 of the Code of Civil Procedure. It is provided by that section that no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, or to obtain declaration of title to immoveable property. But this section should be considered together with Section 43 which directs that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the same cause of action. There is nothing irregular in seeking to recover immoveable and moveable property if the cause of action is the same in respect of both. Nor is there any misjoinder of causes of action, the several grounds of claim being between the same parties.

103. The next objection is that some of the properties in suit were acquired and managed by Tambirans at Tiruppanandal on their own account. It appears further from paragraph 22 of the written statement that objections were taken to various items of [507] property claimed in the plaint. There was no issue recorded as to whether any of the properties claimed in the plaint are the private properties of the Tambirans, not being the endowments of mutts or endowments of charities, and an issue must be referred for trial before a decree can be finally made. Although the 9th issue was recorded with reference to the averment contained in paragraph 13 of the written statement, the Subordinate Judge has recorded no finding on that issue and he must be asked to return a finding. Another objection is that it is contrary to public policy to restrict the power of selecting successors to management and that there may be no one fit for the office among the disciples of the Adhinam at Dharmapuram, that Ramalingam spoke of Dharmapuram men as inefficient and that one Tambiran can make another tambiran. The question is one of vested right and of the recognized usage of a specific religious establishment or society, and no rule of public policy is violated by recognizing and enforcing such right. For centuries there have been men at Dharmapuram competent to manage the Adhinam at that place and the mutts and charities in question and to administer their extensive endowments, and it was not the respondent's case in the Court below that there were

(1) 5 M. 383.

no Tambirans at Dharmapuram competent to manage. As to Ramalingam's remark, we can attach no weight to it as he was very unscrupulous and violated the usage of his Adhinam, and as it was not pleaded by the respondent in the Court below and thereby made the subject of a specific issue. As to the question whether a Tambiran can make another Tambiran, we have already observed that the proper mode of dealing with it is to test it by the usage of the particular Adhinam in dispute and there was not a single instance in which the managing Tambiran at Tiruppanandal or Benares was not a Dharmapuram disciple. Another question is as to the nature of the right which the appellant has in connection with the Mutt at Benares according to usage. He is entitled to see that it is managed by a Tambiran of his Adhinam and that the junior selected for that station is also a Dharmapuram man; for, that had been the custom from the time of Tillanayaka until Ramalingam appointed a layman as his agent in 1876. But with the power of appointing those Tambirans or with the right to the legal possession or administration of the endowments under their management or to exercise supervision over the subordinate mutts under their control, the appellant and his predecessors have [508] had no concern according to usage and they are vested in the managing Tambiran at Tiruppanandal.

104. The result is that the appellant's claim that the properties at Tiruppanandal and Benares belong to the Adhinam at Dharmapuram and to the possession of those properties must be dismissed; that his claim to a declaration of his right to appoint Tambirans to management at Tiruppanandal and Benares and to a direction that possession be transferred to a Tambiran whom he may appoint must likewise be dismissed; that so far the decree of the Subordinate Judge must be confirmed; that in other respects the decree of the Subordinate Judge must be reversed; that the appellant's claim to a declaration that the respondent's appointment by Ramalingam as junior and successor and the will in his favor are illegal and to a direction that they be set aside so far as they relate to the Mutts at Tiruppanandal and Benares and other subordinate mutts and their endowments and the endowments of the Benares and other charities mentioned in the plaint be decreed; that it must be ordered that the Subordinate Judge do direct the appellant to name a Tambiran from among the Tambirans of his Adhinam competent to discharge the duties of the managing Tambiran of Benares (Kasi) Mutt at Tiruppanandal, that if the Subordinate Judge sees no objection to the fitness of the person so named for the office aforesaid, he do appoint him as such managing Tambiran, but in case the Subordinate Judge should object to the person so named by appellant as aforesaid the Subordinate Judge do appoint a competent Tambiran of the Dharmapuram Adhinam as managing Tambiran of Beneres Mutt at Tiruppanandal; that he do thereupon direct the appellant to invest him with arukattu, sundaravadam and cloth as usual, and to certify to such investiture; that upon such investiture being certified, the Subordinate Judge do place the person so appointed and invested in possession of the Benares Mutt at Tiruppanandal and of the properties forming its endowments and the endowments of Benares and other charities attached to the aforesaid mutt and mentioned in the schedule attached to the plaint; that in regard to the Mutt at Benares and the endowments there, the decree should further declare that the Tambiran at Tiruppanandal is bound to appoint a competent Tambiran of the Dharmapuram Adhinam to manage the Mutt at Benares and the Benares charities according to custom under his supervision and control.

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[509] 105. Before a decree is finally made, the Subordinate Judge will be asked to return a finding upon the 9th issue and upon the issue whether any and what properties, not being endowments of the Mutts at Tiruppanandal and Benares and of the charities or their accretions managed by the Tambirans at those stations, have been held by the Tambirans of Tiruppanandal on their own account; costs will be provided for in the final decree. The finding called for will be returned within three months from the receipt of this order, when ten days will be allowed for filing objections.

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APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusami Ayyar.

RANGASAMI (*Defendant*), *Appellant v.* MUTTUKUMARAPPA (*Plaintiff*), *Respondent.**
[21st July, 1886, 18th January, and 18th July, 1887.]

Limitation Act (XV of 1877), *Schedule II, Articles* 132, 147—*Transfer of Property Act—Act IV of* 1882, *Sections* 58, 100—*Hypothecation bond.*

The period of limitation for suits upon hypothecation bonds, which contain no power of sale, or effect no transfer of property, executed before the Transfer of Property Act came into operation, is twelve years under Schedule II, Article 132, of the Limitation Act of 1877—*Aliba* v. *Nanu* (I.L.R., 9 Mad. 218) followed.

Per Muttusami Ayyar, J.—"The transaction in suit appears to be of the kind described in Section 100 of the Transfer of Property Act, which defines how a charge is created;" but "it seems to me that the Transfer of Property Act does not invest all prior hypothecations with the rights and liabilities arising from simple mortgages, whether or not those transactions satisfy the requirements of the definition it contains of simple mortgages."

[Diss., 20 B. 403 (F.B.); R., 13 A. 28 (37); 33 C. 985 (993) = 4 C.L J. 219; 35 C. 837 (843) = 7 C.L.J. 492 = 12 C.W.N. 849; 21 M. 326 (F.B.); 12 C.P.L.R. 26 (30); 16 Ind.Cas. 209 = 23 M.L J. 131 = (1912) M.W.N. 1124; 16 Ind.Cas. 236 (237); 8 M.L.J. 217 (218).]

SECOND appeal from the decree of J. Hope, District Judge of South Arcot, in appeal suit No. 73 of 1884, reversing the decree of C. Sury Ayyar, District Munsif of Cuddalore, in original suit No. 734 of 1883.

This was a suit to recover principal and interest due on a hypothecation bond, dated 1st June 1862, of which the terms are set out *infra* in the judgment of KERNAN, J.

[510] The defendant pleaded that the suit was barred by limitation under Article 132, Schedule II, of the Limitation Act of 1877.

The District Munsif held that that article governed the case and accordingly dismissed the suit. His decree was, however, reversed by the District Judge on the ground that Article 147 and not Article 132 was applicable.

The defendant preferred this second appeal.

This second appeal came on for hearing before Collins, C. J., and Muttusami Ayyar, J., who referred to the Full Bench the question whether twelve or sixty years is the period of limitation for suits brought on hypothecation bonds executed before the Transfer of Property Act, 1882, came into force.

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* Second Appeal No. 913 of 1884.

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Ramachandra Rau Saheb, for appellant.

Mr. *Subramanyam*, for respondent.

The arguments adduced on this second appeal appear sufficiently for the purposes of this report from the judgments of the Court.

The Full Bench (COLLINS, C. J., KERNAN, MUTTUSAMI AYYAR, BRANDT, and PARKER, JJ.) delivered the following

JUDGMENTS.

KERNAN, J.—The question for determination appears to me to be whether the document sued on, dated the 1st of June 1862, is to be held a mortgage within Article 147, Schedule II of the Limitation Act of 1877, or a charge on land under Article 132. If it is held to be merely a charge, then the suit is barred by limitation. If it is held to be a mortgage, then the suit is not barred.

The following is a copy of the instrument :—

"Deed of hypothecation of brick-built house, house-ground, and backyard executed on 20th Vayyasi of the year Dhatu, corresponding to 1st June 1862, to Mulligramampattu Vydialinga Reddi, residing in Tiruppapur in Cuddalore district, by us both, *viz.*, (i) Kanakammal and (ii) Ranganayaki Ammal, widows of the deceased Virasami Naiker, residing in the said village.

"Having pledged to you this day, owing to our necessity, the brick-built house belonging to our deceased husband, Virasami Naiker, in the said village and bounded as follows: north of the northern car street, east of Alappakkattan's house, south of Puduteru, and west of the goldsmith Virabadran's house the amount (we have borrowed) is Rs. 99¾, made up of Rs. 60, the principal of the hypothecation bond executed by our husband, Virasami Naiker, on 21st Vayyasi of Siddardhi (2nd June 1859) for Rs. 60, [511] and interest thereon up to date, *viz.*, Rs. 21½ as per settlement made touching the said document, and Rs. 18¼ received by us in cash this day for our food expenses. We bind ourselves to pay you the said ninety-nine and three-quarters of rupees, together with interest accruing thereon at 1 per cent. per mensem, within seven years from this date and take back the hypothecation bond.

"Thus we have executed the deed of hypothecation of house of our own accord.

† Mark of KANAKAMMAL.
† ,, RANGANAYAKI AMMAL.

Witnesses.

(Signed) K. RAGHAVULU NAIKER—I know.
(,,) KANDAMPALAYAM MUDDUKRISHNA
(,,) PILLAI of the said place—I know.
(,,) V. NARAYANA PILLAI, writer hereof."

Possession of the land was retained by the borrower and never delivered to the lender. The terms of the instrument appear to me to do no more than create a charge or security for the debt on the land. In order to have effect given to the contract for a charge, the lender was entitled to file his suit praying to have the lands declared well charged with the debt and interest and to have the interest of the borrower in the land sold and the debt paid out of the produce of the sale. The right of sale in such cases, and in cases where land was expressly pledged or hypothecated, has been admitted always without question in this Presidency long before any legislation in respect to limitation was introduced. Such right is constantly

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enforced, and also the corresponding right of the borrower to enforce redemption by suit. After the Limitation Act XIV of 1859 came into force, it was held that such security or hypothecation bonds created an interest in immoveable property under Section 12 of that Act, to which the period of twelve years was applicable—*Chetti Gaundan* v. *Sundaram Pillai* (1).

In that case it was however decided that the contract was not one of mortgage, but that it was one of hypothecation, the thing pledged, land, remaining with the pledger subject to the creditor's claim. The Court pointed out that, in the case of a mortgage, the mortgagee of land had the absolute property in the land on the debtor failing to perform the condition of payment of the money secured by the mortgage, subject however to redemption.

[512] In that case the instrument ran as follows, *viz.*, "mortgage deed executed to Chetti Gaundan by us," giving the names, and states that the lands described there are thereby mortgaged. It then stated the amount to be paid and the time of payment and provided that if payment was not so made, the land should be sold to Chetti Gaundan for that amount. The form of the instrument in that case is a good representation of the ordinary hypothecation instrument when possession is not given to the pledgee. Such instruments have never been treated by any of the Courts in this Presidency as mortgages, and the case in *Chetti Gaundan* v. *Sundaram Pillai* (1) has been always acknowledged as explaining an essential difference between a mere pledge or hypothecation of land and a mortgage of land.

The term mortgage not being defined in the Limitation Acts must be held to have been used in those Acts as bearing the meaning ordinarily attached to it by the course and practice of law. In Coke on Littleton, Section 332, it is stated : "If a feoffment (conveyance) be made on condition that if the feoffor pay to the feoffee at a certain day, of say £40 money, that then the feoffor may re-enter (on the lands) : in this case the feoffor is called tenant in mortgage, which is as much to say in French as *mortgagor* and in Latin *mortuam vadium.*" In the note to Section 332, after referring to the origin of the term mortgage, it is said : "now it is so called mortgage, for the reason given by Littleton, and also to distinguish it from that which is called *vivum vadium*, '*quia nunquam moritur.*' As if a man borrow £100 of another and make an estate of lands unto him until he hath received the said sum of the issues and profits of the land—so as in that case, neither money nor land dieth or is lost and therefore it is called *vivum vadium.*"

In Coke on Littleton, Section 333, it is stated : "as a man may make a feoffment in mortgage, so a man may make a gift in tayle in mortgage, and a lease for term of life, and for term of years in mortgage"—see Coote on Mortgages, 4th edition, pp. 1 to 10, which refers to Bacon's Abridgment and many other authors on the subject of mortgage; Blackstone, vol. 2, pp. 157-8 ; and various books of Precedents in conveyancing.

In Watkins' Conveyancing by Mansfield, Chap. 19, on Equity of Redemption, it is said mortgages are of two kinds—first, when a man borrows money of another and *grants him an estate* to hold **[513]** until the rents and profits shall repay the sum borrowed, this is usually called a Welsh mortgage ; but the most usual and common form of the morgtage is, secondly, when a man borrows of another a specific

(1) 2 M.H.C.R. 51.

sum and *grants him an estate for the whole or part of his interest* as in fee or for term of years on condition that if the mortgagor shall repay the mortgage money on a certain day named in the deed, then the mortgagor may re-enter on the estate, or, as is now more usual, that the mortgagor shall re-convey the estate.

It is, therefore, quite clear that an essential of a mortgage (except an equitable mortgage) always has been that some interest of the mortgagor in the lands shall be transferred by the mortgage to the mortgagee.

In this case no interest in the lands was transferred. When the amount secured by a mortgage is not paid on the day named in the mortgage, the estate of the mortgagee became absolute at law, subject, of course, to be redeemed in equity by the mortgagor. But it is open to the mortgagee to file a suit in equity against the mortgagor, either for foreclosure or sale. The decree for foreclosure directed an account to be taken of what was due on the mortgage, and, on payment of that sum and costs within a time fixed, that the plaintiff should re-convey the estate, but in default of such payment the mortgagor should stand barred and foreclosed from all right, title, interest, and equity of redemption in the mortgaged premises—see 1 Seton on Decrees, p. 364. This right of foreclosure was attached to a mortgage as above described alone, and not to a security on the land which was a mere charge thereon not secured by transfer of any interest in the land.

Article 147 of Schedule II of the Limitation Act 1877, refers to a mortgage and to suits for foreclosure, and in my judgment does not include a charge such as that created by the instrument sued on in this case which creates merely a charge on the land. Other cases are, I believe, awaiting the decision of this case, the facts of which show that there was a mere pledge of the lands without possession and without any transfer of any interest of the mortgagor. To such cases in my judgment Article 147 does not apply. Article 132 applies to this case and to all cases of mere hypothecation of the land without possession and without any transfer of any interest of the mortgagor therein.

[514] The Transfer of Property Act, 1882, does not apply to the instrument sued on in this case, and I have not, therefore, referred to that Act. I may, however, say that the definition of mortgage, given by Section 58 is in accord with the meaning of the term mortgage, as expressed on the authorities I have above referred to. The term mortgage has not, as I am informed by one of the Court interpreters, any corresponding vernacular term denoting a *transfer* of land as security. The vernacular word used, as I am informed, means literally only "security bond or pledge of land." Transfers of land are of course made by natives as security, but they are mortgages.

I am unable to agree with the decision of the Allahabad High Court in *Shib Lal* v. *Ganga Prasad* (1). I cannot see that the instrument sued on was a transfer of any interest of the pledgor in property to the pledgee as security. It was not, therefore, a mortgage.

I agree with the conclusion arrived at by the Bombay High Court in *Lallubhai* v. *Naran* (2).

MUTTUSAMI AYYAR, J.—The suit, which is the subject of this second appeal, was brought by the respondent upon a "hypothecation bond" executed on the 1st June, 1862, for Rs. 99-12-0. The document is termed a hypothecation bond; it stipulates for repayment of the debt in seven

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(1) 6 A. 551. (2) 6 B. 719.

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years and secures the debt on the property hypothecated. The appellant pleaded *inter alia* limitation in bar of the claim. The District Munsif upheld the contention on the ground that Article 132 and not Article 147 was applicable to the case. On appeal, the District Judge considered the Article 147 and not Article 132 was the one that applied. He observed "the suits contemplated by that article, *viz.*, suits for foreclosure or sale are not such as can be brought by a mortgagee in possession, but only by simple and conditional mortgagees. This is the law as announced by the Transfer of Property Act, Section 67, and although this enactment is subsequent to the Limitation Act XV of 1877, I consider that it must be held to explain anything that is doubtful in the latter as to the matter at issue." The question referred to the Full Bench is whether twelve or sixty years is the period of limitation for suits brought upon hypothe-[515]cation bonds executed before the Transfer of Property Act came into force.

Article 132 prescribes twelve years from the date when the money sued for becomes due for a suit to enforce payment of money charged upon immoveable property. Article 147 prescribes sixty years for a suit by a mortgagee for foreclosure or sale. Article 148 prescribes sixty years for a suit against a mortgagee to redeem or recover possession of immoveable property mortgaged. The substantial question then for consideration is whether the hypothecation bond in suit operated to create only a charge on immoveable property or a simple mortgage within the meaning of the Transfer of Property Act, Section 58, Clause 6.

The transaction is, I think, clearly not a simple mortgage as defined in Section 58 of that Act. There is neither the transfer of property mentioned in that Section, nor a special agreement whereby the creditor acquires a power to sell the hypothecated property on default of payment according to the contract. On the other hand the transaction in suit appears to be of the kind described in Section 100, which defines how a charge is created. It was argued that the Courts used to sell the hypothecated property at the instance of the creditor, and that a power to sell on default might be taken to be inherent in every contract of hypothecation made prior to 1882; but it must be remembered that the power contemplated by Transfer of Property Act, Section 58, Clause 6, is a power to sell otherwise than through the intervention of a court of justice, and that if the Court directs a sale in the case of a hypothecation bond, it is for the reason that it is the only mode in which the amount charged on immoveable property can be realized.

It is true that, under the Transfer of Property Act, simple mortgages operate to create for the mortgagor a right to redeem, and for the mortgagee a right to ask for an order for sale, and that a suit by the one to redeem and a suit by the other to sell are governed by Articles 148 and 147 respectively; but the Act has no retrospective operation and prior transactions must be interpreted according to the intention of the parties at the time they were concluded. It is also true that we must look to the law in force at the date of the suit for the remedy that is available, but it is necessary that the right in respect of which the remedy is prescribed must exist as an incident of the particular transaction [516] which it is sought to enforce. It seems to me that the Transfer of Property Act does not invest all prior hypothecations with the rights and liabilities arising from simple mortgages whether or not those transactions satisfy the requirements of the definition it contains of simple mortgages.

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As observed in Macpherson on mortgages, the earlier regulations in this Presidency did not profess to introduce new principles of law, and may, therefore, be presumed to be an embodiment of the law which was found to prevail in this country when they were passed. It is stated in Strange's Hindu Law, vol. I, p. 288, that hypothecation was a transaction long known in this country under the name of Drishtabandaka. According to the decisions in *Kadarsa Rautan v. Raviah Bibi* (1), *Golla Chinna Guruvuppa Naidu Kali Appiah Naidu* (2), *Sadagopa Chariyar* v. *Ruthna Mudali* (3), the transaction was held to create a lien or charge on the property hypothecated, and the remedy was considered to be a decree for the sale unless the debt was satisfied within a given time. The question was considered by Mr. Justice Parker and myself in *Aliba* v. *Nanu* (4), and I still adhere to the opinion which was then expressed, *viz.*, that it is Article 132 that governs suits like the one before us.

THE CHIEF JUSTICE.—I concur.

BRANDT, J.—The instrument, which we have to consider is styled an "adaimana pattiram," a pledge-bond or security bond; it bears date the 1st June, 1862 and recites the advance of a sum of money in the year 1860 to the deceased husband of the executant, and the pledge of certain immoveable property as security for that loan, and declares that, in consideration of the amount then due on settlement of accounts on the footing of that debt and of a further advance, the executant covenants to pay the principal and interest at a rate stated within seven years, and concludes with a clause to the effect that on payment of the principal sum and interest the debtor shall receive back the instrument.

The question to be determined is whether this instrument creates a charge only on the land pledged as distinguished from a mortgage in the sense in which those words are used in the Limitation Act of 1877, in which case the suit as a suit to enforce **[517]** payment of money charged on immoveable property is barred under Article 132, Schedule II, of the Act; or is it a suit by a mortgagee for sale to which Article 147 applies?

The personal covenant to pay may be left out of consideration, the only relief sought being the realization of the money claimed by sale of the land.

It has been held by a Divisional Bench of this Court in *Aliba* v. *Nanu* (4) that a suit of this nature does not fall under Article 147 but under Article 132. It is in consequence of one of the learned Judges who decided that case having seen reason to doubt the conclusion arrived at that this reference is made.

The question appears to me also to be not free from doubt, and I was inclined to take the opposite view; having, however, had the advantage of seeing the judgments written by my learned colleagues KERNAN and MUTTUSAMI AYYAR, JJ., and having further discussed the matter with them, I am content to accept the conclusion arrived at by them on the grounds on which their decision is based.

I adhere to my opinion that, for the purpose of determining whether instruments of the character under consideration constitute charges only, as distinguished from mortgages within the meaning of the Limitation Act, regard cannot properly be had to the definitions of a charge and a mortgage in the Transfer of Property Act, which was passed five years

(1) 2 M.H.C.R. 108. (2) 4 M.H.C.R. 434.
(3) 5 M.H.C.R. 457. (4) 9 M. 218.

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later than the Limitation Act; nor to the fact that Article 147 in the latter Act may possibly have been inserted in view to the intended enactment of the Transfer of Property Act; and that the law of Limitation previously in force in respect of mortgages, and changes in that law in English Acts do not afford a basis for determination of the question; but these are not the grounds on which the conclusions arrived at, and which I am prepared to accept, are based.

Obligations of the character now under consideration were entered into, and recognized and enforced by the Courts in this Presidency for a long series of years prior to 1877, and in the absence of any express provision in the Limitation Act of 1859 for suits to enforce a sale—the relief which was afforded to the creditor by the Courts *Chetti Gaundan* v. *Sundaram Pillay* (1)—they were dealt with under the general twelve years' rule, the distinction between a transaction by way of mortgage and an [518] hypothecation being clearly distinguished on the principle enunciated by Holloway, J., in the case last above cited; and although the courts in a suit for that purpose would make a decree for the sale of the pledgor's interest in the land and for payment of the debt out of the proceeds, this was done irrespective of any condition for sale contained or implied in the contract, and an implied contract for such sale cannot, as I am now satisfied to hold, be inferred from the fact that such contracts may have been entered into by the parties with a knowledge of or even with reference to the usual practice of the courts in the case of suits brought for the recovery of money under such contracts, and there is not any such transfer of property or of an interest in property as to constitute the transaction a mortgage as distinguished from a charge in the nature of a pledge or hypothecation not being a mortgage.

PARKER, J.—I have nothing to add to the opinion I have already expressed in *Aliba* v. *Nanu* (2). I am of opinion that the instrument creates a charge and that Article 132 is applicable.

The second appeal was accordingly allowed and the decree of the District Munsif restored.

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10 M. 518.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

THANGAMMAL (*Plaintiff*), *Petitioner v.* THYYAMUTHU AND OTHERS (*Defendants*), *Respondents.** [11th March and 18th April, 1887.]

Civil Procedure Code, Section 622—Small Cause suit to recover money paid by the plaintiff in discharge of a decree-debt against him and the defendants—Jurisdiction of Court to go into facts of former suit.

A sued four persons, against whom, together with A, a money decree had been passed in a previous suit, to recover a proportionate part of a sum paid by A in discharge of the decree-debt. Two of the defendants pleaded that they had not appeared in the former suit, and have been unnecessarily brought on to the record by A:

Held, that the Court had jurisdiction to inquire into the circumstances of the previous suit. *Suput Singh* v. *Imrit Tewari*, I.L.R. 5 Cal. 720, followed.

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* Civil Revision Petition No 107 of 1886.

(1) 2 M.H.C.R. 51.

(2) 9 M. 218.

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PETITION under Section 622 of the Code of Civil Procedure praying the High Court to revise the decree of T. Kanagasabai Mudaliar, **[519]** Subordinate Judge of Tanjore, in Small Cause Suit No. 299 of 1885.

This was a suit to recover together with interest, the amount paid by the plaintiff for the defendants in discharge of a decree debt payable jointly by the plaintiff and the defendants. Defendants Nos. 1 and 2 pleaded that they had been unnecessarily joined as defendants by the present plaintiff in the former suit in which they did not appear. The Subordinate Judge found that this plea was true and dismissed the suit as against defendants Nos. 1 and 2.

The plaintiff presented this petition.

Mr. *Norton* and *Subramanya Ayyar*, for petitioner. The Subordinate Judge travelled beyond his jurisdiction in going into the facts relating to the previous suit; he had only to decide the plaintiff's claim with reference to the decree on which it rested.

Respondents were not represented.

The further arguments adduced on this petition appear sufficiently for the purpose of this report from the judgment of the Court (COLLINS, C.J., and PARKER, J.).

JUDGMENT.

This is not a suit for contribution brought by one of several debtors against his co-debtors, in which an obligation *quasi ex contractu* may be inferred as in *Govinda Muneya Tiruyan* v. *Bapu* (1). Nor is it a case in which there is no right of contribution, because plaintiff and defendants were joint wrong doers. Defendants Nos. 1 and 2 seem to have been quite needlessly included in the former litigation, and the only contesting and interested defendant was the present plaintiff. If she caused persons to be unnecessarily brought in, that fact will hardly give her a right to call upon them to contribute to costs which have been levied from her, though they by their non-appearance may have rendered themselves liable for costs to the original plaintiff.

We think, therefore, that in this case, the Subordinate Judge had jurisdiction to go into the facts *Suput Singh* v. *Imrit Tewari* (2). The petition must be dismissed.

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(1) 5 M H.C.R. 200.

(2) 5 C. 720.

GENERAL INDEX

Acquittal. PAGE

See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 8 M. 296.

I.—Imperial Acts.

Act XIX of 1841 (Succession Property Protection).

S. 3—*Civil Procedure Code, s. 622.*—Where a District Court purporting to act under s. 4 of Act XIX of 1841 directed an inventory of the estate of a deceased person to be taken without conforming to the requirements of s. 3 of that Act, the High Court set aside the order under s. 622 of the Code of Civil Procedure as made without jurisdiction. ABDUL RAHIMAN v. KUTTI AHMED, 10 M. 68 ... 798

Act IV of 1842 (Boat Regulations, Madras Roads).

See MADRAS BOAT RULES, 9 M. 431.

Act V of 1843 (Slavery).

Spiritual slavery of a pupil to his Guru—See HINDU LAW, RELIGIOUS ENDOWMENT, 10 M. 375.

Act VI of 1844 (Inland Customs, Madras).

See ACT I OF 1882 (SALT LAWS AMENDMENT, MADRAS), 8 M. 342.

Act IX of 1846 (Boats in Harbours, Madras).

See MADRAS BOAT RULES, 9 M. 431.

Act XXI of 1850 (Caste Disabilities Removal).

See HINDU LAW—REVERSIONER, 8 M. 92.

Act XXI of 1855 (Minors, Madras).

See JURISDICTION, 9 M. 31.

Act XIV of 1858 (Minors, Madras).

See JURISDICTION, 9 M. 31.

Act XIII of 1859 (Workman's Breach of Contract).

(1) *Contract to supply labourers.*—A contract, in consideration of an advance of money to supply labourers to do certain work on an estate, falls within the scope of Act XIII of 1859, and the fact that such contract contains covenants to pay penalties in default of supplying the labourers, and to repay the advance, if necessary, by personal labour for five years, does not take the contract out of the operation of the Act, so as to make illegal an order directing the contractor to be imprisoned for failure to comply with an order to repay the advance. RAMASAMI v. KANDASAMI, 8 M. 379 = 1 Weir 679 ... 260

(2) *Jurisdiction—Breach of contract to labour in foreign territory.*—V having received an advance of money from G, contracted to labour for him in foreign territory. Having broken the contract, V was prosecuted under Act XIII of 1859, ordered to repay, and sentenced to imprisonment in default: *Held*, that the order was illegal. GREGORY v. VADAKASI KANGANI, 10 M. 21 = 1 Weir 671 ... 765

(3) S. 2—*Advance of grain and money—Order to repay value of work not performed.*—An advance of money and grain having been made to a labourer for work to be done, the labourer failed to complete the work, and an order was passed by a Magistrate, under s. 2 of Act XIII of 1859, directing repayment of the balance of the advance not worked off by the labourer: *Held* that, as it was not proved that the labourer was offered and accepted the grain in lieu of money to be advanced, the order was illegal. KONDADU v. RAMUDU, 8 M. 294 = 1 Weir 700 ... 202

Act XXIV of 1859 (Police, Madras). PAGE

(1) S. 1—See ACT III OF 1864 (ABKARI, MADRAS), 9 M. 97.

(2) *S.* 48 (5)—*Act* I *of* 1885—(*Madras*)—*Dung-heap kept in a town, no offence.*—By cl. 5 of s. 48 of Act XXIV of 1859 (Madras), as amended by Act I of 1885 (Madras), any person, who within the limits of a town "throws or lays down any dirt, filth, rubbish or any stones of building materials; or who constructs a cow-shed or stable within the bounds of any thoroughfare; or who causes any offensive matter to run from any dung-heap into the street" is punishable. A was convicted and fined for having kept a manure-heap in a town but not in a street: *Held*, that the conviction was bad. QUEEN-EMPRESS v. APPATHORY, 9 M. 167 ... 513

Act XXVII of 1860 (Collection of Debts on Succession).

(1) *S.* 2—*Bond given to secure debt due to estate of deceased Hindu—Suit by heir—Waiver of right to protection implied.*—R being a debtor to the estate of a deceased Hindu, executed a bond promising to pay the debt to V, the divided brother of the deceased, as his heir. A suit having been filed against V by the widow of the deceased, who claimed his estate, R offered to pay the debt to V on production of a certificate under Act XXVII of 1860, but not otherwise: *Held*, that as R had executed a bond promising to pay the debt to V, he could not rely on the protection afforded by Act XXVII of 1860. KOTTAM ZAMINDAR v. PITTAPUR ZAMINDAR, 9 M. 171=10 Ind. Jur. 98 ... 516

(2) See LIMITATION ACT (XV OF 1877), 8 M. 207.

Act IX of 1861 (Minors).

See JURISDICTION, 9 M. 31.

Act XX of 1863 (Religious Endowments).

S. 18—*Civil Procedure Code, s.* 622—*Order refusing permission to sue not appealable, nor subject to revision under s.* 622 *of the Code of Civil Procedure.*—An order passed under s.18 of Act XX of 1863, refusing leave to sue, is not appealable, nor, if the Judge has exercised his discretion, liable to revision under s. 622 of the Code of Civil Procedure. *In re* VENKATESWARA, 10 M. 93 ... 818

Act XI of 1865 (Small Cause Court).

(1) *S.* 20—*Civil Procedure Code, s.* 223—*Small Cause decree of Subordinate Judge—Execution against immoveable property—Co-ordinate jurisdiction of Subordinate Judge and District Munsif—Execution by District Munsif.*—The Court of a Subordinate Judge and that of a District Munsif had jurisdiction over certain immoveable property. A Small Cause decree of the former Court having been sent by the Subordinate Judge to the Court of the District Munsif for execution against the said property under the provisions of s. 20 of Act XI of 1865, the application for execution was rejected by the Munsif on the ground that this procedure was illegal]: *Held*, that s. 20 of Act XI of 1865 was not modified by s. 223 of the Code of Civil Procedure, and that the Munsif's Court was, therefore, bound to execute the decree. KAHANARAMA v. RANGA, 8 M. 8 ... 6

(2) *Jurisdiction—Civil Procedure Code, s.* 295—*Suit for refund of assets paid in execution of decree.*—A suit under s. 295 of the Code of Civil Procedure to compel refund of assets paid in execution of a decree to a person not entitled thereto is cognizable by a Court of Small Causes constituted under Act XI of 1865. HARIHARA v. SUBRAMANYA, 9 M. 250 ... 571

(3) *Jurisdiction—Suit to declare moveable property not liable to attachment—Civil Procedure Code, s.* 283.—Certain moveable property having been attached in execution of a Small Cause decree passed by the Court of a Subordinate Judge, a claim thereto was preferred by M and rejected. M then brought a suit in the District Munsif's Court for a declaration that the property was his and was not liable to be sold in execution. The suit was dismissed on the ground that it was cognizable by a Court of Small Cause: *Held*, that M was not bound to sue for recovery of the property and that the suit was not cognizable by a Small Couse Court constituted under Act XI of 1865. MAHOMED KOYA v. KASMI, 9 M. 206 ... 541

(4) *Jurisdiction—Suit to recover municipal tax.*—A suit to recover a municipal tax is not cognizable by a Small Cause Court constituted under Act XI of 1865. LOGAN v. KUNJI, 9 M. 110 ... 473

(5) See SMALL CAUSE COURT, 8 M. 4.

Act XXV of 1867 (*Press and Registration of Books*). PAGE

See PENAL CODE (ACT XLV OF 1860), 9 M. 387.

Act I of 1868 (*General Clauses*).

(1) S. 2 (5)—Interest arising out of land—See DECREE, 9 M. 5.

(2) S. 2 (13)—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 9 M. 36.

(3) S. 5—See ACT I OF 1866 (MADRAS CANTONMENTS), 8 M. 350.

Act XXI of 1866 (*Native Converts' Marriage Dissolution*).

(1) See NATIVE CHRISTIAN, 9 M. 466.

(2) See HINDU LAW—MARRIAGE, 8 M. 169.

Act I of 1871 (*Cattle Trespass*).

(1) *S. 20—Criminal Procedure Code, s. 4 (a), s. 250—Illegal seizure of cattle under the Cattle Trespass Act, not an offence within the meaning of the Code of Criminal Procedure.*—In a case instituted upon complaint made under s. 20 of the Cattle Trespass Act, the Magistrate acquitted the accused, and being of opinion that the complaint was vexatious, directed the complainant to pay compensation to the accused as under s. 250 of the Code of Criminal Procedure: *Held*, that the Act complained of was not an offence within the meaning of the Code of Criminal Procedure, and that the order awarding compensation was illegal. KOTTALANADA v. MUTHAYA, 9 M. 374 = 2 Weir 315 ... 656

(2) Complaint of illegal seizure—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 9 M. 102.

Act III of 1873 (*Civil Courts Act, Madras*).

(1) *Jurisdiction—Court Fees Act, s. 7, cl. 9—Ejectment—Mortgage set up by defendant exceeding limit of jurisdiction.*—In a suit brought in a District Munsif's Court to recover several parcels of land from the defendant, plaintiff alleged that defendant held a valid mortgage of Rs. 206 on two parcels which he offered to redeem. As to the other parcels he alleged that if any charges had been created in defendant's favour over them by his predecessor in title such charges were invalid. The suit as valued by the plaintiff was within the pecuniary limit of the Munsif's jurisdiction. Defendant pleaded that he held a mortgage for Rs. 3,000 over the land and, therefore the Munsif's Court had no jurisdiction to try the suit. The Munsif tried the question of the validity of the defendant's mortgage and decreed possession to plaintiff on payment of Rs. 906 due on account of mortgages and Rs. 1,647-11-9 on account of improvements. On appeal the District Judge held that the Munsif had no jurisdiction, reversed the decree, and ordered the plaint to be returned to be presented in the proper Court: *Held*, that the Munsif's Court had jurisdiction. If a suit is brought in ejectment, and the defendant proves that he holds a mortgage, a decree for redemption cannot be made without his consent. If, in such case, defendant consents to a decree for redemption, and the amount secured by the mortgage exceeds the limit of the pecuniary jurisdiction of the Court, the Court should not proceed further, but return the plaint to be presented in a superior Court. CHANDU v. KOMBI, 9 M. 208 ... 542

(2) *Jurisdiction—Suit for partition—Subject-matter of suit.*—In suits for partition the value of the property of which the plaintiff claims a share, and not the value of the share claimed, determines the jurisdiction of the Court under s. 12 of the Madras Civil Courts Act, 1873. VYDINATHA v. SUBRAMANYA, 8 M. 235 ... 162

(3) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 8 M. 548.

(4) See JURISDICTION, 8 M. 516.

(5) See REGULATION XII OF 1816, 8 M. 569.

Act III of 1874 (*Married Woman's Property*).

See DIVORCE, 9 M. 12.

Act IX of 1875 (*Majority*).

See MINOR, 9 M. 391.

***Act XI of 1878* (*Arms*).** PAGE

(1) *Ss.* 5, 19.—B having obtained a license under the Arms Act, 1878, for a match-lock, had the same converted into a percussion gun. He was convicted under s. 19 of the said Act, on the ground that the license did not permit him to keep a percussion gun: *Held*, that the conviction was bad. QUEEN-EMPRESS v. BODAPPA, 10 M. 131=1 Weir 665 ... 842

(2) *S.* 19—*Unlicensed possession of gunpowder used for making crackers.*—The possession of gunpowder without a license, whether intended for the manufacture of fireworks or not, is an offence under s. 19 of the Indian Arms Act, 1878. QUEEN-EMPRESS v. KHASIM, 8 M. 202=1 Weir 664... 140

***Act XVIII of 1879* (*Legal Practitioners*).**

Ss. 27, 28, 30—*Suit by pleader to recover fee from client—Contract Act, s. 70—Civil Procedure Code, s. 622.*— The Legal Practitioners Act does not debar a pleader from recovering a fee from his client when no contract in writing is made. A Small Cause Court having dismissed a suit brought by a pleader to recover from his client a fee claimed for the conduct of a suit, on the ground that such a suit would not lie, because it was based on an oral contract and such contract could not be enforced by reason of the provisions of the Legal Practitioners Act, the High Court under s. 622 of the Code of Civil Procedure reversed the decree of the Small Cause Court. RAMA v. KUNJI, 9 M. 375 ... 657

II.—Madras Acts.

***Act IV of 1862* (*Enfranchised Inams, Madras*).**

See HINDU LAW (IMPARTIBLE ESTATES), 10 M. 1.

***Act II of 1864* (*Revenue Recovery, Madras*).**

(1) *Ss.* 2, 25, 37—*Sale for arrears of revenue—Liability of all fields included in patta.*—By accepting a raiyatwari patta, the landholder pledges each and every field included therein as security for the whole assessment Several fields separately assessed to revenue were held under one patta by K. Default having been made by K in payment of revenue, one of such fields, of which N was the owner, was attached under the Revenue Recovery Act. N claimed to have it released from attachment on payment of the assessment due upon it. The claim was rejected and the field sold: *Held*, in a suit by N to set aside the sale, that the sale was valid. SECRETARY OF STATE FOR INDIA v. NARAYANAN, 8 M. 130=8 Ind. Jur. 669 ... 91

(2) *S.* 59—*Limitation—Sale of land subject to mortgage—Suit by mortgagor.*—Land which was subject to a mortgage having been sold for arrears for revenue under Act II of 1864 (Madras), the mortgagee's assignee sued to enforce the terms of the bond by sale of the land more than six months after the date of the sale of the land: *Held*, that the suit was barred by s. 59 of the said Act. YELLAYA v. VIRAYA, 10 M. 62 ... 794

(3) *S.* 59—*Limitation Act, Sch.* II, *Arts.* 12, 95—*Suit to set aside fraudulent revenue sale—Limitation.*—Suit to set aside a sale of land, sold as if for arrears of revenue under Act II of 1864 (Madras), on the ground of fraud, and to recover possession of the land from the purchaser who was alleged to be party to the fraud: *Held*, that the suit was governed by Art. 95 of Sch. II of the Indian Limitation Act, 1887. Art. 12 of that schedule, which prescribes a period of one year for suits to set aside sales for arrears of revenue, is intended to protect *bona fide* purchasers only. VENKATAPATHI v. SUBRAMANYA, 9 M. 457 ... 713

***Act III of 1864* (*Abkari, Madras*).**

(1) *S.* 2—*Sale—Barter—Payment of wages in liquor.*—Payment of wages in liquor does not amount to a sale of liquor within the meaning of S. 2 of the Abkari Act (Madras Act III of 1864). QUEEN-EMPRESS v. APPAVU, 9 M. 141=1 Weir 645 ... 495

(2) *S.* 26—*Police Act*, 1859, *s.* 1—*Police officer—Village Police—Mohatad.*—The term "Police officer" used in s. 26 of the Abkari Act (Madras Act III of 1864) includes a mohatad or village policeman. QUEEN-EMPRESS v. SESHAYA, 9 M. 97=1 Weir 630 ... 465

***Act VIII of 1865* (*Rent Recovery, Madras*).** PAGE

(1) *S.* 1—*Inamdar—Regulation* XXV *of* 1802.—S. 1 of Madras Act VIII of 1865 does not confine the term inamdar to such inamdars as are registered: *Held*, therefore, that the purchaser of an inam village, who had not got his name registered as inamdar, was not thereby debarred from enforcing the provisions of the Act against a tenant for arrears of rent. SUBBU v. VASANTHAPPAN, 8 M. 351 ... 241

(2) *Ss.* 1, 2—*Landholder—Distraint.*—V leased certain fields to S at a single rent. Of these fields, some were held by V under a raiyatwari patta, but the patta for the rest stood in the names of V's vendors. V distrained for arrears of rent under the provisions of the Rent Recovery Act: *Held*, that V was not a landholder within the definition in the said Act in respect of the latter fields, and, therefore, that the distraint was illegal. SUBBA v. VENKATA, 8 M. 9 ... 7

(3) *Ss.* 1, 79—*Landholder—Assignee—Delegation of powers.*—The interest of B in the form of a jagir, which he had obtained on lease from the jagirdar, was sold in execution of a decree and purchased by J, who assigned his interest to the plaintiff. In a suit under Act VIII of 1865 (Madras) by plaintiff to compel defendant to accept a patta, defendant objected that plaintiff had no right to enforce acceptance of a patta under the Act: *Held*, by the Full Bench (Turner, C J., Muttusami Ayyar, Hutchins and Brandt, JJ., Kernan, J., dissenting) that plaintiff was a landholder within the meaning of the Act and entitled to enforce acceptance of a patta. GOUSE v. SUNDARA, 8 M. 394 (F.B.) ... 270

(4) *S.* 2—*Tenant—Lessee of zemindar—Limitation.*—In 1869 a village in the zamindari of R was granted by the zamindar to S at a favourable rent, in consideration of S renouncing a claim to the zamindari. The village was not separately assessed and divided off from the zamindari. The rent having fallen into arrears, the village was sold in 1875 under the provisions of the Rent Recovery Act and purchased at the sale by the Agent of the Court of Wards on behalf of the defendants, minor sons of the deceased zamindar. In a suit brought by S, in 1883, to recover the village: *Held*, that the sale was binding on S and that the suit was barred by limitation. BASKARASAMI v. SIVASAMI, 8 M. 196=9 Ind. Jur. 70 ... 136

(5) *Ss.* 3, 4 *and* 7—*Civil Procedure Code, s.* 584—*Powers of High Court on second appeal—Contents of patta—Date of tender of patta.*—A landlord within three days of the end of the fasli tendered to a tenant by way of patta a document containing a statement of account of rent payable in respect of the current fasli: *Held*, that the document tendered was a good patta, and that under local custom a valid tender of patta may be made at the end of the fasli. On second appeal by a landlord against a decree of a District Judge, who stated in his judgment that "though the tenant admitted the execution of the muchalka, it was not shown that he dispensed with the patta;" no objection was taken in the memorandum of appeal that the muchalka, which contained a statement that no patta was necessary, had been neglected or misconstrued. The High Court ordered that the Judge be asked to take the postscript into his consideration and submit a revised finding. NARAYANA v. MUNI, 10 M. 363=11 Ind. Jur. 329. 1006

(6) *Ss.* 3, 4, 9—*Landlord and tenant—Right to enforce acceptance of patta.*—The renter of a zamindari, to whom the right to collect the kattubadi or quit-rent on inam lands and the road-cess payable to Government was delegated, sued to compel the inamdars to accept pattas and execute muchalkas for the amounts due: *Held*, that the inamdars, not being cultivating tenants, were not bound, under Act VIII of 1865 (Madras), to accept a patta. RAMA v. VENKATACHALAM, 8 M. 576=9 Ind. Jur. 460 ... 395

(7) *S.* 7—*Tender of patta.*—When a Collector in a suit brought under the provisions of the Rent Recovery Act has decided that a tenant is to accept a patta on certain terms, the landholder is not bound to tender such patta for acceptance before suing to enforce the terms thereof. COURT OF WARDS v. DARMALINGA, 8 M. 2 ... 2

(8) *Ss.* 7, 9—*Demand of patta.*—The Rent Recovery Act does not require that a tenant demanding a patta shall apply in writing to the landholder specifying the lands and the fasli for which the patta is required. STRINIVASA v. NARAYANASAMI, 8 M. 1 ... 1

Act VIII of 1865 (Rent Recovery, Madras)—(Continued). PAGE

(9) *S.* 11—*Implied contract.*—Where a landlord, having for many years accepted rent at "dry" rates from a tenant for certain land, sued the tenant to enforce acceptance of a patta at "garden" rates on the ground that the tenant had raised a crop with water taken from a well constructed by the tenant: *Held*, that there was an implied contract within the meaning of s. 11 of the Rent Recovery Act to accept rent at "dry" rates, and that plaintiff was, therefore, not entitled to enhance that rate of rent, the improvement having been effected at the expense of the tenant. KRISHNA v. VENKATASAMI, 8 M. 164 ... 114

(10) *S.* 11—*Water-cess—Tenants — Cultivation improved by water taken from landlord's tank.*—A landlord has a right to charge water-cess when his tenant cultivates a wet crop on dry land or a second wet crop on wet land by means of water taken from the landlord's tank. THAYAMMAL v. MUTTIA, 10 M. 282 ... 950

(11) *S.* 11, *cls.* i, iii, iv—*Improvements effected by tenant—Enhancement of rent—Sanction of Collector.*—The sanction of the Collector required by the proviso to cl. iv, s. 11 of the Rent Recovery Act as a condition precedent to the enhancement of rent when the landlord has improved the land or has had to pay additional assessment to Government, is not requisite when, improvements having been made by the tenant, the landlord seeks to enhance the rent. *Per Muttusami Ayyar, J.*: The proviso to cl. iv of s. 11 of the Rent Recovery Act implies that when the tenant has improved the land at his own expense the landlord is not entitled on that ground to enhance the rent. *Semble*: cl. i of s. 11, which provides that all contracts for rent, express or implied, shall be enforced, cannot be so applied as to deprive a tenant of the benefit of improvements made at his own expense. *Per Hutchins, J.*: when improvements have been made by the tenant, the proper rate of rent has to be determined with reference to the several provisions of s. 11, quite irrespective of the improvements. VENKATAGIRI RAJA v. PITCHANA, 9 M. 27 ... 415

(12) *S.* 13—*Who entitled to proceed under—Attachment held good as to part.*—A granted two villages in perpetuity to B, under a deed, reserving a certain rent to himself which was to be recovered "according to the Act" if it fell into arrear. The rent remained unpaid for two years, and A obtained an attachment for the whole arrear under the Madras Rent Recovery Act: *Held*, (1) that A was entitled to proceed as landlord under the Madras Rent Recovery Act, (2) that the attachment held good for such amount of rent as was recoverable under that Act. RAMACHANDRA v. NARAYANASAMI, 10 M. 229=11 Ind. Jur. 331 ... 912

(13) *S.* 33—*Sale—Adjournment for want of bidders to next day, invalid—Duty of officer conducting the sale.*—A sale of land for arrears of rent under the provisions of the Rent Recovery Act having been advertised for a certain day, was, owing to the absence of bidders on that day, adjourned and held on the day following by the officer empowered to sell: *Held*, that the sale was invalid. PALANI v. SIVALINGA, 8 M. 6 ... 5

(14) *Ss.* 35, 76—*Civil Procedure Code, ss.* 4, 622.—A sale of the tenant's interest in certain land having taken place under ss. 39 and 40 of the Rent Recovery Act, the Deputy Collector refused to issue a sale certificate to the purchaser, on the ground that the sale had been irregularly conducted: *Held* that under s. 35 of the Rent Recovery Act, the purchaser was entitled to a sale certificate: *Held*, further, that the High Court had no power to review the proceedings of the Deputy Collector under s. 622 of the Code of Civil Procedure. VELLI PERIYA MIRA v. MOIDIN PADSHA, 9 M. 332 ... 627

(15) *S.* 38—*Civil Procedure Code, ss.* 276, 295—*Sale of tenant's interest by landlord pending attachment by Civil Court.*—The interest of a tenant in certain land having been attached by his creditor in execution of a decree for money, the landlord attached the same land for arrears of rent, brought into sale, and purchased it under the provisions of the Rent Recovery Act. The creditor subsequently purchased the interest of the tenant, which was sold in execution of his decree. In a suit by the landlord to have the sale to the creditor declared invalid, *held*, that the landlord's purchase was subject to the creditor's attachment. SUBRAMANYA v. RAJARAM, 8 M. 573=10 Ind. Jur. 60 ... 393

***Act VIII of 1865* (*Rent Recovery, Madras*)—(*Concluded*).** PAGE

(16) *Ss.* 39, 40, 78—*Civil Procedure Code, s.* 11—*Remedy of tenant aggrieved by notice of attachment.*—A tenant having received a notice of attachment under s. 39 of the Rent Recovery Act sued in a District Munsif's Court to have the notice cancelled, no specific damage being alleged: *Held*, that the suit did not lie. MAHOMED v. LAKSHMIPATI, 10 M. 368 ... 1010

(17) *Ss.* 39, 41, 43, 44—*Delivery of possession—Appeal—Limitation.*—A obtained a warrant ejecting B for arrears of rent under s. 41 of the Rent Recovery Act. B appealed within fifteen days, but A was put into possession on 13th May 1882. B's appeal came on for hearing and was dismissed on 30th June 1883. B instituted this suit to recover possession of land on 28th July 1898: *Held*, that B's suit was not time barred under s. 44 of the Rent Recovery Act. PADSHA v. TIRUVEMBALA, 9 M. 479 ... 729

(18) *S.* 51—*Presentation of plaint—Acceptance by Court of plaint sent by post.*—K sent a plaint by post to a Revenue officer, who was on tour and, in obedience to an order issued by such officer to pay batta within a certain date, presented himself and paid the amount demanded within thirty days from the date of the cause of action: *Held* that the suit was instituted within the time prescribed by s. 51 of the Rent Recovery Act. SANKARANARAYANA v. KUNJAPPA, 8 M. 411 ... 282

(19) *Mulageni lease—Encumbered tenancy—Sale for arrears of rent.*—A demised land to B on a mulageni lease. B mortgaged his tenancy to C. The rent under the mulageni lease fell into arrears, and A obtained a decree against B for the amount:—*Held*, that arrears of rent are not a first charge on the tenant's holding, and accordingly that the landlord could not execute his decree by sale of the tenancy free from the mortgage created by the tenant. PADAKANNAYA v. NARASIMMA, 10 M. 266=11 Ind. Jur. 253 ... 938

***Act I of 1866* (*Cantonment, Madras*).**

(1) *Cantonment Rules, ch. IV, s.* 16—*Failure to report small-pox not punishable.*—Failure by a householder to report a case of small-pox in his house, as directed by s. 16 of ch. IV of the Cantonment Act Rules, is not punishable under Madras Act I of 1866. QUEEN-EMPRESS v. LALLA, 8 M. 428=1 Weir 708 ... 293

(2) *S.* 22—*General Clauses Act*, 1868, *s.* 5.—S. 5 of the General Clauses Act, 1868, does not authorize a Cantonment Magistrate to award rigorous imprisonment in default of payment of a fine imposed under Act I of 1866 (Madras). QUEEN-EMPRESS v. GOUNDADU, 8 M. 350 ... 240

***Act IV of 1866* (*Enfranchised Inams, Madras*).**

(1) See HEREDITARY VILLAGE OFFICE, 8 M. 249. ...

(2) See HINDU LAW (IMPARTIBLE ESTATES), 10 M. 1. ...

***Act III of 1871* (*Towns Improvement, Madras*).**

(1) *Ss.* 62, 169—*Profession tax—Non-payment of—Offence—Nature of—Prosecution—Limitation.*—A complaint having been laid (on the 26th March 1885), under s. 62 of Act III of 1871 (Madras) against O for having exercised his profession for more than two months in the official year 1884-85 in a municipality without paying the tax in respect thereof, the Magistrate dismissed the complaint, on the ground that the prosecution was barred by s. 169 of the Act, inasmuch as five months had elapsed since the last payment in respect of the tax became due: *Held*, that the complaint if laid within three months from the close of the official year, or, if O ceased to exercise his profession before the close of the official year, within three months from such date, was not barred by s. 169 of the Act. OOCTACAMUND MUNICIPALITY v. O'SHAUGHNESSY, 9 M. 38 ... 423

(2) *Ss.* 64, 72—*Tax on animals, License, Extent and limit of.*—N having taken out a license under the provisions of the Towns' Improvement Act, 1871, for a bullock, the bullock died and N bought another bullock, but did not take out a second license. N was convicted for keeping this bullock without a license: *Held* (by Turner, C. J., and Hutchins, J., Brandt, J., dissenting) that the conviction was right. MUNICIPAL COMMISSIONERS OF MANNARGUDI v. NALLAPA, 8 M. 327 ... 225

(3) *Ss.* 138, 139—*Street—Encroachment—Possession—Private property*—Onus probandi.—H owned a house in the town of A, to which the Towns'

Act III of 1871 (*Towns Improvement, Madras*)—(*Concluded*). PAGE

Improvement Act, 1871, was extended in 1879. In 1882 the Municipal Commissioners, professing to act under s. 139 of the said Act, removed a pial which projected beyond the main walls of H's house and abutted on a lane which was used by the public. H proved that the pial had existed for fifty years: *Held*, that the action of the Municipal Commissioners was illegal. HANUMAYYA v. ROUPELL, 8 M. 64=9 Ind. Jur. 71 ... 44

(4) See ACT IV OF 1884 (DISTRICT MUNICIPALITIES, MADRAS), 9 M. 429.

Act V of 1878 (*City of Madras, Municipal*).

Ss. 103, 105, *Sch. A*, *Class* I.—Although the tax levied on professions under s. 103 of the City of Madras Municipal Act, 1878, is described as a yearly tax, a half-yearly liability is incurred in respect thereof by the taxpayer. W having been assessed under class I, sch. A of Act V of 1878 Madras, to profession tax at the yearly rate of Rs. 150, paid a moiety thereof for the first half of the year 1884 as provided in s. 105 of the said Act. When the tax for the second half-year became due, Madras Act I of 1884 had come into force and W was assessed for the second half of the year under class I of sch. A of that Act at Rs. 125, being a moiety of the yearly tax on the same class: *Held*, that the assessment was legal. WILSON v. PRESIDENT, MUNICIPAL COMMISSION, MADRAS, 8 M. 429... 294

Act I of 1882 (*Salt Laws Amendment, Madras*).

S. 26, *cl.* 3; *s.* 27 (*e*)—*Salt imported from Foreign State, contraband.*—S. 26 of the Salt Laws Amendment Act (Madras Act I of 1882) makes it penal to import salt by any route not legally sanctioned for that purpose, and also to possess salt known to have been imported in contravention of the Salt Laws, and s. 27 of the said Act authorizes, *inter alia*, the Governor in Council to make rules for regulating the import of salt by land. No such rules having been passed in 1884, P was convicted of being in possession of salt known to have been manufactured in, and imported from, the Native State of Pudukottai: *Held*, that the conviction was right. QUEEN-EMPRESS v. PODIATHAL, 8 M. 342 ... 235

Act V of 1882 (*Forest, Madras*).

(1) *Ss.* 2, 43—*Rules* 10, 13, 23—*Logs permanently fastened to a building cease to be timber.*—The accused were convicted of removing 'timber' vested in the Forest Department, and the convicting Magistrate ordered it to be confiscated: *Held*, that having been already permanently fastened to a building it had ceased to be timber within the meaning of s. 2 of Forest Act, and the order for confiscation was illegal. QUEEN-EMPRESS v. KETHIGADU, 9 M. 373=1 Weir 757 ... 655

(2) *S.* 10—*Appeal to the District Court—Court Fees Act, Sch. II, art.* 11 (*a*), *art.* 17, *cl.* vi.—An appeal to the District Court from the rejection of a claim by a Forest Settlement officer under cl. ii of s. 10 of the Madras Forest Act, 1882, falls under art. 17, cl. vi, and not under art. 11 (*a*) of sch. II of the Court Fees Act, 1870. KAMARAJA v. SECRETARY OF STATE FOR INDIA, 8 M. 22 ... 16

(3) *Ss.* 14, 39—*Indian Limitation Act—Act* XV *of* 1877, *ss.* 5, 6—*Period of Limitation—Power to excuse delay.*—Delay in preferring an appeal under the Madras Forest Act beyond the period prescribed by s. 14 of that Act, may be excused under s. 5 of the Indian Limitation Act, 1877. REFERENCE UNDER S. 39 OF FOREST ACT V OF 1882, 10 M. 210 ... 899

Act I of 1884 (*City of Madras, Municipal*).

S. 123—*Tax on buildings—Hospital built by Government—Standard of hypothetical rent.*—Under s. 123 of the City of Madras Municipal Act, the gross annual rent at which a building might reasonably be expected to let from month to month, or from year to year is, for the purpose of assessment to house-tax under the Act, to be deemed to be the annual value of such building. The Lying-in Hospital at Madras, built and supported by Government, having been assessed by the President of the Municipality as on a rental of Rs. 1,000 a month, the Magistrates on appeal reduced the assessment, finding that Rs. 7, 920 would be a reasonable rent, having regard to the letting value of the buildings in the neighbourhood; but, at the request of the Municipality, referred the following questions to the High Court:—

Act I of 1884 (City of Madras, Municipal)—(Concluded). PAGE

Whether (as contended by Government) the property in question should be valued and assessed on the rent, which, on the property being offered in the open market without reserve, a person desirous of securing it would have to pay; or whether (as contended by the Municipality) it should be valued and assessed on the highest reserve rent which an owner of the property offering it in the open market would reasonably demand, and below which sum he would not be willing to let:—*Held*, that the standard value was what the hypothetical tenant requiring the building for use as a hospital would be willing to pay rather than rent a less suitable building and adapt it to his requirements at his own expense, and that in this sense the contention of the Municipality was correct. SECRETARY OF STATE v. MADRAS MUNICIPALITY, 10 M. 38 ... 777

Act IV of 1884 (Madras District Municipalities, Madras).

(1) *S.* 103—*Procedure to compel payment of tax—Distress.*—Under s. 103 of Act IV of 1884 (Madras), a prosecution for default of payment of tax cannot be instituted unless the tax cannot be recovered by distress and sale of moveable property of the defaulter as provided in that section. QUEEN-EMPRESS v. O'SHAUGHNESSY, 9 M. 429 ... 694

(2) *Ss.* 191, 192, 193, 198—*Butchers' licenses—Private market, meaning of.*—A Municipal Council, under the Madras District Municipalities Act, refused to give licenses to certain persons keeping butchers' shops not used as slaughter-houses, except on the condition that they should remove to a fixed market:—*Held*, that butchers' shops are not "private markets" within the meaning of the Act, and that the action of the Municipal Council was *ultra vires*. QUEEN-EMPRESS v. BAODUR BHAI, 10 M. 216=1 Weir 741 ... 903

Act I of 1885 (Madras Amending Act).

See ACT XXIV OF 1859 (POLICE, MADRAS), 9 M. 167.

Adverse Possession.

(1) Denial by a mortgagee in possession of the mortgagor's right to redeem is not sufficient to convert such possession into adverse possession. MUSSAD v. THE COLLECTOR OF MALABAR, 10 M. 189 ... 884

(2) *Limitation Act, sch.* II, *art.* 12—*Sale of land in execution of decree—Suit by third party to recover—Burden of proof.*—In a suit to redeem certain land demised on kanam in 1850 by A to the predecessor of B, C, who was in possession of the land, was made a defendant. A proved his title to the land and possession up to 1850. C pleaded title to the land and denied that B had ever been in possession. Both pleas were found to be false. It was found, however, that C had been in possession from 1869 to 1885, and that in 1876 the land had been sold in execution of a decree against C (to which A was not a party) and purchased by D, who re-sold to C in 1879. The Lower Court held that C's possession must be taken to have been derived from B, till the contrary was proved; but that the suit was barred by art. 12 of sch. II of the Indian Limitation Act, 1877, because it had not been brought within one year from the date of the sale in 1876:—*Held*, that the suit was not barred by limitation, and that the burden of proving that his possession was not derived from B lay upon C. NILAKANDAN v. THANDAMMA, 9 M. 460 ... 716

(3) See FOREST LAND, 9 M. 285.

(4) See LIMITATION ACT (XV OF 1877), 9 M. 482.

Advocate.

See STAMP ACT (I OF 1879), 8 M. 14.

Agreement.

See STAMP ACT (I OF 1879), 10 M. 27.

Aliyasantana Law.

(1) *Partition—Evidence—Admissibility as to pedigree in a document that has been set aside by the Court.*—In a suit for division of the property of an extinct divided branch of the family of the parties who were governed by the Aliyasantana law, a written agreement which had been set aside by the Court as against the defendants was offered in evidence by the

Aliyasantana Law—(*Concluded*). PAGE

plaintiff to prove that the parties were of equal grade of relationship, in which case it was admitted that partition was enforceable.—*Held*, that the written agreement was admissible as evidence of pedigree and that the plaintiff was entitled to the decree sought for. TIMMA v. DARAMMA, 10 M. 362 ... 1005

(2) *Yajaman—Family compact.*—The question, whether, according to the Aliyasantana usage obtaining in South Canara, the senior member, male or female, or only the senior female, is the *de jure* yajaman (manager) of the family is not concluded by authority and cannot be determined without evidence of usage. By a family compact (between all the members of an Aliyasantana family) in settlement of disputes in the family, it was agreed that the senior male for his life should enjoy the possession of the family land and protect the females:—*Held*, that the senior female, assuming that she was *de jure* yajaman, could not arbitrarily revoke this arrangement. DEVU v. DEYI, 8 M. 353 ... 242

Amendment.

See CIVIL PROCEDURE CODE (XIV OF 1882), 10 M. 152.

Appeal.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 8 M. 300; 8 M. 373; 8 M. 473.

Appealable Order.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 10 M. 179.

Application.

See LIMITATION ACT (XV OF 1877), 8 M. 207.

Army Act of 1881 (44 and 45 Vic., c. 58).

(1) *Ss.* 144, 151—*Civil Procedure Code, s.* 468—*Jurisdiction of Small Cause Courts over soldiers.*—A sued a soldier to recover a debt not amounting to £30:—*Held*, that the suit was cognizable by a Court of Small Causes. *Semble.*—The Commanding Officer of the defendant is bound to cause the summons of the Small Cause Court to be served on him. MAHOMED SAIB v. AGGAS, 10 M. 319 ... 976

(2) *S.* 145—S. 145 of the Army Act, 1881, is not applicable to soldiers of Her Majesty's Indian forces. NATHUD BI v. JAFAR HUSAIN, 8 M. 365 = 1 Weir 667 ... 251

(3) *S.* 151 (3)—*Civil Procedure Code, s.* 266, *exp.* (*b*)—*Debtor subject to military law—Attachment of moiety of salary under Rs.* 20 *per mensem.*—S. 151 of the Army Act, 1881, not being affected by the provisions of s. 266 of the Code of Civil Procedure, the attachment by a Civil Court of a moiety of the monthly salary of a debtor subject to military law, not exceeding Rs. 20 is legal. VIRARAGAVA v. RAMUDU, 9 M. 170 ... 515

(4) *S.* 156—Under the Army Act, 1881 (44 and 45 Vict., (*c.*) 58), s. 156, any person who takes in pawn a military decoration from a soldier is liable to punishment:—*Held*, that this section of the Army Act, 1881, is applicable to a person who takes a medal in pawn from a sepoy in India. QUEEN-EMPRESS v. NARAYANASAMI, 10 M. 108 = 1 Weir 668 ... 825

Assessors.

See CRIMINAL PROCEDURE CODE (X OF 1882), 9 M. 42.

Attachment.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 10 M. 169; 10 M. 194.

Attempt.

See PENAL CODE (XLV OF 1860), 8 M. 5.

Audi Alteram Partem.

See CLUB, 9 M. 319.

Award.

See CIVIL PROCEDURE CODE (XIV OF 1882), 9 M. 475.

Barrister.

See STAMP ACT (I OF 1879), 9 M. 140.

Bench of Magistrates. PAGE

See CRIMINAL PROCEDURE CODE (X OF 1882), 9 M. 36.

Boat Rules.

In Madras Ports—Refusal to carry cargo without reasonable excuse.—By the Boat Rules of a certain port it was provided, (1) that all licensed boats must carry such number of passengers and quantity of goods as should be expressed in the license; and (2) that the owner of a licensed boat who should refuse to let his boat on hire without assigning reasonable and satisfactory grounds for such refusal should be liable to a penalty:—*Held*, that a refusal by a person in charge of a licensed boat to receive goods on board unless a tallyman was sent with them, on the ground that he could not count, was not a reasonable and satisfactory cause. QUEEN-EMPRESS v. KAMANDU, 10 M. 121 ... 835

Bond.

See STAMP ACT (I OF 1879), 8 M. 87; 10 M. 158.

Cantonment Act Rules.

Ch. IV, s. 16.—See ACT I OF 1866 (MADRAS CANTONMENT), 8 M. 428.

Cause of Action.

(1) *Suit by debtor to compel creditor to accept money due.*—A bond having been executed whereby it was stipulated that a debt should be paid by instalments subject to the condition that if any one instalment were not paid within a certain time after it became due, the whole amount remaining due should become payable at once, the creditor evaded the debtor's attempts to pay the instalments as they became due, and the debtor brought a suit to compel the creditor to accept an instalment due:—*Held*, that such a suit would not lie. KRISTAYA v. KASIPATI, 9 M. 55=10 Ind. Jur. 25 ... 435

(2) *Suit for damages caused by false statement of witness in a suit.*—No action will lie against a witness for making a false statement in the course of a judicial proceeding. CHIDAMBARA v. THIRUMANI, 10 M. 87 ... 811

(3) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 8 M. 520.

(4) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 8 M. 147; 9 M. 279.

(5) See JURISDICTION, 9 M. 39.

Christianity.

See HINDU LAW (MARRIAGE), 8 M. 169.

Civil Procedure Code (*Act VIII of 1859*).

(1) *S.* 7—*Separate causes of action.*—Section 7 of Act VIII of 1859 required that every suit should include the whole of the claim arising out of the cause of action, meaning the whole of the claim arising out of the cause of action upon which the suit was brought, not that every suit should include every cause of action, or every claim, which the plaintiff had against the defendant. Accordingly, where a plaintiff had sued to obtain his share of an estate in land, in consequence of having been wrongfully dispossessed by the defendant, whom he afterwards in the present suit sued for his share of personal property, being entitled to both under a will, it was *held* that the subsequent suit was not barred by reason of the non-claim in the prior one. The claim in respect of the personality had not arisen out of the cause of action which existed in consequence of the wrongful dispossession; the case was not like one of the conversion of several things; and the causes of action were distinct. PITTAPUR RAJA v. SURIYA RAU, 8 M. 520 (P.C.)=12 I. A. 116=9 Ind. Jur. 274=4 Sar P.C.J. 638 ... 356

(2) *S.* 148—Res judicata—*Previous suit by next friend dismissed for default—Evidence of fraud of next friend—Limitation—Contract by a minor—Ratification by acquiescence.*—A sued in 1885 to recover certain estates from B, alleging claim under his adoption which took place in 1865. A suit to recover the same estates had been filed on behalf of A by his next friend and had been dismissed for default in 1872. In 1875 A, being still a minor, relinquished his claim to the estates for Rs. 12,000 under exhibit B.; but now alleged that he thought he was relinquishing it only in favour of the defendant's predecessor in title who died in 1883, having

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been in possession of the estates since 1867. The plaintiff attained his majority in 1878;—*Held*, that the claim was *res judicata*, the plaintiff having failed to prove fraud on the part of his next friend: that whether the cause of action arose in 1865 or 1867, it was equally barred from 1879: that assuming the plaintiff was a minor of 15 years of age at the date of the deed of relinquishment, it is not likely he would not have understood its effect, or that he failed to ascertain it when he attained his majority in 1878. *Per cur.*—The plea of *res judicata* ordinarily presupposes an adjudication on the merits; but s. 148 of the Code of Civil Procedure (Act VIII) of 1859 contains a statutory direction that in case the plaintiff neglects to produce evidence and to prove his claim as he is bound to do, the Court do proceed to decide the suit on such material as is actually before it, and that the decision so pronounced shall have the force of a decree on the merits, notwithstanding the default on the part of the plaintiff. VENCATACHALAM v. MAHALAKSHMAMMA, 10 M. 272 ... 943

(3) *S.* 246—*Limitation Act*, 1871—*Estoppel.*—An order passed under s. 246 of the Code of Civil Procedure, 1859, rejecting a claim after investigation, will, if not contested by suit by the claimant, estop him afterwards from pleading adverse possession at the date of the order in a suit brought to eject him by the decree-holder. VELAYUTHAN v. LAKSMANA, 8 M. 506 ... 346

(4) *S.* 264—*Execution of decree against a member of an undivided family by sale of his personal interest in the family estate, which was an impartible zamindari; such interest, by reason of his death before the sale, consisting only of the rents and profits then uncollected.*—On a sale of the right, title, and interest in an impartible zamindari in execution of decrees against the zamindar, the head of an undivided family, the question was whether (*a*) only his own personal interest, or (*b*) the whole title to the zamindari, including the interest of a son and successor, passed to the purchaser. The proclamation of sale purported to relate to (*a*) only; and between the dates of proclamation and the auction-sale the zamindar died. On the argument that, this having given rise to an ambiguity, the Court must be understood to have sold all that it could sell, and that under the circumstances it could sell, and was bound to sell (*b*) because, the debts, the subject of the decrees under execution, not having been incurred by the late zamindar for any immoral purpose, the entire zamindari formed assets for their payment in the hands of his son: *Held*, that the question of what the Court could, or should, have sold had not arisen. All that required decision was what the Court had sold. If (*a*) only was put up for sale, then that interest only could have been purchased. Two Courts having concurred in finding that (*a*) only was sold, in which also their Lordships agreed, only that interest passed to the purchaser. PITTACHI v. CHINNATAMBIAR, 10 M. 241 (P.C.) = 14 I. A. 84 = 11 Ind. Jur. 272 = 5 Sar. P.C.J. 38 ... 921

(5) *S.* 269—*Limitation—Suit brought after one year—Civil Procedure Code*, 1877, *s* 335—*Limitation Act*, 1877, *sch.* II, *arts.* 11, 13.—An order having been passed on the 10th August 1877 under s. 269 of the Code of Civil Procedure, 1859, cancelling delivery of possession of land brought to sale and purchased by a decree-holder, no suit was brought by the decree-holder to establish his rights to the land until 1883: *Held*, that the repeal of s. 269 of the said Code on 1st October 1877 did not deprive the order of the 10th August 1877 of the effect it possessed when passed, and therefore that the suit was barred by limitation. VENKATACHALA v. APPATHORAI, 8 M. 134 ... 94

Civil Procedure Code (Act X of 1877).

(1) *S.* 13—Res-judicata—*Estoppel—Privity in estate—Costs of inserting irrelevant matter in the printed record.*—A competent Court having decided upon an issue directly raised in a suit brought by a person alleging himself to have been adopted, that this adoption had not taken place, it was held that the present suit was barred under Act X of 1877, s. 13, as *res judicata*, having been brought by the son of the defendant in the former suit, claiming through his father, to establish the same adoption; and that the section applied, although the suits related to different properties. The establishment of the adoption alleged in the first suit would have obliged

Civil Procedure Code **(*Act X of 1877*)—(*Concluded*).** PAGE

the father of the present plaintiff to share with the adopted son his ancestral estate. That adoption having been negatived, the son, in this suit, ought to be estopped from making title on the ground that the adoption had placed the person, from whom he claimed to inherit, in the relation of father's brother to him. Where irrelevant matter had been introduced into the record, the Registrar was directed to tax the costs as if the record had not contained what he might consider to have been inserted unnecessarily. PITTAPUR RAJA v. BUCHI SITAYYA, 8 M. 219 (P.C.)=12 I. A. 16=4 Sar. P.C.J. 598=9 Ind. Jur. 121 ... 152

(2) Ss. 44, 146, 147, 539—*Suits in respect of religious and charitable trusts.—Joinder of claim for moveable and immoveable property—Form of decree not indicated in the plaint but indicated by the issues—Limitation Act*, 1877—*Act* XV *of* 1877. *s.* 10—*Act* V *of* 1843—*Spiritual slavery of a pupil to his Guru.*—This was a suit brought in 1881 with no written consent of the Advocate-General by the head of an Adhinam for declarations that a Mutt was subject to his control: that he was entitled to appoint a manager: that the present head of the Mutt was not duly appointed and his nomination by his predecessor was invalid; and for delivery of possession of the moveable and immoveable properties of the Mutt to a nominee of the plaintiff. The claim extended also to religious establishments at Benares and elsewhere connected with the Mutt. The Mutt was founded by a member of the Adhinam. Many previous heads of the Mutt had agreed to be "slaves" of the head of the Adhinam, but for over 60 years the head of the Adhinam had exercised no management over the endowments belonging to the Mutt; and in a suit (compromised) of the year 1854 the present pretensions of the head of the Adhinam had been denied *in toto*. The defendant had succeeded in 1880 to the management of the Mutt under the will of his predecessor, dated the same year, and was not a disciple of the Adhinam:—*Held*, (1) that the Mutt is affiliated to the Adhinam, but the head of the Adhinam is not entitled to appoint to the office of head of the Mutt and is not entitled to an order for delivery of the property of the Mutt to himself or to his appointee; (2) that on the evidence as to the usage in the establishments in question, the head of the Mutt is entitled to appoint his successor, but his election is limited to members of the Adhinam; and the head of the Adhinam is entitled to enforce this rule though he is bound to invest a disciple properly nominated by the head of the Mutt; (3) that the defendant not being disciple of the Adhinam, his appointment is invalid and the head of the Adhinam is entitled to see that a competent member of the Adhinam was appointed in his stead; (4) that the plaintiff is entitled to declarations based on the two last mentioned findings since they were comprised in the issues framed under ss. 146 and 147 of the Code of Civil Procedure, although the appropriate form in which the decree should be passed was not indicated with precision in the plaint itself; (5) that the suit was barred by limitation in respect of the personal claim to manage the endowments as to which no claim had been put forward for 60 years; (6) that the suit was not barred by limitation in respect of the claim to set aside the appointment of the defendant (who entered into possession in 1880 under a will, dated in the same year), or to see that a competent Dharmapuram man be appointed, in spite of the total denial of the claims of the head of the Adhinam in 1854; (7) that the consent of the Advocate-General to the suit is not required; the suit having been instituted under the Civ. Pro. Code of 1877 and the cause of action not being an alleged breach of trust; (8) that there is nothing irregular in seeking to recover moveable and immoveable property in the same suit if the cause of action is the same in respect of both; (9) that the agreement of the head of the Mutt to become the "slave" of his *guru* could have no legal operation since 1843, and that the adverse possession of the defendant from that year is fatal to any claim of the plaintiff under such agreement. GIYANA SAMBANTHA PANDARA SANNADHI v. KANDASAMI TAMBIRAN, 10 M. 375 ... 1015

Civil Procedure Code **(*Act XIV of 1882*).**

(1) Ss. 4, 622.—See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 9 M. 332.

(2) *Ss.* 5, 360. *Ch.* XX—*Small Cause Court—Mufassal Insolvency jurisdiction.*—Under S. 360 of the Code of Civil Procedure, the local Government cannot invest a Mufassal Small Cause Court with the insolvency jurisdiction

***Civil Procedure Code* (*Act XIV of 1882*)—(*Continued*).** PAGE

conferred on District Courts by Ch. XX of the said Code, inasmuch as, by reason of s. 5, Ch. XX does not extend to such Courts of Small Causes. SETHU v. VENKATARAMA, 9 M. 112 ... 475

(3) S. 11.—See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 10 M. 368.

(4) Ss. 11, 15—Suit for Minor—Jurisdiction.—See JURISDICTION, 9 M. 31.

(5) *S.* 13—*Hindu Law*—Res judicata—*Representation of estate by Hindu widow—Decree in favor of widow—Suit by reversioner—Admission by widow subsequent to decree, not binding on reversioner.*—In 1877, S claiming to be the adopted son of M, sued A, the widow of M. to recover his estate. A denied the adoption. S. failing to adduce any evidence, the suit was dismissed under S. 158 of the Code of Civil Procedure, 1877. In 1882 by an agreement made between A and S, A acknowledged the title of S as adopted son of M. A having died, a suit was brought against S by a reversioner of M to recover the estate of M: *Held*, that S was estopped by the decree in the former suit from setting up his claim as adopted son against the plaintiff, and that the subsequent agreement between A and S did not affect plaintiff's right. ARUNACHALA v. PANCHANADAM, 8 M. 348 ... 239

(6) S. 13.—See RES JUDICATA, 8 M. 83. ...

(7) *S.* 13—*Explanation* 5.—In 1881 A sued B, C, and others for damages for the loss of his crops by the diversion of a water-channel by the defendants. A claimed a right common to himself and other raiyats of his village to use the water during the day time under an arrangement, by which B, C, and the other defendants in the suit were entitled to use the water during the night time. In 1882 A and four other raiyats, not parties to the former suit, sued B, C, and thirteen others, not parties to the former suit, for a decree declaring that the plaintiffs were entitled to the exclusive use of the water in the channel by day. The Lower Courts held that the suit was barred by S. 13 of the Code of Civil Procedure: *Held*, that as between the plaintiffs other than A and the defendants, and as between A and the defendants other than B and C, the suit was not barred by S. 13 of the Code of Civil Procedure. THANAKOTI v. MUNIAPPA, 8 M. 496 ... 339

(8) S. 13, Expl. 5, s. 30.—See MALABAR LAW—KARNAVAN, 10 M. 79

(9) *S.* 26—*Misjoinder—Amendment of plaint—Specific Relief Act, s.* 42—*Declaratory suit.*—Suit by six plaintiffs praying for a declaration that certain proceedings of a District Temple Committee removing them from office as trustees of a temple were illegal. Defendants pleaded that the suit would not lie because of misjoinder and also because further relief might have been sought:—*Held* that, under S. 26 of the Code of Civil Procedure, the plaintiffs could not sue jointly and that the plaint should be returned for amendment, one of the plaintiffs to be allowed to use it as his own: *Held*, also, that unless there had been an actual ouster from office, a declaratory suit would lie. RAMANUJA v. DEVANAYAKA, 8 M. 361=9 Ind. Jur. 264 ... 248

(10) *S.* 30—*Malabar Law—Joinder of parties.*—Res judicata.—*Cancellation of deeds—Declaratory suit—Withdrawal of part of claim.*—A and B, junior members of a Malabar tarwad, sued to cancel certain mortgages executed by their karnavan and senior anandravan, on the ground that the secured debt was not binding on the tarwad, and to appoint A to the office of karnavan. The last part of the prayer was withdrawn. The mortgages were executed to secure a decree-debt, the decree having been passed *ex parte* against the late karnavan of the tarward. No fraud was alleged, but the Lower Courts found that the karnavan had been guilty of fraud in allowing the decree to be passed *ex parte*. The plaintiffs had not been parties to the decree, and the other junior members of the tarwad who had been joined were exempted from liability: *Held*, that the nature of the debt was not *res judicata*, and that the plaintiffs were entitled to a declaration that the mortgages in question were invalid as against them: *Held* further *per cur.*—All the members of the plaintiffs' tarwad should have been joined actually or constructively; but (*Kernan*, J., dissenting) the objection as to non-joinder is not essential, but merely formal, and weight should not be attached to it when it is first taken on second appeal. MOIDIN KUTTI v. KRISHNAN, 10 M. 322 ... 978

Civil Procedure Code (Act XIV of 1882)—(*Continued*). PAGE

(11) S. 30—*Suit for obstruction of highway—Special damages.*—The rule of English Law that no action can be maintained by one person against another for obstruction to a highway without proof of special damage should be enforced in British India as a rule of "equity and good conscience." S. 30 of the Code of Civil Procedure was not intended to allow individuals to sue on behalf of the general public but to enable some of a class having special interest to represent the rest of the class. ADAMSON v. ARUMUGAM, 9 M. 463=10 Ind. Jur. 374 ... 718

(12) S. 32. See REGULATION (X OF 1831), 10 M. 44.

(13) Ss. 32, 368—*Death of respondent in appeal—Rival claims to represent deceased.*—Although a Court is bound by s. 368 of the Code of Civil Procedure to place on the record the name of the person alleged by the appellant to be the legal representative of a deceased respondent, nevertheless, where a person, other than the person alleged by the appellant to be such representative, claims, on good *prima facie* grounds, to be the representative of the deceased respondent, and the interests of the person entitled to the estate of the deceased may be prejudiced, the Court should, under s. 32 of the Code of Civil Procedure, proceed to make such claimant also a party to the appeal. ATHIAPPA v. AYANNA, 8 M. 300 ... 206

(14) S. 43.—Upon a settlement of accounts between plaintiff and defendants, Rs. 3.985-6-9 was found due by the defendants, who agreed to pay the same. They gave to plaintiff an order on their agents to pay Rs. 2,500 from the profits of certain land, and promised to pay the balance within a month. Plaintiff filed two suits, one for Rs. 2,500 and the other for the balance of the debt. Defendants pleaded that both suits should be dismissed, as brought in contravention of the requirements of s. 43 of the Code of Civil Procedure. The Lower Courts held that there were two distinct causes of action, and decreed both claims:—*Held*, on second appeal, that plaintiff had only one cause of action, and that the decree in one of the suits must be reversed. APPASAMI v. RAMASAMI, 9 M. 279=10 Ind. Jur. 219 ... 591

(15) S. 43—*Cause of action—Splitting a claim—Separate suits for rent due for successive years.*—Petitioners filed two suits in a Small Cause Court on the same day to recover rent due for two successive years under the same lease. The sum of the two claims exceeded the pecuniary limit of the Court's jurisdiction. The suit for the rent of the first year was dismissed under s. 43 of the Code of Civil Procedure, on the ground that the claim ought to have been included in the suit for the second year's rent: *Held* that, as the petitioners had no intention of abandoning either claim, the proper course was to allow them to withdraw both suits and file a fresh suit in a competent Court. ALAJU v. ABDOOLA, 8 M. 147 ... 103

(16) S. 43—*Declaration of title to continue to enjoy separate possession of land—Suit for partition.*—The plaintiffs having obtained a declaration of title to continue to enjoy separate possession of certain lands sued the former defendants again for partition of the same lands:—*Held*, that the suit was unnecessary and should be dismissed. *Per cur.*—The claim and the remedy mentioned in s. 43 of the Code of Civil Procedure have reference to the cause of action litigated in the previous suit. ANDI v. THATHA, 10 M. 347 ... 995

(17) S 43—*Lis pendens.*—N being mortgagee in possession of five-eighths of a pangu (share) of certain land—security for a debt of Rs. 400—hypothecated his rights to M in 1876. In 1878 K bought two-eighths of the said five-eighths from the mortgagor. In 1879, K sued N claiming possession of his two-eighths on payment of Rs. 400 and obtained a decree and possession thereof. Pending this suit, N assigned his mortgage to M. M was aware of the suit, and K was aware of the assignment when he paid Rs. 400 into Court for N. In 1883, K bought the remaining three-eighths from the mortgagor and sued N and M to recover possession thereof. M pleaded that the suit was barred by s. 43 of the Code of Civil Procedure, inasmuch as K might have recovered the five eighths in the suit against N:—*Held*, that this plea was bad. M also pleaded that he had a valid mortgage over three-eighths:—*Held*, by *Muttusami Ayyar, J*, that, if the assignment of the mortgage by N to M was a real transaction, this plea

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was good. *Per Muttusami Ayyar, J.*—The doctrine of *lis pendens* can only be relied on as a protection of the plaintiff's right to property actually sought to be recovered in the suit. BRAHANNAYAKI v. KRISHNA, 9 M. 92 ... 461

(18) *Ss.* 43, 373—*Merger of securities.*—On the 5th September 1874, R, a Hindu, and his sons borrowed Rs. 5,000 from V and mortgaged to him certain land, items 1, 2 and 3. On the 7th September 1874, V borrowed Rs. 5,000 from R N and mortgaged his rights in items 1 and 2 and land of his own to R N. In 1877 R N bought at a sale in execution of a decree against R the share of R. in the said items 1 and 2 subject to the mortgage created by R on 5th September 1874 and to another mortgage created by R on 11th January 1875. In 1880, R N sued V and the sons of R for arrears of interest due under his mortgage bond. This suit was withdrawn with liberty to bring a fresh suit for the principal and interest due under the bond. In 1885, R N sued the sons of R and V to recover principal and interest due under his mortgage bond. V pleaded that, as R N had bought R's share in items 1 and 2, subject to the mortgages created by him, R N's rights as mortgagee were merged in his rights as purchaser, R's sons pleaded, *inter alia*, that the suit was barred by the provisions of ss. 43 and 373 of the Code of Civil Procedure:—*Held*, that the claim of R N was neither merged nor barred. VENKATA v. RANGA, 10 M. 160 ... 862

(19) *S.* 45—*Hindu Law—Suit for partition—Alienees made parties to suit—Onus probandi.*—Where a suit was brought by Hindu for partition of family property against his father, brothers, and fifteen others to whom, it was alleged, the father had improperly alienated numerous parcels of the said property at different times:—*Held*, that the better course was for the Court to have ordered, under s. 45 of the Code of Civil Procedure, separate trials to be held in respect of each alienation. In a suit brought by a Hindu to contest an alienation of family property made by his father, the onus of proving that the alienation is binding on the son lies upon those who claim the benefit of the alienation. SUBRAMANYA v. SADASIVA, 8 M. 75 .. 52

(20) *S.* 57—*Plaint presented in a wrong Court.*—In all cases where no option as to the selection of the Court is allowed by law to the plaintiff, a plaint presented in a wrong Court must be returned for presentation in the proper Court. MUTTIRULANDI v. KOTTAYAN, 10 M. 211 ... 900

(21) *S.* 57—*Suit filed in wrong Court—Return of plaint.*—In a suit filed in a District Munsif's Court to recover certain land, the defendants alleged that the value of the land was understated by the plaintiff and exceeded by far the pecuniary limit of the Court's jurisdiction. Upon enquiry the Munsif found this allegation to be true and directed the plaint to be returned to the plaintiff for presentation in a superior Court. The plaint having been presented in the Subordinate Court, the Subordinate Judge, on the authority of *Jagjivan Javerdhas Seth* v. *Magdum Ali* (7 B. 487), dismissed the suit:—*Held*, that the procedure adopted by the Munsif was correct. KANDU v. KONDA, 8 M. 62 ... 43

(22) *Ss.* 59, 63, 138, 139—*Appeal—Rejection of documents admitted by Lower Court.*—Certain documents having been allowed by the District Munsif to be filed by the plaintiff during the trial of a suit, the District Judge, on appeal, held that he was bound to strike them off the file on the ground that they were not filed with the plaint nor entered in any list annexed to the plaint, and because the Munsif had not recorded any reason for admitting them:—*Held*, that, as the documents had been admitted in evidence by the Lower Court, the Appellate Court was bound to consider them. MINAKSHI v. VELU, 8 M. 373 ... 256

(23) *Ss.* 98, 99—*Decree passed in a restored suit pending appeal against order of restoration.*—A suit was filed in a Munsif's Court, but neither party appeared for the hearing, and the suit was dismissed. The Munsif subsequently on review made an order restoring the suit and eventually decreed for the plaintiff. The defendant in the meanwhile appealed to the District Court against the order of restoration, and after the date of the decree, the District Court made an order allowing the defendant's appeal. The plaintiff appealed to the High Court and the order of the District

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Court was reversed and the order of restoration upheld :—*Held*, that the Munsif's decree was not passed without jurisdiction. ALWAR v. SESHAMMAL, 10 M. 290 ... 956

(24) *Ss.* 98, 99, 157, 158.—A District Munsif struck a case off the file of his Court on neither party appearing. Subsequently on an application by the plaintiffs the case was restored. The order of restoration was reversed by the District Judge:—*Held*, (1) that the order to strike off the case was illegal; (2) that assuming that the case was dismissed, no appeal lay to the District Judge whose order was accordingly made without jurisdiction. ALWAR v. SESHAMMAL, 10 M. 270 ... 941

(25) *Ss.* 100, 101, 108, 540 —*Appeal from* ex parte *decree.*—A defendant against whom a decree has been passed *ex parte*, and who has not adopted the procedure provided by s. 108 of the Code of Civil Procedure, can appeal from such decree under the general provisions of s. 540. KARUPPAN v. AYYATHORAI, 9 M. 445 ... 705

(26) *Ss.* 130, 387, 591, 622—*Interlocutory orders not subject to revision.*—Under s. 622 of the Code of Civil Procedure, interlocutory orders passed under s. 387 refusing applications for the issue of a commission to examine witnesses, or, under s. 130, directing the production of documents, cannot be revised. NIZAM OF HYDERABAD, *In re*, 9 M. 256 ... 575

(27) *S.* 206—*Jurisdiction of Court to amend its decree after appeal.*—Under s. 206 of the Code of Civil Procedure a Court has power to amend its decree by bringing it into conformity with the judgment after the said decree has been confirmed on appeal. SUNDARA v. SUBBANNA, 9 M. 354 ... 642

(28) *Ss.* 206, 622—*Error of Law—Application to bring decree into conformity with judgment—Limitation Act not applicable.*—Applications to the Court under s. 206 of the Code of Civil Procedure are not governed by the Limitation Act. A Small Cause Court rejected an application made under s. 206 of the Code of Civil Procedure to bring a decree into conformity with the judgment, on the ground that a former application had been dismissed for default and the petitioner was bound to apply within one month from the date of dismissal and was now too late. On an application to the High Court under s. 622 of the Code to set aside this order :—*Held*, that the High Court could not interfere. JIVRAJI v. PRAGJI, 10 M. 51 ... 786

(29) S. 223—See Act XI of 1865 (SMALL CAUSE COURT), 8 M. 8.

(30) *S.* 230—*Lmitation—Twelve years rule—" Law in force" prior to that Code—Includes Act* X *of* 1877.—In s. 230 of the Code of Civil Procedure, 1882, the words " Law in force" include the Civil Procedure Code, 1877, as well as the Limitation Act then the force; *Held*, therefore, where an application for execution of a decree of 1872 had been made and granted in January 1882 and under s. 230 of the Code of Civil Procedure 1877, further execution became barred, before the date on which Civil Procedure Code, 1882, came into force, that no application within three years from such date could be granted under s. 230 of that Code. KOLLU SHETTATI v. MANJAYA, 9 M. 454 ... 711

(31) *S.* 232—*Purchase of decree by creditor of one of several judgment-debtors—Probability of decree being executed against another judgment-debtor no ground for refusing execution to purchaser.*—A decree for damages and costs having been obtained against P and C, A, to whom P was indebted and was about to assign property as security, in order to prevent P being adjudicated an insolvent, and with a view to execute the decree against C if possible, purchased the decree. A applied, under s. 232 of the Code of Civil Procedure, for leave to execute the decree. This application was rejected by *Kernan, J.*, on the ground that the decree was certain to be executed against C and not against P, under whose orders and for whose benefit C acted when he infringed the right of, and became liable in damages to, the plaintiff in the suit:—*Held*, on appeal, that the benefit likely to be gained by P by this transaction was no sufficient ground for refusing leave to A to execute the decree. AGRA BANK v. CRIPPS, 8 M. 455 ... 311

(32) *S.* 244.—B obtained a decree on a settlement of accounts made with V as trustee of a mutt. V's title as trustee having subsequently been negatived by decree and the title of S declared, B applied to execute his decree against the property of the mutt and to have S substituted as party to the

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suit in place of V. The application was rejected by the Munsif, but on appeal the District Judge made S a party and reserved for determination in execution proceedings the question whether the debt was contracted for the benefit of the mutt :—*Held*, that S was properly made a party, but that it was not open to him to raise this question in execution proceedings SUDINDRA v. BUDAN, 9 M. 80=10 Ind. Jur. 100 ... 452

(33) *S.* 244.—R having obtained a decree for money against K, the karnavan of the defendants, K died and the defendants were made parties to the suit as representatives of K. Tarward property was then attached by R, and the defendants having objected, the Court raised the attachment. R sued for a declaration that the property released was liable to be sold :—*Held*, that the suit was barred by s. 244 of the Code of Civil Procedure. RAVUNNI MEMON v. KUNJU NAYAR, 10 M. 117=11 Ind. Jur. 150=11 Ind. Jur. 294 ... 832

(34) *S.* 244—*Execution proceedings—Re-valuation of improvements allowed for in decree.*—A mortgagor obtained a decree for redemption on payment of the mortgage amount, together with a further sum assessed as the value of improvements made by the mortgagee. When the decree-holder applied for the execution of the decree it was contended on behalf of the mortgagee that the improvements ought to be re-valued as they were at the time of execution of more value than at the date of the decree :—*Held*, that the mortgagee was entitled to re-valuation in the execution proceedings. RAMUNNI v. SHANKU, 10 M. 367 ... 1009

(35) *Ss.* 244, 331, 332—*Decree on compromise—Execution against party to suit, not party to compromise—Resistance to execution—Procedure.*—In a suit for partition a compromise was entered into by all the parties except S, and a decree obtained on the terms thereof. In execution S was dispossessed and presented a petition to the Court, objecting that the decree was not binding on her. The petition was rejected :—*Held*, that the objection raised by S ought to have been investigated under S. 244 of the Code of Civil Procedure, and that S was entitled to appeal against the order rejecting the petition. SANKARAVADIVAMMAL v. KUMARASAMYA, 8 M. 473 ... 324

(36) *Ss.* 244, 583.—The Court has power to award to successful appellant interest upon an amount found on appeal to have been improperly levied in execution of a decree. AYYAVAYYAR v. SHASTRAM AYYAR, 9 M. 506 ... 747

(37) *Ss.* 244, 583, 622—*Claim for rateable distribution by creditor rejected—Sum detained in Court, pending application to High Court—Application rejected—Interest on sum detained claimed in execution—Procedure.*—In execution of a decree by R, S, another creditor, claimed a rateable share of the proceeds realized. His claim was rejected. Pending an application to the High Court under s. 622 of the Code of Civil Procedure to set aside this order, the share claimed by S was detained in Court at his request. The High Court rejected the application of S, and R took out execution for the costs incurred therein and for interest on the sum detained in Court at the request of S :—*Held*, that the interest could not be awarded to R in execution of the decree for costs. SANJIVI v. RAMASAMI, 8 M. 494 ... 338

(38) *Ss.* 248, 295, 622—*Execution proceedings—Rateable distribution—Application for further execution—Notice.*—A and subsequently B, obtained decree against X, in execution of which the same land was attached, and B obtained an order for rateable distribution. Neither decree was satisfied. A then applied for attachment of other property and the sale was fixed for 28th September. On the 26th September B filed a petition for further attachment under ss. 250, 274, and also a petition for rateable distribution under s. 295 of the Code of Civil Procedure. The District Judge rejected the application for execution as being too late, and then the application under s. 295, because no application for execution was pending.—*Held*, on appeal that the petition for execution was wrongly rejected, but the High Court could not, under s. 622 of the Code of Civil Procedure, revise the order rejecting the application under s. 295 for rateable distribution. VENKATARAMAN v. MAHALINGAYYAN, 9 M. 508 ... 749

(39) *S.* 258—*Contract to certify satisfaction of decree—Breach—Suit for damages.*—The provision in s. 258 of the Code Civil Procedure, 1882, which forbids any Court to recognize a payment under, or an adjustment of, a

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decree, unless certified to the Court executing the decree, does not debar a suit for damages for a breach of a contract to certify. MALLAMMA v. VENKAPPA, 8 M. 277 (F.B.) ... 191

(40) *S. 258—Satisfaction of decree not certified—Fraudulent execution—Charge under Penal Code, s. 213—Proof of payment.*—S. 258 of the Code of Civil Procedure, which provides that no payment or adjustment of a decree not certified to the Court, as in the said section provided, shall be recognized by any Court, does not debar a Criminal Court from recognizing such payment where the decree-holder is charged with fraudulently executing a satisfied decree. QUEEN-EMPRESS v. PILLALA, 9 M. 101 = 1 Weir 183 ... 467

(41) S. 266, Explanation (*b*)—See ARMY ACT, 1881, 9 M. 170.

(42) *S. 268—Decree—Execution—Attachment—Deposit by servant of Railway Company—Rights of attaching creditor.* Where money deposited with a railway company by one of its servants as a guarantee for the due performance of his duties was attached by a judgment creditor of such servant under s. 268 of the Code of Civil Procedure:—*Held*, that the creditor was not entitled to have his decree satisfied out of the deposit, but was entitled to a stop order under cl. (*c*) of s. 268, and also to payment of the interest, if any, due by the company on such deposit to the servant. KARUTHAN v. SUBRAMANYA, 9 M. 203 ... 538

(43) *Ss. 268, 274—Sale of interest of obligee in a hypothecation bond.*—The interest of the obligee in a bond hypothecating certain land as security for a debt having been attached under s. 274 of the Code of Civil Procedure and sold, a suit was brought by the purchaser upon the said bond; it was objected that the suit was not maintainable because the bond had not been also attached as a debt under s. 268:—*Held*, that the fact of the bond not having been attached as a debt under s. 268, did not affect the right of the purchaser to realize the amount due under it. SAMI v. KRISHNASAMI, 10 M. 169 ... 869

(44) *Ss. 268, 284, 287 (e), 301—Attachment of a debt due to a judgment-debtor—Sale of debt—Payment into Court—Prohibitory order.*—A decree-holder by a prohibitory order made under s. 268 (*a*) of the Civil Procedure Code attached a debt due to his judgment-debtor. The debt was not paid into Court:—*Held*, that the Court cannot, under s. 268, of the Code of Civil Procedure, call on a person subject to a prohibitory order to pay or show cause why he should not pay his debt into Court. The Court is bound to satisfy itself that a debt is due, the debt must then be sold and delivery made under ss. 284 and 301 of the Code of Civil Procedure. SIRIAH v. MUCKANACHARY, 10 M. 194 ... 888

(45) S. 276—See INSOLVENCY ACT, 11 and 12 Vic. ch. 21, 8 M. 554.

(46) Ss. 276, 295—See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 8 M. 573.

(47) S. 283—See ACT XI OF 1865 (SMALL CAUSE COURT), 9 M. 206.

(48) *S. 292—Pleaders not officers of the Court within the meaning of that section.*—Pleaders of parties to a suit are not debarred by s. 292 of the Code of Civil Procedure from purchasing property sold in execution of the decree. ALAGIRISAMI v. RAMANATHAN, 10 M. 111 ... 827

(49) *S. 295—Mortgage—Sale by first mortgagee—Arrears of rent—Claim by puisne mortgagee on proceeds of sale—Limitation Act, sch. II, arts.* 12, 13.—Certain land was mortgaged to A with possession to secure the repayment of a loan of Rs. 2,000 and interest. It was stipulated in the deed that the interest on the debt should be paid out of the profits, and the balance paid to the mortgagors. By an agreement subsequently made, it was arranged that the mortgagors should remain in possession and pay rent to A. A obtained a decree for Rs. 2,000 and arrears of rent and costs, and for the sale of the land in satisfaction of the amount decreed. The land was sold for Rs. 2,855 in March 1881. In May 1881 B, a puisne mortgagee, applied to the Court for payment to him of Rs. 500 of this sum, alleging that A was entitled only to Rs. 2,000 and Rs. 280 costs, but not to arrears of rent, in preference to his claim as second mortgagee. The claim of B was rejected on the 27th May 1881 and the whole amount paid out to A. In February 1882, B (who had filed suit on the 23rd March 1881)

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obtained a decree upon his mortgage. On the 23rd May 1884, B sued to recover Rs. 510 paid to A on account of rent on the 27th May 1881. The Lower Court dismissed the suit on the grounds (1) that A was entitled to treat the arrears of rent as interest; (2) that the suit was barred by limitation:—*Held*, on second appeal, that B was entitled to recover the sum claimed. SIVARAMA v. SUBRAMANYA, 9 M. 57=9 Ind. Jur. 385 ... 437

(50) S. 295—See ACT XI OF 1865 (SMALL CAUSE COURT), 9 M. 250.

(51) S. 295—See CIVIL PROCEDURE CODE (ACT XIV OF 1882) 10 M. 57.

(52) *S.* 311—"*Decree-holder" not restricted to decree-holder who has attached, but includes one entitled to ratable distribution under s.* 295.—Where one decree-holder had attached certain land and another decree holder against the same debtor had entitled himself to ratable distribution of the assets under s. 295 of the Code of Civil Procedure:—*Held*, that the latter was entitled to apply, under s. 311 of the Code, to set aside the sale on the ground of material irregularity. LAKSHMI v. KUTTUNNI, 10 M. 57 ... 790

(53) *Ss.* 313, 315—*Refund of purchase-money—Limitation Act, sch.* II, *art.* 174.—Under s. 313 of the Code of Civil Procedure a purchaser at a sale in execution of a decree may resist the confirmation of the sale and prevent its conclusion, while under s. 315 he may apply, after the confirmation of the sale, for refund of the purchase-money on the ground that nothing passed by the sale. To entitle a purchaser, under para. 2 of s. 315 of the Code of Civil Procedure, to a refund of purchase-money, it is not necessary that a Court should have decided in other proceedings that the judgment-debtor had no saleable interest in the property which purported to be sold, or that the purchaser should have obtained actual possession and have been deprived thereof. SIVARAMA v. RAMA, 8 M. 99 ... 70

(54) *S.* 315—*Refund of purchase-money.*—Upon an application for refund of purchase-money under s. 315 of the Code of Civil Procedure, the Munsif being of opinion that the purchaser had in collusion with the judgment-debtor run up the price of the land at auction far beyond its value with a view to prevent other property attached from being sold to satisfy the decree, rejected the application, except as to a sum of Rs. 50, which represented the alleged value of the judgment-debtor's interest in the land brought to sale by the decree-holder:—*Held*, that, as the judgment-debtor was found to have no interest in the land, the purchaser was entitled to a refund of the money paid to the decree-holder. KUNHI MOIDIN v. TARAYIL MOIDIN, 8 M. 101 ... 71

(55) *Ss.* 315, 622.—Where an order was passed under s. 315 of the Code of Civil Procedure directing refund to a purchaser in execution of a decree in a suit in which a second appeal lay to the High Court:—*Held*, that under s. 622 of the Code of Civil Procedure, the High Court could set aside the order because, the judgment-debtor having been found to have a saleable interest, the Lower Court had no power to order a refund. KUNHAMED v. CHATHU, 9 M. 437 ... 699

(56) *S.* 317—*Benami purchaser—Stranger to the transaction not affected*.—In a suit by A against B and C to recover land. A alleged that B bought the land at a Court-sale on his behalf. B did not contest the suit. C, who did not claim under B, pleaded that A could not recover by reason of the provisions of s. 317 of the Code of Civil Procedure:—*Held*, that s. 317 only enabled the certified purchaser and those claiming under him to avoid arrangements made with him in the nature of a trust, and was no bar to the suit. RAMAKRISHNAPPA v. ADINARAYANA, 8 M. 511=10 Ind. Jur. 20 ... 349

(57) *Ss.* 318, 335—*Suit to recover possession of property sold in execution of decree.*—S. attached certain land and a house in execution of a decree against R. M put in a claim, under s. 278 of the Code of Civil Procedure, alleging that he was in possession as purchaser from R. The claim was rejected. No suit was brought by M to contest this order. S purchased the said land and house in execution and obtained a sale certificate. In 1884 S sued M to recover possession of the land and house, alleging that in execution proceedings in 1882 he had been put into possession of the land, but not of the house, which was found locked up by the Court amin, and that M prevented him from enjoying both the land and house. M pleaded that S had never been put into possession, and again set up his

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title as purchaser from R and possession under such title. The Munsif found that S had been put into formal or constructive possession of the land, but not of the house, and decreed the claim. On appeal the District Judge held that S was bound to proceed according to the provisions of s. 335 of the Code of Civil Procedure to recover possession, and could not bring a separate suit: —*Held* that, whether there had been legal delivery or not, the suit was not barred. SEVU v. MUTTUSAMI, 10 M. 53=11 Ind. Jur. 19 ... 787

(58) *S.* 331—*Civil Courts Act, Madras,* 1873, *s.* 12—*Jurisdiction—Claim below ordinary pecuniary limit.*—A Court executing a decree obtains, by virtue of s. 331 of the Code of Civil Procedure, a special jurisdiction which enables it to try a claim, of which the value of the subject-matter falls below the pecuniary limits of its ordinary jurisdiction. By virtue of s. 647 of the Code of Civil Procedure, a superior Court may, for sufficient cause, transfer a claim, registered under s. 331, to a Subordinate Court for trial. SITHALAKSHMI v. VYTHILINGA 8 M. 548 (F.B.) 375

(59) *Ss.* 332—*Limitation Act, sch, II, arts.* 11, 13.—Where an application was made under s. 332 of the Code of Civil Procedure for possession of property and rejected, and the applicant brought a suit to recover the property more than one year subsequent to the order rejecting the application :—*Held,* that the suit was not barred either by art. 11 or art. 13 of sch. II of the Indian Limitation Act, 1877. AYYASAMI v. SAMIYA, 8 M. 82 ... 57

(60) *Ss.* 335, 623—*Limitation Act—Act XV of* 1877, *sch. II, art.* 11—*Order disallowing claim in execution proceedings—Review of judgment—Malabar Law—Personal decree against karnavan.*—Where a review of judgment was applied for on the ground of the subsequent publication of the report of a High Court decision on a point of law which governed the case but which had not been urged at the previous hearing, it was considered that the applicant was not to blame for his omission to bring the decision to the notice of the Court at the first hearing, and the application for review of judgment was granted. A sued for possession of certain shops belonging to a Malabar tarwad, which had been attached in execution of a personal decree passed against a karnavan in a suit on a private debt. In the execution proceedings, an objection petition was put in stating that the shops were sridhanam and was rejected; and the order of rejection was not appealed against for one year. Respondents Nos. 1 to 4, the husbands of the persons who put in the objection petition, were in possession and were now sued for possession. The plaintiff was assignee of the purchaser at the execution sale :—*Held,* that upon the facts found, the plaintiff acquired nothing under the Court sale. *Per cur.*—An order rejecting a claim petition under s. 335 of the Civil Procedure Code, not being appealed against within one year acquires the force of a decree. ACHUTA v. MAMMAVU, 10 M. 357. ... 1002

(61) *Ss.* 336, 341, 344, 349—*Judgment-debtor—Imprisonment—Discharge.*—Sections 336 and 349 of the Code of Civil Procedure, 1882, are applicable to judgment-debtors under arrest, but not committed to jail. A judgment-debtor committed to jail can only be discharged under s. 341. *In re* QUARME, 8 M. 503 ... 344

(62) *Ss.* 336, 344, 638—*Discharge of judgment-debtor arrested under decree of High Court.*—A judgement-debtor having been arrested in execution of a decree of the High Court in its Original Civil Jurisdiction and brought before the Court under the provisions of s. 336 of the Code of Civil Procedure, claimed to be discharged on the ground that he intended to apply to the Court to be declared an insolvent either under the provisions of ch. XX of the Code or of 11 and 12 Vict. (c) 21 :—*Held,* that the judgment debtor on expressing his intention to file a petition and schedule under 11 and 12 Vict., c. 21, and complying with the conditions of s. 336 of the Code of Civil Procedure was entitled to be discharged. *Ex parte* PINSENT 8 M. 276 ... 190

(63) *S.* 341—*Decree—Execution—Arrest—Non-payment of subsistence-money—Discharge—Re-arrest.*—The discharge of a judgment-debtor before imprisonment on account of the non-payment of the subsistence-money for the

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debtor is no bar to the debtor being re-arrested. SUBBA v. VENKATA, 8 M. 21 ... 15

(64) S. 373—*Jurisdiction—Suit to declare land liable to be sold in execution of decree—Civil Procedure Code, s. 373—Withdrawal of part of claim.*—In a suit brought in a District Munsif's Court to declare certain land liable to be sold in execution of a decree for more than Rs. 2,500, the defendants pleaded that the Court had no jurisdiction. The Munsif allowed the plaintiff to amend the plaint by stating that he abandoned his claim to execute the decree against the land for more than Rs. 2,500. On appeal, the District Judge held that the plaint could not be amended after the first hearing:—*Held*, on appeal to the High Court, that the claim was not one which could be amended so as to bring the suit within the pecuniary jurisdiction of the District Munsif. ANNAJI v. RAMA KURUP, 10 M. 152 ... 857

(65) S. 375—*Agreement to compromise appeal—Petition to Court by both parties—Consent withdrawn before decree by one party—Remedy—Transfer of Property Act, s. 59—Charge on immoveable property—Oral agreement as to terms of compromise of suit—Terms of compromise in dispute—Proof by affidavit and further evidence.*—The parties to an appeal, in which an issue had been remitted for trial to the Lower Court, having presented a petition to the Lower Court, stating that the suit had been compromised and the terms of the compromise, requested the Lower Court to move the Appellate Court to pass a decree in accordance with such terms. Before a decree was passed, one of the parties objected to the compromise being accepted:—*Held*, that it was open to the Court, such objection notwithstanding, to pass a decree in accordance with the agreement. An oral agreement by the parties to a suit that a decree be passed creating a charge on immoveable property above Rs 100 in value, is not rendered inoperative by s. 59 of the Transfer of Property Act. The parties to an appeal applied to the Court to pass a decree in accordance with the terms of a compromise, and, before decree was passed, one of the parties objected to such decree being passed on the ground that certain conditions precedent to be performed by the other party had not been performed. The Court (this being denied by the other party) called for affidavits in proof of the terms of the agreement of compromise, and, these being found not to be sufficiently conclusive, directed the Lower Court to take evidence on the point. APPASAMI v. MANIKAM, 9 M. 103 ... 468

(66) S. 375—*Compromise of suit—Consent withdrawn before decree.*—By an agreement made in writing before the hearing, the parties to a suit entered into a compromise by which the plaintiff agreed for consideration to withdraw the suit. When the case came on for hearing, plaintiff refused to fulfil his promise. The defendant having produced the agreement, the Munsif held that it must be enforced, and dismissed the suit. On appeal, the District Judge held that the agreement could not be treated as a compromise as the plaintiff did not consent, and remanded the suit:—*Held*, that the agreement could be enforced. KARUPPAN v. RAMASAMI, 8 M. 482 ... 330

(67) Ss. 404, 406—*Application for permission to sue as paupers, presented by several paupers jointly.*—The mere fact that several persons jointly present an application for permission to sue as paupers does not authorize the Court to entertain it on behalf of applicants who do not appear in person. BURGESS v. SIDDEN, 10 M. 193 ... 887

(68) S. 468—*Army Act of* 1881, 44 *and* 45 *Vic. c.* 58, *ss.* 144, 151—*Jurisdiction of Small Cause Court over soldiers.*—A sued a soldier to recover a debt not amounting to £30:—*Held*, that the suit was cognizable by a Court of Small Causes *Semble.*—The Commanding Officer of the defendant is bound to cause the summons of the Small Cause Court to be served on him. MAHOMED v. AGGAS, 10 M. 319 ... 976

(69) Ss. 483, 484, 648—*Attachment before judgment—Property not in jurisdiction.*—Under the provisions of ss. 483 and 484 of the Code of Civil Procedure, 1882, property of the defendant, which is not within the jurisdiction of the Court, cannot be attached before judgment. KRISHNASAMI v. ENGEL, 8 M. 20 ... 14

Civil Procedure Code (Act XIV of 1882)—(Continued). PAGE

(70) *S. 503—Powers of receiver.*—In 1879, a zamindar granted a lease of part of the zamindari for twenty years, reserving a rent of 18,000 rupees per annum. In 1881, the zamindari having been attached by a creditor, the zamindar granted a new lease in perpetuity in lieu of the former lease, reserving a rent of Rs. 12,000 a year. A receiver of the zamindari having subsequently been appointed with full powers under the provisions of s. 503 of the Code of Civil Procedure, sued the lessee to recover rent at the rate reserved in the first lease from 1881 : *Held*, that the receiver was entitled to recover the rent claimed. The provisions of s. 503 of the Code of Civil Procedure were intended to declare that the receiver, in respect of all property which was or could be attached, had the powers of the owner as they existed at the time the property was brought under the orders of the Court by attachment, provided that they have not ceased by operation of law. GOPALASAMI v. SANKARA, 8 M. 418=9 Ind. Jur. 308. 287

(71) *S. 503—Receiver, Appointment of, after decree—Limitation Act, s. 15—Injunction.*—In a suit brought in 1880 by the widow of a deceased partner, to wind up a partnership, the surviving partner was prohibited by the Court, at the instance of the plaintiff, from collecting debts due to the firm ; but leave was given to apply for the recovery of debts which might become barred by limitation. After decree, on the application of the plaintiff, a receiver was appointed under s. 503 of the Code of Civil Procedure to collect outstanding debts for the purpose of executing the decree. The receiver having sued in 1883 to recover a debt which was due to the firm in 1879, the suit was dismissed (1) on the ground that the appointment of a receiver after decree was *ultra vires*; (2) because the debt was barred by limitation : *Held*, (1) that the appointment of the receiver was valid, (2) that under s. 15 of the Limitation Act the suit was not barred. SHUNMUGAM v. MOIDIN, 8 M. 229 ... 159

(72) *S. 503—Receiver—Powers—Limitation—Cause of action.*—A zamindari was attached in execution of certain decrees against the zamindar, and the plaintiff was appointed receiver with full powers, under s. 503 of the Code of Civil Procedure, to manage the zamindari. Before the appointment of the receiver, the zamindar had expended certain sums at the defendant's request to repair a tank for the irrigation of lands held by them in common with him. This suit was brought to recover the sums so expended. It was objected that the receiver could not maintain the suit on the ground that the sum sued for was neither the subject of a suit against the zamindar nor property attached in execution of a decree against him : *Held*, that the receiver could maintain the suit. It was also contended that the suit, whether viewed as one for contribution or upon a contract, was barred by limitation in respect of all payments made by the zamindar more than three years before the suit ; and further, that the receiver could only sue the defendants severally for their proportionate shares of the sum claimed. *Held*, that the suit being for work and labour done at their request was not barred by limitation, and that the defendants were jointly and severally liable for the sum sued for. SUNDARAM v. SANKARA, 9 M. 334 ... 628

(73) *Ss. 503, 505, 588—Receiver, appointment of—Appealable order.*—An order rejecting an application to appoint a Receiver is an order passed under s. 503, and is therefore appealable under s. 588, cl. 24 of the Code of Civil Procedure. VENKATASAMI v. STRIDAVAMMA, 10 M. 179 (F.B.) ... 876

(74) *Ss. 506, 622—Award—Error of procedure—Relief refused on equitable grounds.*—R. M, party to a suit, having authorised his agent to conduct the suit, the agent consented to the case being referred to arbitration by the Court. The arbitration was carried on to the knowledge and with the assent of R. M. On an application by R. M., under s. 622 of the Code of Civil Procedure, to set aside the award made by the arbitrators on the ground (1) that his pleader had not been authorised in writing, as required by s. 506 of the Code to apply for arbitration, and (2) that he himself had not consented to the reference : *Held*, that under the circumstances, R. M. was not entitled to relief. UNNIRAMAN v. CHATHAN, 9 M. 451 ...

(75) *Ss. 508, 521, 522, 622—Act VIII of 1859, s. 318—Award made after time allowed by Court, invalid,—when the time runs.*—An order of reference to arbitration was made on 21st January. Six weeks' time was allowed for the return of the award. No application was made for extension of time.

Civil Procedure Code (Act XIV of 1882)—(Continued). PAGE

The award having been returned on 8th May, the Court refused to give judgment in accordance with it under s. 522 of the Code of Civil Procedure, on the ground that it was not valid. The plaintiffs now petitioned High Court under s. 622 of the Code of Civil Procedure: *Held*, that the award was invalid and the Court had not failed to exercise jurisdiction within the meaning of s 622 of the Code of Civil Procedure. SIMSON v. VENKATAGOPALAM, 9 M. 475 ... 726

(76) S. 539—*Sanction granted to two persons separately to institute suit in respect of branch of charitable trust.*—R. instituted a suit with the Collector's sanction to compel the performance of a charitable trust; D. was subsequently joined as plaintiff, having also obtained the Collector's sanction to institute the suit: *Held*, that the sanction obtained by D. related back to the institution of the suit. RAMAYYANGAR v. KRISHNAYYANGAR, 10 M. 185 ... 881

(77) Ss. 544, 622—*Appeal against appellate decree by party to suit who did not appeal against original decree.*—S having mortgaged land to K. as security for a debt, sold it to V. who undertook to pay the debt. K alleging that C had undertaken either to make V pay the debt or to execute a mortgage of his own land to secure its repayment, and that V had dispossessed him, sued S, V and C to recover the debt by sale of the land mortgaged, mesne profits from V, and costs from S, V and C. The District Munsif decreed payment against S; mesne profits, and, in default of payment by S, a sale of the land against V; and costs against S, V and C. V and C appealed against this decree. The Subordinate Judge found that the debt had been paid and held that, even if the debt had not been paid, K had no cause of action against V or S, but, if at all, against C, and dismissed the suit as against V. The Subordinate Judge also held that he had no jurisdiction to interfere with the decree against S, and saw no reason to interfere with the decree against C. S appealed against this decree: *Held*, that even if S was not entitled to appeal in order to have the decree against him set aside, the error of the Subordinate Judge could be corrected under s. 622 of the Code of Civil Procedure by a direction to exercise the discretionary power given by s. 544 of the said Code. SESHADRI v. KRISHNAN, 8 M. 192 ... 133

(78) S. 561—*Appeal from appellate decree disallowing memorandum of objections—Limitation Act—Act* XV *of* 1877, *s.* 12—*Karnam—Rights of* de facto *karnam.*—A filed a plaint on 28th June 1882, for a declaration of his title as karnam of a village and for arrears of dues payable to him as such, including those for fasli 1288, which accrued due on 1st July, 1879. His family had held the office and discharged its duties for three generations, but there was no evidence of any formal appointment of A, or his ancestors: *Held*, that the plaintiff was entitled to the dues as *de facto* karnam, and his claim was not barred in respect of any of the arrears claimed. *Per cur*—The preliminary objection taken by the respondent that no second appeal lies from so much of the decree of the Subordinate Judge as disallowed the objections filed by the appellant under s. 561 of the Code of Civil Procedure, is without weight. GANAPATI v. SITHARAMA, 10 M. 292 ... 957

(79) S. 561—See HINDU LAW—PARTITION, 8 M. 214.

(80) Ss. 562, 565, 566—*Illegal order of remand.*—A District Munsif having taken all the evidence offered on the issue in a suit, disposed of the suit upon his finding on one of the issues without deciding the rest. On appeal the District Judge reversed the decree and remanded the suit for the trial of the issues left untried: *Held*, that under s. 562 of the Code of Civil Procedure, the order of remand was illegal. AMMA v. KUNHUNNI, 9 M. 355 ... 643

(81) S. 582—See LIMITATION ACT (XV OF 1877), 9 M. 1.

(82) S. 583—See LIMITATION ACT (XV OF 1877), 10 M. 66.

(83) S. 584—*Powers of High Court on second appeal.*—On second appeal by a landlord against a decree of a District Judge, who stated in his judgment that "though the tenant admitted the execution of the muchalka, it was not shown that he dispensed with the patta." no objection was taken in the memorandum of appeal that the muchalka, which contained a statement that no patta was necessary, had been neglected or misconstrued.

Civil Procedure Code (Act XIV of 1882)—(Concluded). PAGE

The High Court ordered that the Judge be asked to take the postscript into his consideration and submit a revised finding. NARAYANA v. MUNI, 10 M. 363=11 Ind. Jur. 329 ... 1006

(84) *Ss.* 588, 592—*Letters Patent, s.* 15.—S. 15 of the Letters Patent of the High Court at Madras being controlled by s. 588 of the Code of Civil Procedure, no appeal lies from the order of a single Judge of the High Court made under s. 592 of the Code of Civil Procedure rejecting an application for leave to appeal *in forma pauperis. In re* RAJAGOPAL, 9 M. 447 ... 706

(85) *S.* 592—*Pauper appeal—Application by party, not by pleader, necessary.*—An application for leave to appeal *in forma pauperis*, under s. 592 of the Code of Civil Procedure, must be made by the party in person, subject to the exemption contained in s. 404 of the Code of Civil Procedure. *In re* NARISI, 8 M. 504 ... 345

(86) *S.* 599—*Limitation Act, s.* 12, *sch.* II, *art.* 177—*Period of Limitation for admission of an appeal to Privy Council.*—On a petition for leave to appeal to the Privy Council presented on the 8th April, it appeared that the period of six months from the date of the decree to be appealed against had expired on the 23rd of March if the time occupied by the petitioner in getting a copy of the decree was to be computed in that period: *Held*, that the petition was barred by limitation. *Per Cur.*—It is not at all clear that the word "ordinarily" in s. 599 of the Code of Civil Procedure does not refer to the circumstance referred to in the second paragraph of that section, *viz.*, when the last day happens to be one on which the Court is closed. LAKSHMANAN v. PERYASAMI, 10 M. 373 ... 1013

(87) *S.* 622—*Jurisdiction, s.* 311—*Sale set aside on account of irregularity only.*—Where a Court, professing to act under s. 311 of the Code of Civil Procedure, set aside a sale in execution of a decree without proof of substantial injury having been suffered by the applicant: *Held*, that such order was passed without jurisdiction within the meaning of s. 622 of the said Code. LAKSHMANA v. NAJIMUDIN, 9 M. 145 ... 498

(88) *S.* 622—*Small Cause suit to recover money paid by the plaintiff in discharge of a decree-debt against him and the defendants—Jurisdiction of Court to go into facts of former suit.*—A sued four persons, against whom, together with A, a money decree had been passed in a previous suit, to recover a proportionate part of a sum paid by A in discharge of the decree debt. Two of the defendants pleaded that they had not appeared in the former suit, and have been unnecessarily brought into the record by A: *Held*, that the Court had jurisdiction to inquire into the circumstances of the previous suit. THANGAMMAL v THYYAMUTHU, 10 M. 518 ... 1112

(89) S. 622—See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), 9 M. 375.

(90) *Ss.* 623, 624—*Review of judgment—Abolition of Court—Business transferred to another Court.*—S. 624 of the Code of Civil Procedure must be read as a proviso to s. 623: *Held*, therefore, that, when a Court had been abolished and its business transferred to a Court presided over by another Judge, such Judge should not entertain an application for review of judgment except in the case provided for by s. 624. SARANGAPANI v. NARAYANASAMI, 8 M. 567 ... 389

(91) Ss. 629, 632—See LETTERS PATENT, 1865, 9 M. 253.

(92) *S.* 648—*Residence—Arrest before judgment.*—Where an officer proceeding from Burmah to England on leave resided a few days in Madras on the way: *Held* that such residence was sufficient, for the purpose of s. 648 of the Code of Civil Procedure, to render him liable to arrest before judgment. EVERET v. FRERE, 8 M. 205 ... 142

Club.

Expulsion of member by committee—Audi alteram partem.—G having been expelled from a club by the committee on the ground that he had published a certain pamphlet which was considered to be a libel by the committee, sued the members of the committee for damages and to have his name replaced on the list of members. It was proved that, in considering G's conduct with reference to the publication of the pamphlet, the committee took into consideration certain letters which G had written to certain members of the committee and that his expulsion was partly for

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printing the pamphlet and partly for writing the letters: *Held*, that as the decision of the committee was arrived at *bona fide*, the Court had no right to decide whether the pamphlet was or was not a libel: *Held*, further, that as G had no opportunity for defending himself on the charge of writing the letters, his expulsion was illegal. GOMPERTZ v. GOLDINGHAM, 9 M. 319 ... 618

Coercion.

See HINDU LAW—WIDOW, 8 M. 304.

Collateral Agreement.

See CONTRACT ACT (IX OF 1872), 9 M. 441.

Compensation.

(1) See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 9 M. 102.

(2) See LANDLORD AND TENANT, 10 M. 112.

Compromise.

See CIVIL PROCEDURE CODE (XIV OF 1882), 8 M. 482, 9 M. 103.

Condition Precedent.

See CONTRACT, 8 M. 38.

Confession.

See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 9 M. 224.

Contract.

(1) *Breach—Rescision—Reciprocal promises—Condition precedent—Damages, Measure of.*—On 6th March, 1883 V promised to sell 5,000 bags of gingelly seed at Rs. 7 As. 11 a bag to S. Two-thirds of the price was paid in advance. V agreed to deliver the 5,000 bags at the end of April and to give S notice as instalments of 1,000 bags were ready for delivery within the stipulated time, and S promised to pay V the balance of the contract price on each instalment when ready for delivery. There was neither delivery nor payment in terms of the contract: 3,000 bags were delivered by V, but S did not pay the balance of the price due, and 2,000 bags were never delivered. On 7th May V declined to deliver these bags, on the ground that S had not paid the balance of the contract price for the 3,000 bags delivered when ready for delivery, and, subsequently, repaid to S the balance due to him of the money advanced. In a suit by S against V for damages for non-delivery of 2,000 bags: *Held*, that V was not excused from performance of his promise by the failure of S to pay the balance due for the bags delivered, and that S was entitled to recover the difference between the market and the contract price on the day the contract was broken by V. SIMSON v. VIRAYYA, 9 M. 359 ... 646

(2) *Executory sale—Delivery order—Appropriation of goods to contract—Substitution of liability—Condition precedent—Delivery in certain months—Payment in advance—Refusal to deliver—Damages.*—In January 1883 W. & Co. of Madras contracted to deliver to P. & Co. of Madras certain goods of a certain quality, subject to survey before shipment, at a certain price "f.o b. Cocanada, delivery in April and May; terms, full advance and local exchange ¾ per cent. payable at Madras." This contract was contained in bought and sold notes. It was further agreed that the goods were to be delivered on board any ship P. & Co. might direct at the port of Cocanada. P. & Co. paid the full amount of the purchase-money in January. On the 31st March P. & Co. wrote to W. & Co. requesting that the goods might be marked in a certain way. On the 18th May W. & Co. wrote to P. & Co. enclosing a letter from W. & Co. to S. N. & Co. of Cocanada requesting S. N. & Co. to hold the goods (which were said to have been purchased by W. & Co. from S. N. & Co. and to be in godown) at the disposal of P. & Co In the letter to P. & Co. from W. & Co the goods were also said to be in godown at that date. On the same day P. & Co. wrote to S. N. & Co. enclosing a delivery order for the goods (which P. & Co. stated they believed to be in godown), requesting that they might be marked in a particular way. On the 25th May S. N. & Co. wrote to P. & Co. informing them that they held the goods at P. & Co.'s disposal. On the 28th May P. & Co. received this letter. On the 31st May P. & Co.

Contract—(*Concluded*). PAGE

chartered a ship to take on board the said goods and other goods bought by P. & Co. from S. N. & Co. and others, and wrote to S. N. & Co. informing them that the ship would arrive about the 12th June. On the 5th June P. & Co. wrote to S. N. & Co. acknowledging receipt of a letter which stated that only a portion of the goods to be shipped was ready. On the 9th June P. & Co. received a letter from S. N. & Co. stating that all the goods were ready. On the 17th June the ship arrived at Cocanada. On the 21st June S. N. & Co. stopped payment and ceased to carry on business. No goods were delivered according to the contract. S. N. & Co. never had the goods to deliver between 18th May and 17th June. In a suit by P. & Co. to recover from W. & Co. the price paid and damages for breach of contract to deliver the goods, it was contended for W. & Co.

I.—That the transfer of the delivery order of the 18th May amounted to a delivery of the goods: *Held*, that as S.N. & Co. had neither had possession of the goods to be delivered nor had appropriated any goods to the contract, the delivery order was inoperative.

II.—That the acceptance of the delivery order by P. & Co. amounted to an agreement that S. N. &. Co. should deliver to P. & Co. the goods when ready; and that the liability of S. N. & Co. was substituted for that of W. & Co.: *Held*, that such an agreement could not be inferred.

III.—That as S. N. & Co. by accepting the delivery order were estopped from denying that they had possession of the goods as against P. & Co., S. N. & Co. were discharged as against W. & Co, and therefore P. & Co. had no remedy against W. & Co.: *Held*, (1) that S. N. & Co. were not discharged as against W. & Co, as S.N. & Co.'s representations were false; (2) that even if S. N. & Co. were discharged, this could not affect P. & Co.

IV.—That as P. & Co. had not supplied a ship in May, they had failed to perform their part of the contract and could not recover:—*Held*, distinguishing, *Bowes* v. *Shand* (L.R. 2 App. Ca., 455) and *Reuter* v. *Sala* (L. R., 4 C.P.D., 239), that the presence of the ship in May was not a condition precedent to P. & Co. recovering.

V.—That W. & Co. had rescinded the contract on the 29th June by refusing to delieve, and therefore P. & Co. were only entitled to recover the price paid: *Held*, that W. & Co. were not entitled to rescind the contract: *Held*, also that P. & Co. having paid in advance, were entitled to a reasonable time after the 29th June to prepare to purchase other goods, and were entitled to the difference between the contract price and the market price on the 1st of July as damages for the breach to deliver. SHAW v. BILL, 8 M. 38 ... 27

(3) *Instalment bond—Agreement to pay enhanced rate of interest on default, enforceable.*—An agreement to pay the principal of a debt by instalments with interest, and on default of payment of each instalment to pay an enhanced rate of interest thereon from the date of default of payment, is not an agreement which should be relieved against. JAGANADHAM v. RAGUNADHA, 9 M. 276=10 Ind. Jur. 217 ... 589

(4) See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 8 M. 164.

(5) See ALIYASANTANA LAW, 8 M. 353.

(6) See SMALL CAUSE COURT, 8 M. 4.

Contract Act (*IX of 1872*):

(1) *Ss.* 21, 65—*Mistake of law—Agreement to secure repayment of loan, collateral, to primary obligation.*—By an agreement in writing, defendants, trustees of a temple, in consideration of an advance of money which they represented was required to pay off debts incurred for the benefit of the temple, granted to plaintiff a lease of the right to manage the temple lands, and plaintiff promised that he would repay himself out of the profits to be derived from the lands and that neither the defendants nor their family property should be made liable for the debt. In a suit by plaintiff against a tenant of the temple lands, this lease was held to be void for illegality. Defendants subsequently resumed management and plaintiff sued them to recover the money advanced by him. It was found that the agreement was entered into by both parties under a mistake as to the validity of the lease: *Held*,

Contract Act (*IX of 1872*)—(*Concluded*). PAGE

that assuming s. 65 of the Contract Act was not intended to vary the rule, that a mistake of law is no ground for relieving a party from his own contract, plaintiff was nevertheless entitled to recover on the ground that the agreement which provided for repayment was collateral and had failed. An agreement that an obligation which is contracted shall be discharged in some particular mode is collateral to the primary contract which created the obligation, though the two agreements may be mixed up in one contract. KRISHNAN v. SANKARA VERMA, 9 M. 441 ... 702

(2) S. 70—See ACT XVIII OF 1879 (LEGAL PRACTITIONERS), 9 M. 375.

(3) *S.* 74—*Penalty—Enhanced rate of interest and compound interest.*—A mortgagor agreed that if any instalment of interest accruing due on the mortgage was not paid, he should pay compound interest and discharge the principal in one year, and further that if the principal was not so discharged he should pay interest at an enhanced rate: *Held*, that the mortgagee could enforce the agreement. APPA RAU v. SURYANARAYANA, 10 M. 203 ... 893

(4) S. 74—Penalty—See CONTRACT, 9 M. 276.

(5) *S.* 264—*Partnership—Notice of dissolution—Sleeping partner.*—A, B and C traded together in partnership as B C & Co., A being a sleeping partner. After the partnership was dissolved, B and C continued to trade together under the same name and incurred debts to the plaintiffs, who sued to recover the amounts from A, B and C. The plaintiffs had not dealt with the old partnership nor received notice of its dissolution, and it was not alleged that they knew of A's previous connection with it: *Held*, that the suits did not lie against A. RAMASAMI v. KADAR BIBI, 9 M. 492 ... 738

Costs.

(1) See CIVIL PROCEDURE CODE (ACT X OF 1877), 8 M. 219.

(2) See DIVORCE, 9 M. 12.

Counsel.

Privilege.—An advocate in India cannot be proceeded against civilly or criminally for words uttered in his office as advocate. SULLIVAN v. NORTON, 10 M. 28 (F.B.) ... 770

Court Fees Act (*VII of 1870*).

(1) *S.* 6, *sch.* II *art.* 17.—In a suit on a mortgage bond a decree was passed for payment of principal and interest, and in default for sale, of the mortgaged property. Some of the defendants filed a memorandum of appeal against so much of the decree as declared the liability of the property, affixing a stamp of Rs. 10 only: *Held*, that the proper stamp to be paid was not Rs. 10 as in the case of a declaratory decree, but on the value of the debt not exceeding the value of the property. VENKAPPA v. NARASIMHA, 10 M. 187 ... 882

(2) *S.* 7, *cls.* (*ii*), (*iv*)—*Claims for future emoluments attached to an office—Jurisdiction—Valuation—Madras Civil Courts Act,* 1873, *s.* 12—*Portion of a claim struck out and plaint returned for presentation to inferior Court.*—In a suit filed in the Court of a Subordinate Judge, the plaintiff prayed, *inter alia*, for a decree for the payment, annually, of the emoluments attached to a certain office, or their value at a rate stated in the plaint. This portion of the claim he valued, under cl. (ii) of s. 7 of the Court Fees Act, at ten times the amount of the value claimed for one year. The value of the claim thus stated exceeded the pecuniary limit of the jurisdiction of the District Munsif. The Subordinate Judge held that this portion of the claim was not actionable, inasmuch as the right to the emoluments was conditional upon services to be rendered, and did not fall under cl. (ii) of s. 7 of the Court Fees Act, not being a fixed sum payable periodically, and therefore he held that the plaint was improperly valued, that the suit was not within his jurisdiction, and that the plaint should be returned to be presented to the proper Court: *Held*, that this order was right. KRISHNAN v. REVI VARMA, 8 M. 384 ... 263

(3) *S.* 14, *sch.* I, *arts.* 4, 5—*Review of judgment—Stamp duty—Ninety days—Computation of time.*—In computing the period of eighty-nine days from the date of decree, within which an application for review of judgment may

Court Fees Act (VII of 1870)—(Concluded). PAGE

be presented on payment of half the fee leviable on the plaint or memorandum of appeal (under art. 5 of sch. I of the Court Fees Act, 1870), the time during which the Court is closed for vacation cannot be excluded. *In re* KOTA, 9 M. 134=9 Ind. Jur. 423 ... 490

(4) Sch. II, art. 1 (*b*)—See STAMP ACT (I OF 1879), 8 M. 15.

(5) *Sch. II, art.* 10 (*a*)—*Stamp Act, sch.* 1, *art.* 50 (*b*)—*Power to vakil to obtain copies from Collector's office—Stamp.*—A document authorising a vakil to apply for copies of records from the Collector's office is properly stamped with a Court-fee stamp under art. 10 (*a*) of sch. II of the Court Fees Act, 1870, and does not require to be stamped as a power of attorney under art. (*b*) of sch. I of the Indian Stamp Act, 1879. REFERENCE UNDER STAMP ACT, s. 46, 9 M. 146 (F.B.) ... 499

(6) Sch. II, art. 11 (*a*); art. 17, cl. VI—See ACT V OF 1882 (MADRAS FOREST), 8 M. 22.

Criminal Procedure Code, 1882.

(1) *Ss.* 4, 202, 350.—A Magistrate upon complaint, made, having issued process and examined witnesses in support of complaint, ceased to exercise jurisdiction. His successor on taking up the case referred the complaint to the police for inquiry and report, and upon receipt of the report discharged the accused: *Held*, that this procedure was illegal. A reference under s. 202 of the Code of Criminal Procedure cannot be made after evidence has been taken for the complaint and process issued. SADAGOPACHARYAR V. RAGAVACHARYAR, 9 M. 282=2 Weir 245 ... 593

(2) S: 4 (*a*), s. 250—See ACT I OF 1871 (CATTLE TRESPASS), 9 M. 374.

(3) *Ss.* 15, 264, 407, 414—*General Clauses Act, s.* 2 (13)—*Bench of Magistrates with second-class powers—Conviction—Appeal.*—An appeal lies under s. 407 of the Code of Criminal Procedure from a conviction by a Bench of Magistrates invested with second or third class powers. QUEEN-EMPRESS v. NARAYANASAMI. 9 M. 36=2 Weir 460 ... 422

(4) *Ss.* 17, 435, 437—*District Magistrate—Power to revise proceedings of Sub-Divisional Magistrate of the first class—"Inferior," "Subordinate" Magistrates—Reason of distinction.*—Under Section 435 of the Code of Criminal Procedure, a District Magistrate has power to call for, and examine, the record of a proceeding before a Sub-Divisional Magistrate of the first class. *In re* PADMANABHA, 8 M. 18 (F.B.)=9 Ind. Jur. 73=2 Weir 540 ... 13

(5) S. 33—*Penal Code, s.* 65—*Imprisonment in default of payment of fine.*—S. 33 of the Code of Criminal Procedure, 1882, does not authorise a Magistrate to pass a sentence in default of payment of fine in excess of the term prescribed by s. 65 of the Indian Penal Code. QUEEN-EMPRESS v. VENKATESAGADU, 10 M. 165 (F.B.)=2 Weir 30 ... 866

(6) *Ss.* 133, 137, 140.—A Sub-divisional Magistrate having made a conditional order, under s. 133 of the Code of Criminal Procedure, against a person to abate a nuisance or appear and show cause before a Second-class Magistrate why the order should not be enforced, the said person appeared as directed, and the order was made absolute under s. 137. The Second-class Magistrate then issued a notice and order under s. 140, requiring the nuisance to be abated within a certain date. The District Magistrate having referred the case on the ground that the Second-class Magistrate had no jurisdiction to pass final orders in such clases. *Held* that the order was not illegal. *In re*, NARASINHA. 9 M. 201=10 Ind. Jur. 185=2 Weir 60 ... 537

(7) *Ss.* 164, 364, 533—*Evidence Act, ss.* 65, 80—*Confessions—Improper examination of accused person by Magistrate — Record rejected.*—The Deputy Magistrate of Malabar, purporting to act under the provisions of the Mappilla Act (Madras Act XX of 1859), recorded a statement in the nature of a confession made by V, who was under arrest on suspicion of being concerned in a Mappilla outrage. This statement which was made in Malayalam, was recorded in English in the form of a narrative, and was signed by the Magistrate only. The same Magistrate shortly afterwards, purporting to act under the Code of Criminal Procedure, before any evidence was recorded against V, examined him as to this statement which was read over and translated to him. In answer to questions, V

Criminal Procedure Code, 1882—(*Continued*). PAGE

admitted that he had made it voluntarily. This examination was recorded according to the provisions of s. 364 of the Code of Criminal Procedure. After other evidence was recorded, V retracted his statement. He was committed to the sessions, tried and convicted mainly on his own recorded statement and examination. The Deputy Magistrate was examined as a witness, and stated that the statement recorded by him was made by V and was correctly recorded and was made voluntarily. *Held*, that the record of the statement made by V to the Deputy Magistrate was not admissible in evidence against V. Per *Parker, J.*—The provisions of s. 164 of the Code of Criminal Procedure are imperative, and s. 533 will not render a confession admissible where no attempt has been made to conform to the provisions of the former section. If the confessional statement of V was recorded by the Magistrate in his executive capacity, it was not receivable in evidence under s. 80 of the Evidence Act. The action of the Magistrate in examining V as to his confessional statement before there was any legal evidence on the record against him was legal, and, therefore, the record of such examination could not be used in evidence against V. Inasmuch as the record of the statement of V was not admissible, secondary evidence thereof could not be given. QUEEN-EMPRESS v. VIRAM, 9 M. 224=2 Weir 125 ... 553

(8) *S.* 195—*Registration Act, s.* 41—*Sanction of Registrar—Condition precedent to trial for forgery of will registered.*—A Sub-Registrar acting under s. 41 of the Registration Act, 1877, is a "Court" within the meaning of s. 195 of the Code of Criminal Procedure. *In re* VENKATACHALA, 10 M. 154 =11 Ind. Jur. 140=2 Weir 170 ... 858

(9) *S.* 195—*Sanction to prosecute—Notice to accused.*—A conviction for preferring a false complaint is not illegal only by reason of the prosecution having been sanctioned without notice previously given to the accused. Sanctioning a prosecution for an offence is a judicial act, and the party to whose prejudice it is done must be previously heard and a judgment formed upon legal evidence. In cases in which the Magistrate dismisses the original complaint upon a report from the police, there is no legal evidence before him on which to form his judgment. In cases, however, in which the Magistrate examines the complainant and hears the evidence and acquits or discharges the accused, and then, without notice to the complainant, sanctions his prosecution for preferring a false charge, sanction cannot be said to be improperly given. QUEEN-EMPRESS v. SHEIK BEARI, 10 M. 232 (F.B.)=2 Weir 181 ... 914

(10) *S.* 197—*Sanction to prosecute Judge for words uttered on the bench.*—Where a Judge was charged with using defamatory language to a witness during the trial of a suit: *Held*, that under s. 197 of the Code of Criminal Procedure, the complaint could not be entertained by a Magistrate without sanction. *In re* GULAM MUHAMMAD SHARIF-UD-DAULAH, 9 M. 439 =2 Weir 213 ... 701

(11) *S.* 250—*Frivolous complaint—Compensation—Cattle Trespass Act, ch.* V—*Complaint of illegal seizure, not complaint of offence.*—The illegal seizure of cattle under colour of Cattle Trespass Act, 1871, not having been constituted an offence under that Act or otherwise, an award of compensation, under s. 250 of the Code of Criminal Procedure, to the accused on such complaint, is illegal. PITCHI v. ANKAPPA, 9 M. 102=2 Weir 315 ... 468

(12) *S.* 269—*Jury wrongly treated as assessors by judge—Unanimous opinion of jury treated as assessors accepted as formal verdict.*—L and N were tried by a Sessions Court on charges of dacoity and murder. The jury returned a verdict of guilty on both charges. The Judge, contrary to the provisions of s. 269 of the Code of Criminal Procedure, treated the jury as assessors in respect of the charge of murder, and, convicting L and N of dacoity, acquitted them of murder: *Held*, that the irregular procedure of the Judge could not deprive the verdict of the jury of its proper legal effect. QUEEN-EMPRESS v. LAKSHMANA, 9 M. 42=9 Ind. Jur. 387 ... 426

(13) *S.* 271—*Murder—Explanation of charge essential.*—At a trial before a Sessions Court a charge was read out to the prisoner to the effect that they at a certain place on a certain date committed murder by causing the death of M, and that they had thereby committed an offence punishable under s. 302 of the Indian Penal Code and within the cognizance of

***Criminal Procedure Code 1882*—(*Continued*).** PAGE

the Court of Sessions. The prisoners pleaded guilty and were convicted on their plea. The charge was not explained to the prisoners. In answer to questions put by the Court, prisoners stated that they had killed M, and that they made the admissions of their own accord and not on the persuasion of any one: *Held*, that the conviction must be quashed and a new trial ordered. AIYAVU v. QUEEN-EMPRESS, 9 M. 61=2 Weir 337... 439

(14) *Ss.* 286, 288, 537—*Wintesses, Examination of—Irregularity.*—At a trial before a Sessions Court, the attorney, who appeared for the prisoner, suggested to the Court that, to expedite the trial certain depositions of witnesses for the prosecution, taken before the Magistrate should be read, and that he should be allowed to cross-examine the witnesses thereupon; to this course the Government Prosecutor and the Court consented: *Held*, that this procedure war illegal, but that, inasmuch as it had not occasioned a failure of justice, a new trial should not be granted. SUBBA v. QUEEN-EMPRESS, 9 M. 83=2 Weir 356 ... 455

(15) *Ss.* 342, 364—*Withdrawal of uncorroborated evidence by the witness—Examination of the accused—Confessions.*—A and B were charged with the murder of C, the husband of B. There was some evidence that B had said her husband was dead a few days after his disappearance; and some bones, a skull, and some clothes were found in a neighbouring burying ground which were identifi d as those of C. B made a statement, recorded on 4th June by the Village Munsif, to the effect that she had lured C into a garden, and that A, who was her paramour, had murdered him in her arms, which statement she repeated frequently with greater detail in answer to questions from the Committing Magistrate, and subsequently before the Sessions Court. On her appeal to the High Court, after she had been sentenced to death, she retracted her former statements and made the usual charges of ill-treatment against the Police. A made a statement to the Committing Magistrate which he subsequently repudiated before the Sessions Court, to the effect that he has assisted in disposing of the corpse of C at the request of his brother-in-law, who corrobarated the statement in two depositions before the Magistrate which were likewise repudiated by the deponent before the Sessions Court: *Held*, that the conviction of A was wrong and further (Parker, J., dissenting) that the conviction of B was wrong. *Per* Kernan, J.—"As the second prisoner has withdrawn all the confessional statements made by her, it is necessary, according to the rulings of this Court, to examine the evidence and see if there is reliable independent evidence to corroborate to a material extent and in material particulars the statements contained in the withdrawn confessional statements. If no such corroborative evidence exists, then the contradictory statements of the second prisoner remain and doubt exists as to which statements is true, and the confessional statements cannot be safely relied on against the prisoner." *Semble.* The same rule should be followed when a witness withdraws his deposition before the Sessions Court. *Per* Kernan, J.—The examination of au accused person, under Criminal Procedure Code, s. 364, is subject to the purpose referred to in s. 342, *viz.*, "to enable him to explain any circumstances appearing against him," and not to supplement the case for the prosecution against him to show that he is guilty. QUEEN-EMPRESS v. RANGI, 10 M. 295=2 Weir 361 ... 959

(16) *S.* 349.—A Second-class Magistrate having convicted a person of theft and sent him to a First-class Magistrate for enhanced punishment as an old offender, under s. 349 of the Code of Criminal Procedure, the First-class Magistrate returned the prisoner to the Second-class Magistrate and directed that officer to commit the case to Sessions. On a reference by the Sessions Judge, the High Court, while allowing the committal to stand, directed that in all cases referred under s. 349 of the Code of Criminal Procedure, the Court to which the case is referred should dispose of the case itself and not send it back to the Court by which the reference is made for committal to Sessions. QUEEN-EMPRESS v. VIRANNA, 9 M. 377=2 Weir 427 ... 658

(17) *Ss.* 403, 437—*Different charges arising out of the same transaction—Acquittal—Further inquiry—Re-trial.*—E being charged with theft and mischief in respect of certain branches cut from a tree claimed by the complainant, was tried by a Subordinate Magistrate on the charge of mischief

Criminal Procedure Code, 1882—(Concluded). PAGE

and acquitted on the ground that, as against the complainant, E had title to the tree. On the application of the complainant the District Magistrate directed further inquiry into the case under s. 437 of the Code of Criminal Procedure, and on a reference to the Court of Session, the Sessions Judge held that, as no inquiry into the charge of theft had been held, the order was legal: *Held* that the District Magistrate had no power to pass such an order under s. 437, and that a trial on the charge of theft was barred by virtue of s. 403 of the Code of Criminal Procedure. QUEEN-EMPRESS v. ERRAMREDDI, 8 M. 296=2 Weir 554 =9 Ind. Jur. 461 ... 240

(18) Ss 419, 420—See LIMITATION ACT (XV OF 1877), 9 M. 258.

(19) *S.* 437—*Further inquiry—Re-trial—District Magistrate, Powers of.*—Where an accused person has been discharged by a Magistrate, further inquiry cannot be directed, under s. 437 of the Code of Criminal Procedure, on the ground that the Magistrate has not rightly appreciated the credit due to the witnesses. Further inquiry should only be directed when other witnesses might have been examined, or when the witnesses have not been properly examined; and inasmuch as s. 437 does not direct that the evidence already taken should be taken again, the further inquiry should ordinarily be made by the Magistrate who made the original inquiry. Where a District Magistrate being of opinion that a Subordinate Magistrate had, without just cause, refused credit to the witnesses in a certain case and had improperly discharged an accused person, directed a further inquiry by another Magistrate, and the accused was on the same evidence re-tried and convicted: *Held*, that the conviction must be quashed. QUEEN-EMPRESS v. AMIR KHAN, 8 M. 336=2 Weir 557 ... 231

(20) *S.* 488.—Where an application is made to a Magistrate to enforce an order for maintenance, passed under s. 488 of the Code of Criminal Procedure, such Magistrate is not bound to enforce the order if the defendant proves that the claim for maintenance has been released. RANGAMMA v. MUHAMMAD ALI, 10 M. 13=2 Weir 635 ... 759

(21) *S.* 488—*Maintenance—Imprisonment for default of payment—Subsequent offer to pay—Sentence absolute.*—A sentence of imprisonment awarded under s. 488 of the Code of Criminal Procedure for wilful neglect to comply with an order to pay maintenance is absolute and the defaulter is not entitled to release upon payment of the arrears due. BIYACHA v. MOIDIN KUTTI, 8 M. 70=2 Weir 639 ... 48

(22) *S.* 517—*Disposal of stolen property—Cow stolen—Disposal of calf, not in esse at time of theft, by Magistrate on conviction of thief.*—R's cow having been stolen, the thief after a lapse of a year and a half was convicted. Six months after the theft, V innocently purchased the cow, which while in his possession had a calf. The Magistrate, under s. 517 of the Code of Criminal Procedure, ordered that the cow and calf should be delivered up by V to R: *Held*, that, as the calf was not even in embryo at the date of the theft, the order to deliver up the calf was illegal. *In re*, VERNEDE, 10 M. 25=2 Weir 670 ... 768

(23) Ss. 517, 520.—An order passed under s. 517 of the Code of Criminal Procedure may be revised by a Court of Appeal although no appeal has been preferred in the case in which such order was passed. QUEEN-EMPRESS v. AHMED, 9 M. 448=2 Weir 672 ... 707

(24) *S.* 526—*District Magistrate and Civil and Sessions Judge* (qua *Magistrate*) *of Bangalore subordinate to High Court.*—The District Magistrate and the Civil and Sessions Judge of the civil and military station at Bangalore are Magistrates subordinate to the High Court at Madras within the meaning of s. 503 of the Code of Criminal Procedure. SCOTT v. RICKETTS, 9 M. 356=2 Weir 677 ... 644

Custom.

Practice—Labis—Ravuthans of Palgat—Muhammadan religion—Hindu law of inheritance—Exclusion of widow and daughters by son's evidence necessary to support valid custom.—A claim by the widow of S. Ravuthan, a Labi of Palgat, and her daughters for their shares of his estate under Muhammadan law was opposed by other members of the family, who pleaded that, according to a special custom obtaining among the Ravuthans of that part of the country adopted from Hindu law, females are excluded

Custom—*(Concluded)*. PAGE

from inheritance if sons or sons' sons exist. In two instances it was proved that woman of this class had obtained shares under Muhammadan law by suits without this plea having been put forward. The District Munsif described these cases as interruptions and found on the evidence that the custom was proved. On appeal this decree was confirmed by the Subordinate Judge: *Held*, that no valid custom was established by the evidence. A custom to the valid must be consciously accepted as having the force of law. MIRABIVI v. VELLAYANNA, 8 M. 464 = 9 Ind. Jur. 267. 317

Damages.

(1) See CONTRACT, 8 M. 38, 9 M. 359.

(2) See DEFAMATION, 8 M. 175.

Debt.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 10 M. 194.

Declaration.

See LIMITATION ACT (XV OF 1877), 10 M. 213.

Decree.

(1) *Execution—Invalid sale—Possession given to purchaser—Restitution sought in execution by judgment-debtor—Remedy by suit.*—Certain land having been attached in execution of a decree by a District Court, S, the representative of the judgment-debtor, preferred a claim to the land in his own right, which was rejected, and the land was subsequently sold to a stranger, and the sale was confirmed on the 23rd February 1884. On the same date the High Court, on appeal by S, set aside the order rejecting his claim. The District Court, in ignorance of the order of the High Court having subsequently put the purchaser in possession of the land, S applied for restitution: *Held*, that the order of the District Judge confirming the sale was passed without jurisdiction, and that the District Judge had no power to restore possession to S. SUBBAYA v. YELLAMMA, 9 M. 130 = 10 Ind. Jur. 101 ... 487

(2) *Execution—Limitation—Decree for possession upon payment of mortgage amount and value of improvements—Final decree on ascertaining value of improvements.*—In a decree for redemption of a Malabar kanam (mortgage), it was ordered on the 12th December 1879 that the defendants should put the plaintiff in possession of the land upon payment by plaintiff to defendant No. 1 of the mortgage amount, and of the value of improvements, to be determined in execution, to such of the defendants as should be found entitled. On the 12th August 1880 the plaintiff applied for execution, and on the 23rd September 1881 an order was passed that execution should issue on payment into Court by the plaintiff of the mortgage amount and the value of improvements which had then been ascertained. The plaintiff having failed to deposit the said amount, the application for execution was struck off the file on the 10th November 1881. On the 8th December 1883 the plaintiff applied again for execution, and objection was taken that the application was barred by limitation: *Held*, that the application was not barred by limitation. KRISHNAN v. NILAKANDAN, 8 M. 137 ... 96

(3) *Execution—Sale—Immoveable property — Hypothecation bond—Interest of obligee sold—General Clauses Act,* 1868, *s.* 2 (5)—*Interest arising out of land.*—Where a judgment-debtor is entitled to a debt secured by a collateral hypothecation of land and the decree-holder attaches and sells the judgment-debtor's interest in the bond, such interest is immoveable property for the purpose of attachment and sale under the Code of Civil Procedure, 1882. *Per* Turner, C.J.—*Quære*—Whether the decree-holder could not sell the debt apart from the security as moveable property. APPASAMI v. SCOTT, 9 M. 5 ... 400

(4) *Ex parte—Limitation Act, s. 5—Admission of appeal out of time—Order set aside at hearing.*—An order made *ex parte*, under s. 5 of the Indian Limitation Act, 1877, admitting an appeal after the period prescribed therefor, may be set aside on proper cause being shown by the Court which made it. VENKATRAYUDU v. NAGADU, 9 M. 450 ... 708

(5) *Fraud—Collusion between parties—Defendant subsequently pleading his own fraud.*—A obtained a decree against B, in execution of which he was put

***Decree*—(*Concluded*).** PAGE

in possession of certain land by proclamation, the land being in the possession of tenants. A subsequently sued B and the tenants to recover possession of the same land. B pleaded that the decree obtained by A was the result of a collusion between himself and A in fraud of B's creditors: *Held*, that it was not open to B to raise this plea. VENKATRAMANNA v. VIRAMMA, 10 M. 17 = 11 Ind. Jur. 18 ... 762

(6) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 8 M. 277, 9 M. 445.

(7) See HINDU LAW—DEBTS, 8 M. 208.

(8) See HINDU LAW—JOINT FAMILY, 8 M. 376, 8 M. 388.

(9) See MALABAR LAW—KARNAVAN, 8 M. 381, 8 M. 484.

Defamation.

(1) *Slander—Action for abuse, no special damage being alleged—Damages, Measure of.*—The rule of English Law which prohibits, except in certain case, an action for damages for oral defamation unless special damage is alleged, being founded on no reasonable basis, should not be adopted by the Courts of British India. If defamatory expressions are used under such circumstance as to induce in the plaintiff reasonable apprehension that his reputation has been injured, and to inflict on him pain consequent ons uch belief, the plaintiff is entitled to recover damages without actual proof of loss sustained. *Semble*:—An action will not lie for vulgar abuse or hasty expressions; but for malicious or culpable oral defamation an action will lie. Vindictive damages should not be awarded, and a distinction should be drawn in awarding damages when the defendant acts from carelessness and when he acts maliciously. In the latter case the plaintiff is entitled to full compensation for the pain suffered, and in the former to a sum sufficient to establish his innocence of the charges made. PARVATHI v. MANNAR, 8 M. 175 ... 121

(2) See COUNSEL, 10 M. 28.

(3) See CRIMINAL PROCEDURE CODE, (1882) 9 M. 439.

(4) See PENAL CODE (ACT XLV OF 1860), 9 M. 387.

Degradation.

See HINDU LAW—MARRIAGE, 8 M. 169.

Deposit.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 9 M. 203.

District Magistrate.

See CRIMINAL PROCEDURE CODE, 1882, 8 M. 18, 8 M. 336.

District Munsif.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 10 M. 152.

Divorce.

(1) *Costs of wife—Indian Succession Act, 1865, s. 4—Married Woman's Property Act, 1874.*—A wife without property of her own seeking a divorce is entitled to have provision made by her husband for the payment of her costs in the suit. NATALL v. NATALL, 9 M. 12 ... 405

(2) See HINDU LAW—MARRIAGE, 8 M. 169.

Emoluments.

See HEREDITARY VILLAGE OFFICE, 8 M. 249.

Enfranchisement.

See HEREDITARY VILLAGE OFFICE, 8 M. 249.

Escheat.

Under Mapilla Act—See MALABAR LAW—MORTGAGE, 10 M. 189.

Estoppel.

(1) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 8 M. 134, 8 M. 506, 8 M. 520.

(2) See CIVIL PROCEDURE CODE (ACT X OF 1887), 8 M. 219.

(3) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 8 M. 348, 8 M. 496.

(4) See TRADE-MARK, 8 M. 149.

(5) See RES JUDICATA, 10 M. 102.

Evidence. PAGE

(1) *Admissibility as to pedigree of a document that has been set aside by the Court.*—In a suit for division of the property of an extinct divided branch of the family of the parties who were governed by the Aliyasantana law, a written agreement which had been set aside by the Court as against the defendants was offered in evidence by the plaintiff to prove that the parties were of equal grade of relationship, in which case it was admitted that partition was enforceable: *Held*, that the written agreement was admissible as evidence of pedigree and that the plaintiff was entitled to the decree sought for. TIMMA v. DARAMMA, 10 M. 362 ... 1005

(2) *Admissibility of petition signed by a person available but not called as witness.*—A, the son of a deceased zamindar, sued B and C, his widow and brother, for possession of the zamindari, which was impartible. In order to prove that A was illegitimate, C, filed two petitions purporting to have been signed and sent to the Collector of the district by C, in 1871, referring to A's mother as a concubine. C was not examined as a witness: *Held*, that their contents were not evidence, but the petitions were themselves evidence to show that a complaint was made as mentioned therein. PARVATHI v. THIRUMALAI, 10 M. 334 ... 986

(3) See ADVERSE POSSESSION, 9 M. 460.

Evidence Act (I of 1872).

(1) Ss. 65, 80—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 9 M. 439.

(2) S. 91—*Suit for money lent—Unstamped promissory note—Cause of action.*—The terms of a contract to repay a loan of money with interest, having been settled and the money paid, a promissory note specifying these terms was executed later in the day by defendant and given to plaintiff. This promissory note was not stamped. In a suit brought to recover the unpaid balance of the loan on an oral contract to pay: *Held*, that plaintiff could not recover. POTHI REDDI v. VELAYUDASIVAN, 10 M. 94=11 Ind. Jur. 60 ... 816

Fishery.

Tidal river—Prescription.—The right of the public to fish in tidal waters in British India may be curtailed by an exclusive privilege acquired by grant or prescription by certain persons within certain limits. Such an exclusive privilege, being an infringement of the general rights of the public, could be acquired by a period of enjoyment which would suffice for the acquisition of an easement against the Crown. VIRESA v. TATAYYA, 8 M. 467 ... 319

Forest Land.

(1) *Enjoyment—Adverse possession—Quasi possession—Prescription.*—In a suit by a zamindar to recover certain forest tracts from Government, the plaintiff relied on certain accounts called Ayakut accounts as furnishing proof of the inclusion of the said tracts within the limits of the zamindari. The District Judge refused to accept these accounts as evidence of reputation, because no evidence was produced to show for what purpose, by whom, and in what circumstances, these accounts were prepared, and what guarantee existed to ensure their accuracy: *Held*, that inasmuch as they were from time to time prepared for administrative purposes by village officers and were produced from proper custody and otherwise sufficiently proved to be genuine, were admissible as evidence of reputation. No distinction can be drawn between evidence of reputation to establish and to disparage a public right. The plaintiff having proved that he and his ancestors had cut wood, pastured cattle, and gathered forest produce in certain forests for fifty years, the Lower Court held that such acts of enjoyment were only evidence of an easement and not of adverse possession; *Held*, that these acts as they had been done under the belief and assertion that the said tracts formed portion of the zamindari, and that the plaintiff and his ancestors were owners of the said tracts were evidence of adverse possession.

In principle, an act done is one of ownership or evidence of an easement according as the person doing it asserts general ownership or a particular right in other property. The enjoyment of any right of ownership over the soil is, *prima facie*, proof of ownership of the soil. Where therefore the Lower Court found such an enjoyment of a forest as proved title to

***Forest Land*—(*Concluded*).** PAGE

the profits thereof and such enjoyment was accompanied with an assertion of ownership of the soil: *Held*, that the Court was bound to find a title to the soil established. Where a tract of land with a defined boundary has been throughout claimed by a person as owner and acts of ownership have been done on various portions of it, such acts may be accepted as evidence of the possession of the whole tract. SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA, 9 M. 285 ... 595

(2) *Malabar—Presumption as to ownership—Rights of Crown and of occupier of waste land under Hindu law—Suit by Crown for declaration of title and possession—Plaint—Cause of action within statutory period not alleged—Burden of proof—Limitation—Regulation* II *of* 1802—*Remedy suspended—Right surveying—Act* XIV *of* 1859—*Claim by Crown not affected—Limitaion Act*, 1871—*Effect on subsisting rights—Limitation Act*, 1877, *ss.* 2—28—*Construction.*—In the district of Malabar and the tracts administered as part of it, there is no presumption that forest lands are the property of the Crown. According to the Hindu law a right to the possession of land is acquired by the first person who makes a beneficial use of the soil, the right of the Sovereign being to assess the occupier to revenue. Assuming that the Crown has the right to oust any person who, without sanction, occupies waste land which has not been appropriated for any public purpose, it cannot, by a suit brought for a declaration of title, or for ejectment, the date at which the cause of action arose not being stated in the plaint, compel a defendant to prove possession for 60 years. As a general rule, a plaintiff must not only show he has a title, but that he has a subsisting title, which he has not lost by the prescriptive sections of the Limitation Act. The probable explanation of the ruling in *Radha Gobind Roy's case* (Suth. P. C. Cases 809) is, that when a plaintiff proves title and possession, it is to be presumed that his possession continues till the defendant proves that the possession interrupted, but that where the plaintiff can prove title only, and not possession, he must prove that the adverse possession of the defendant or the acts of which he complains as impugning his title, occurred within the period prescribed by the Limitation Act. In a suit instituted in March 1879 by the Crown for a declaration of title to certain forest land and for possession of a portion thereof, the defendants alleged that the land has been in their possession for more than 60 years: *Held* that it was incumbent on the Crown, under art. 149 of sch. II of the Indian Limitation Act, 1877, to show possession of the proprietary rights claimed within 60 years, or, if the defendants proved possession, that such possession commenced or became adverse within such period. The District Court having held, that up to April 1, 1873, when the Limitation Act of 1871 came into force, the limitation for such a suit was 12 years from the time when the cause of action arose, and that the suit was barred by adverse possession for 12 years prior to April 1, 1873: *Held*, that even if Regulation II of 1802 applied to claims by the Crown, inasmuch as the Regulation only barred the remedy and did not extinguish the right, and Act XIV of 1859 did not extend to such a claim, the right subsisted when the Limitation Act of 1871 came into operation, and as long as that Act was in force, and that the Crown, being entitled under that Act to sue within 60 years from the date of the cause of action, and under s. 28 of the Limitation Act of 1877, to sue within 2 years from the 1st of October 1877, the suit wss not barred, provided it could be shown that the cause of action arose within 60 years from the date of its institution. SECRETARY OF STATE v. VIRA RAYAN, 9 M. 175 ... 519

Forfeiture.

See LANDLORD AND TENANT, 10 M. 351.

Fraud.

(1) *Fradulent alteration of Document—Effect of—English Law how far applicable in mufassal.*—In a suit brought to recover Rs. 815, principal and interest due according to the terms of a registered mortgage bond, it was found that the plaintiff had fraudulently altered the terms of the bond prior to registration (1) by inserting a condition, making the whole sum payable upon default of payment of any instalment, and (2) by doubling the rate of interest. The defendant admitted in his written statement

***Fraud*—(*Concluded*).** PAGE

that he had received a certain portion of the consideration for the bond from the plaintiff. At the trial the plaintiff claimed to amend the plaint and recover the first instalment according to the terms of the bond as executed by defendant: *Held*, by the Full Bench (*Kernan, Offg. C.J., Muttasami Ayyar, Hutchins, Parker and Handley, JJ.*) that the suit must be dismissed. *Per Kernan and Muttusami Ayyar, JJ.*—The decision in Ramasamy Kon's case is in conformity with the Law of England. *Per Kernan, Hutchins, Parker and Handley, JJ.*—The rule in *Master* v. *Miller* is in consonance with equity and good conscience and applicable to the mufassal. *Per Muttasami Ayyar, J.*—That rule is more penal than equitable, but having been adopted by the Courts since 1866 must be followed. CHRISTACHARLU v. KARIBASYYA, 9 M. 399 (F.B.) = 10 Ind. Jur. 409 ... 673

(2) See DECREE, 10 M. 17.

(3) See HINDU LAW—WIDOW, 8 M. 304.

(4) See VENDOR AND PURCHASER, 9 M. 89.

Governor in Council.

See JURISDICTION, 8 M. 24.

Hereditary Village Office.

Regulation VI of 1831—Act IV of 1866 (Madras)—Karnams inam land—Hereditary office—Enfranchisement—Inam Commissioner's title-deed—Title to emoluments of office.—The lands forming the emoluments of an hereditary village office having been separated from the office by Government, were enfranchised and granted by the Inam Commissioner to V, who had been appointed to, and, at the date of enfranchisement, held the office without possessing any hereditary claim thereto. In a suit by R, who claimed to be of the family of the hereditary office-holders, to recover the land from V: *Held*, by the Full Bench (Hutchins, J., dissenting) that R could not recover. VENKATA v. RAMA, 8 M. 249 (F.B.) = 9 Ind. Jur. 185. 172

Highway.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 9 M. 463.

Hindu Law.

1.—GENERAL.
2.—ADOPTION.
3.—ALIENATION.
4.—CUSTOM.
5.—DEBTS.
6.—GIFT.
7.—IMPARTIBLE ESTATES.
8.—INHERITANCE.
9.—JOINT FAMILY.
10.—MAINTENANCE.
11.—MARRIAGE.
12.—PARTITION.
13.—RELIGIOUS ENDOWMENT.
14.—REVERSIONER.
15.—SELF-ACQUISITION.
16.—STRIDHANAM.
17.—SUCCESSION.
18.—WIDOW.

——1.—General.

(1) Landlord and Tenant—Compensation. See LANDLORD AND TENANT, 10 M. 112.

(2) Waste lands—Rights of Crown and occupier—See FOREST LAND, 9 M. 175.

——2.—Adoption.

(1) *After upanayanam of sagotra—Brahmans—Custom proof.*—According to the custom obtaining amongst Brahmans in Southern India, the adoption of a boy of the same gotra, after the upanayanam ceremony has been performed, is valid. VIRARAGAVA v. RAMALINGA, 9 M. 148 (F.B.) ... 500

(2) *Authority—Consent of sapinda.*—V, one of the nearest male sapindas of S, gave his son in adoption to the widow of S, in 1878. Both

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the giver and receiver professed to have been carrying out the directions of S. In 1883 a suit was brought by N, another sapinda, to set aside this adoption, and it was found that S. had not authorized the adoption as alleged by the defendants: *Held*, that, under the circumstances, V's assent to the adoption did not render it valid. VENKATALAKSMAMMA v. NARASAYYA, 8 M. 545 ... 373

(3) *Custom—Brahmans—Adoption of daughter's and sister's sons.*—In Southern India the custom which exists among Brahmans of adopting a sister's or daughter's son is valid. VAYIDINADA v. APPU, 9 M. 44 (F.B.) ... 427

(4) *Widow adopting to her deceased husband, with consent of sapindas—Effect of estate having already vested in the widow of a son.*—A son's widow having obtained her widow's estate in the property inherited by her deceased husband from his father, the widow of that father cannot adopt a son to the latter, whether she acts under authority from her husband or as widow with the assent of sapindas. That the power of the father's widow to adopt a son to him is brought to an end upon the vesting of the estate in the son's widow was decided in *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* and *Padmokumori Debi* v. *The Court of Wards*. THAYAMMAL v. VENKATARAMA, 10 M. 205 (P.C.) = 11 Ind. Jur. 271 = 14 I.A. 67 = 5 Sar. P.C.J. 10 ... 895

—3.—*Alienation.*

See HINDU LAW—WIDOW, 8 M. 290, 8 M. 304, 8 M. 552.

——4.—*Custom.*

(1) *Caste usage—Expulsion of member of caste under mistake of fact and without notice.*—In a suit relating to the management of the common property of the members of a Hindu caste, the plaintiff's right to sue was denied on the ground that, having violated the rules of the caste, he had been expelled from it: *Held*, (1) that it was open to the Court to determine whether or not the alleged expulsion from caste was valid; (2) that if the plaintiff had not in fact violated the rules of the caste, but was expelled under the *bond fide*, but mistaken belief that he had committed a caste offence, the expulsion was illegal and could not affect his rights. *Per Kernan, J.*—A Custom or usage of a caste to expel a member in his absence without notice given or opportunity of explanation offered is not a valid custom. KRISHNASAMI v. VIRASAMI, 10. M. 133 ... 843

(2) *Illatam custom—Status of son-in-law—Coparcenary survivorship—Proof of special custom.*—Although an illatam son-in-law and a son adopted into the same family may live in commensality, neither they nor their descendants can, in the absence of proof of custom, be treated as Hindu coparceners having the right of survivorship. CHENCHAMMA v. SUBBAYA, 9 M. 114 ... 476

(3) See HINDU LAW—ADOPTION, 9 M. 44, 9 M. 148.

(4) See HINDU LAW—MARRIAGE, 8 M. 440.

——5.—*Debts.*

(1) *Debt binding on family—Suit against one of two undivided brothers—Personal decree—Attachment of family property—Effect of decree.*—The creditor of a joint Hindu family, consisting of two brothers, sued the elder brother only (the younger being a minor) to recover a debt binding on both brothers, and having obtained a decree for the payment of the debt, attached the family property. In a suit by the younger brother to set aside the attachment *quoad* his share in the property attached: *Held*, that, inasmuch as the decree was not passed against the elder brother as manager of the family, the younger brother's suit must prevail. VIRARAGAVAMMA v. SAMUDRALA, 8 M. 208 ... 144

(2) *Liability of ancestral estate for father's debt—Effect of sale in execution of mortgage decree and of money decree against the father—Transfer of Property Act*, s. 85.—Where the property of an undivided Hindu family, consisting of father and sons, has been sold in execution of a decree obtained against the father only for a debt contracted by him for purposes neither immoral nor illegal, the sons cannot recover their shares from the purchaser, if the decree has been obtained upon a mortgage or hypothecation of the property directing such property to be sold to realize the

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debt. It is otherwise if the decree in execution of which the sale takes place is a mere money decree. *Per Kernan, J.*—It will still be necessary in all cases where a creditor seeks in a suit to bind a son's estate in ancestral or other property for a debt incurred by his father and not by him, that the son should be made party to the suit. PONNAPPA v. PAPPUVAYYANGAR, 9 M. 343 (F.B.) ... 635

———***6.—Gift.***

Of undivided share by a coparcener invalid.—The rule of Hindu law which forbids voluntary alienations of the family estate by a Hindu coparcener applies as well to gifts to relatives as to gifts to strangers. PONNUSAMI v. THATHA, 9 M. 273 ... 587

———***7.—Impartible Estates.***

(1) *Impartible zamindari—Money decree against zamindar—Attachment and sale of estate—Suit by son to recover after father's death—Rights of purchaser.*—In execution of a money decree obtained against the holder of an impartible zamindari, the creditor attached certain immoveable property—portion of the zamindari—which he described as the property of the debtor. This was sold by the Court and purchased by L. A suit having been brought by the son of the judgment-debtor, after his father's death to recover the property from L:—*Held*, that all that L acquired was the life-interest of the judgment-debtor, in the property, and therefore the plaintiff was entitled to recover. SIVAGANGA ZAMINDAR v. LAKSHMANA, 9 M. 188 ... 528

(2) *Unsettled palayam held on service tenure—Commutation of service for quit-rent—Enfranchisement—Inam putta issued to Hindu widow by Government, acknowledging her absolute title to estate, not a grant of a new estate—Joinder of plaintiffs— Suit by daughter and daughter's son against widow to declare alienations invalid.*—The palayam of C was granted during the Muhammadan rule to a Hindu on service tenure, the condition being that the grantee should maintain a body of police for the service of the paramount power. This palayam was not brought under permanent settlement under the provisions of Regulation XXV of 1802. The last male holder died in 1860 leaving him surviving a widow K and a daughter C. In 1865 the Government discontinued the service and, in lieu thereof and of the reversionary interest of the Crown, imposed a quit-rent, and an inam putta was issued to K by the Inam Commissioner by which her title to the estate was acknowledged by the Government of Madras and the estate was confirmed to her as her absolute property subject to the quit-rent. In 1882, C and her minor son A sued K and others, to whom K had alienated portions of the estate, for a declaration that they were the reversionary heirs of K and that the alienations made by K were good only during the lifetime of K. The District Judge held that there being no collusion between C and the defendants, A was not entitled to join in the suit:—*Held*, that A was entitled to join C as co-plaintiff. *Held* also that the effect of the inam putta was not to confer on K any new estate but merely as between the Crown and the owners of the estate to release the reversionary right of the Crown. NARAYANA v. CHENGALAMMA, 10 M. 1 ... 751

——***8.—Inheritance.***

(1) *A son's power to adopt—Impartible estate—Failure to prove alleged custom in a family against adoption—Invalid agreement between father and father's brother, in a joint family, contrary to rights of son already born.*—Two brothers, undivided under the Mitakshara, the family estate being an impartible zemindari in the possession of one of them who had a son, contracted with each other that, in the event of an indefinite failure of male issue in the line of either of them, the estate should descend in the line of the brother having aurasa (self-begotten) issue, and should not be alienated from the line of the latter by adoption:—*Held*, that this contract did not bind the son not to adopt, or exclude from the inheritance a son adopted by him. Such a stipulation was contrary to the law declared in the *Tanjore* case and was ineffectual to prevent the son's exercising his right of adoption. SURIYA RAU v. RAJA OF PITTAPUR, 9 M. 499 (P.C.)=13 I.A. 97=4 Sar. P.C.J. 725=10 Ind. Jur. 392 ... 742

(2) *Partition—Disqualified heirs—Birth of qualified heir.*—Under the Hindu law of inheritance which obtains in Southern India, the sons of a deaf and

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dumb member of an undivided Hindu family are entitled to a share of the family estate in the lifetime of their father, notwithstanding that they were born after the death of their grandfather. In such a case the estate vests on the death of the grandfather in the qualified heirs subject to the contingency of its being divested on the recovery of the disqualified, or the birth of a qualified heir. KRISHNA v. SAMI, 9 M. 64 (F.B.) ... 441

(3) *Stepmother—Paternal uncle.*—Under the Hindu law which obtains in the presidency of Madras, a stepmother does not succeed to the estate of her stepson in preference to a paternal uncle. MARI v. CHINNAMMAL, 8 M. 107 (F.B.) ... 75

(4) *Stepmother—Sagotra Sapindas.*—According to Hindu law current in the Madras Presidency, a stepmother does not succeed to the estate of her stepson in preference to his grandfather's brother's grandson. RAMASAMI v. NARASAMMA, 8 M. 133=8 Ind. Jur. 666 ... 93

(5) *Unborn son—Right to ancestral property not defeated by will of father.*—According to the Hindu law which obtains in the Madras Presidency, the right of a son in the womb to ancestral property cannot be defeated by a will or gift. *Quære*:—Whether this rule would govern the case of an alienation for value. MINAKSHI v. VIRAPPA, 8 M. 89=9 Ind. Jur. 21... 62

——9.—Joint Family.

(1) *Decree against an undivided brother—Mortgage of joint property.*—A, an undivided member of a Hindu family, mortgaged part of the family property by way of conditional sale to B, to secure a loan. B having sued A personally for the amount due, A admitted the mortgage and said he would surrender the property in discharge of the debt, and a decree was passed accordingly. A's undivided brothers intervened in execution:—*Held*, that the decree not being passed against the joint family or its representative, and not describing the property, which it directed to be delivered to the plaintiff by way of absolute sale to be family property, could not be executed against the family property. GURUVAPPA v. THIMMA, 10 M. 316 ... 973

(2) *Decree against father—Sale of ancestral estate in execution of money-decree—Son's liability and rights.*—A sale of ancestral property in execution of a money-decree obtained against a Hindu father will, if the debt was neither immoral nor illegal, pass to the purchaser, the entire interest of which the father could dispose, *i.e.*, his son's as well as his own share, provided the purchaser has bargained and paid for such interest. The son not being bound by the decree against his father may contest the sale by suit, but unless he proves that the debt was not such as to justify the sale, he cannot succeed. The revised ruling of the Full Bench in *Ponnappa* v. *Pappuvayyangar* (9 M. 343) as to sales in execution of money-decrees against the Hindu father has been overruled by the decision of the Privy Council in *Musssamut Nanomi Babuasin* v. *Modon Mohun*, 13 I.A. 1=13 C. 21. NARASANNA v. GURRAPPA, 9 M. 424 ... 690

(3) *Execution of decree against a member of an undivided family by sale of his personal interest in the family estate, which was an impartible zemindari; such interest, by reason of his death before the sale, consisting only of the rents and profits then uncollected.*—On a sale of the right, title, and interest in an impartible zamindari in execution of decrees against the zamindar, the head of an undivided family, the question was whether (*a*) only his own personal interest or (*b*) the whole title to the zemindari including the interest of a son and successor, passed to the purchaser. The proclamation of sale purported to relate to (*a*) only; and between the dates of proclamation and the auction sale the zamindar died. On the argument that, this having given rise to an ambiguity, the Court must be understood to have sold all that it could sell, and that under the circumstances it could sell, and was bound to sell, (*b*); because, the debts, the subject of the decrees under execution, not having been incurred by the late zamindar for any immoral purpose, the entire zamindari formed assets for their payment in the hands of his son: *Held*, that the question of what the Court could or should, have sold had not arisen. All that required decision was what the Court had sold. If (*a*) only was put up for sale, then that interest only could have been purchased. Two Courts having

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concurred in finding that (*a*) only was sold, in which also their Lordships agreed, only that interest passed to the purchaser. PATTACHI v. CHINNATHAMBIAR, 10 M. 241 (**P.C.**) = 14 I.A. 84 = 11 Ind. Jur. 272 = 5 Sar. P.C.J. 38 ... 921

(4) *Execution of decree for maintenance of widow—Liability of ancestral estate.*—Maintenance decreed to a coparcener's widow by reason of her exclusion from succession in a joint family cannot be regarded as a charge on the family estate or the decree treated as a decree against the managing member of the family for the time being.

A, the widow of an undivided member of joint Hindu family, obtained a decree for maintenance against B, the brother of her deceased husband. not expressed to be a decree against the head or representative of the joint family. B died, and C, his son, having been brought in as his representative, resisted the execution of the decree by attachment of the family estate:—*Held*, that the family estate was not liable. *Per cur.*—In a regular suit, C may clearly be held liable to pay maintenance to A, and a decree may be passed against him; but in execution proceedings the decree must be taken as it stands and executed against the son as his legal representative in the mode prescribed by s. 234 of the Code of Civil Procedure, and it is not open to extend the scope of the decree in such proceedings. MUTTIA v. VIRAMMAL, 10 M. 283 (**F.B.**) ... 951

(5) *Money decree against father—Attachment of son's shares.*—In a suit brought against the father of a Hindu family and his eldest son, on a bond executed by the former, by which family property was hypothecated as security for the repayment of the debt, decree was passed against the father only and his share of the property was declared liable to be sold. In execution of this decree, family property was attached, but, on the intervention of the younger sons, the attachment was set aside as to their shares. In a suit brought by the decree-holder to establish his right to sell the younger sons' shares in satisfaction of the decree against their father:—*Held*, that so far as the younger sons were concerned the decree must be treated as a decree for money against the father and that all that could be sold in execution of the decree against the father was the share of the father. UMAMAHESWARA v. SINGAPERUMAL, 8 M. 376 = 9 Ind. Jur. 265 ... 258

(6) *Mortgage by father—Suit to enforce against manager of family—Decree for sale—Attachment—Order for sale of property—Sale of right, title and interest—Rights of purchaser.*—V, a Hindu, and his son P executed a mortgage of a house, the self-acquired property of V. V having died, P, the manager of the family, was sued by the mortgagee on his own promise in the mortgage-deed and as representative of V, and a decree was passed for the sale of the house in default of payment by P within three months of the debt then due. This period having elapsed, the mortgagee applied to the Court to enforce the decree by attachment of the mortgaged property, and the property having been attached, application was made for sale. By a warrant, dated 3rd December 1874, the Sheriff of Madras was ordered to sell the property, and on the 12th July 1875 the Sheriff sold the right, title, and interest of the judgment debtor in the said house to K. In a suit brought by K against P and the other members of the family to recover possession of the house:—*Held*, that as the mortgagee intended to enforce his rights under the mortgage by sale, and the Court intended to sell the house as mortgaged property, K was entitled, by virtue of his purchase, to recover possession of the house. KRISHNAMA v. PERUMAL, 8 M. 388 ... 266

——10.—Maintenance.

(1) *Parent and child—Duty of son to maintain aged mother.*—According to Hindu Law, a son is bound to support his aged mother, whether or not he has inherited property from his father. SUBBARAYANA v. SUBBAKKA, 8 M. 236 ... 163

2) *Suit to reduce rate awarded by decree.*—S, a Hindu, obtained a decree for maintenance at a certain rate against R, her father-in-law. After the death of R, V, who was adopted by R, subsequent to the decree, sued S to have the rate reduced on the ground that the estate of R, which came to his hands, was considerably diminished in value:—*Held*, that, as the

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estate had been diminished by the voluntary acts of R and V, the claim could not be allowed. VIJAYA v. SRIPATHI, 8 M. 94=9 Ind. Jur. 68 ... 66

(3) *Sudra—Illegitimate son—Issue of adulterous intercourse—Maintenance.*—A Sudra having kept the wife of another man in his house for many years as a concubine, had a son by her whom he recognised as his own. In a suit brought by the son, who was of age, to recover maintenance from his putative father:—*Held*, that he was entitled to recover. KUPPA v. SINGARAVELU, 8 M. 325 ... 223

(4) See HINDU LAW (JOINT FAMILY), 10 M. 283.

——*11.—Marriage.*

(1) *Lingaits—Marriage—Desertion of wife—Re-marriage of wife valid.*—According to custom obtaining among the Lingaits of South Canara, the remarriage of a wife deserted by her husband is valid. VIRASANGAPPA v. RUDRAPPA, 8 M. 440=9 Ind. Jur. 349 ... 301

(2) *Marriage—Divorce—Change of religion—Degradation—Death of husband while outcaste—Dissolution of marriage—Suit by widow to recover husband's estate.*—In 1850 K married S, both being Brahmans. K subsequently became a convert to Christianity. In 1881 K died and S claimed his estate:—*Held*, that, according to Hindu Law, K died an outcaste and degraded, and that, as his degradation was unatoned for, the marriage became absolutely dissolved, and no right of inheritance remained to S. SINAMMAL v. THE ADMINISTRATOR-GENERAL OF MADRAS, 8 M. 169... 117

——*12.—Partition.*

(1) *Partition suit—Joint property—Stridhanam—Presumption—Procedure—Suit by grandson against uncle in lifetime of grandfather, alleged to be imbecile—Death of grandfather before trial—Objection to suit on appeal disallowed—Civil Procedure Code, s. 561—Objections to decree* in forma pauperis *disallowed.*—K sued N (his uncle) for partition of the estate of V, the (father of N), in the lifetime of V, who was alleged to be of unsound mind. N objected to the suit being entertained on the ground that V was alive. Before issues were settled V died and the suit was tried and K obtained decree. On appeal by N on the ground that, when the plaint was filed, K had no cause of action:—*Held*, that the decree could not on this ground be set aside. Objections by a respondent to a decree under s. 561 of the Code of Civil Procedure cannot be filed *in forma pauperis*. When property stands in the name of a female member of a joint Hindu family there is no presumption that such property is the common property of the family. NARAYANA v. KRISHNA, 8 M. 214 ... 148

(2) *Rights of an illegitimate son of a Sudra—Position of legitimate, adoptive, and illegitimate sons and daughter's sons, compared—Construction of a deed of partition—Partial partition—Admissibility in evidence of petitions signed by a person available but not called as witness.*—A, the son of a deceased zamindar, sued B and C, his widow and brother, for possession of the zamindari, which was impartible. In order to prove that A was illegitimate, C filed two petitions purporting to have been signed and sent to the Collector of the district by C, in 1871, referring to A's mother as a concubine. C was not examined as a witness:—*Held*, that their contents were not evidence, but the petitions were themselves evidence to show that a complaint was made as mentioned therein.

In order to prove that C was divided from the late zamindar, A filed and proved a deed of partition executed by them in respect of their moveable property and of a house, which concluded as follows:—"There shall be connection only by relationship, but there shall be no pecuniary connection between us." *Held*, that the deed effected only a partial partition, and that the last clause must be referred to the co-parcener's right in partible property described in the instrument, and did not operate as a release of any right of succession to impartible property.

A was found to be an illegitimate son of the late zamindar:—*Held*, that he could not exclude his father's co-parcener or widow from succession to the impartible zamindari. PARVATHI v. THIRUMALAI, 10 M. 334 ... 986

(3) *Sudras—Illegitimate son, status and rights of—Suit for partition by illegitimate son of undivided brother against sons of other brothers.*—In a joint Hindu family of the Sudra caste, consisting of three brothers, two left

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legitimate sons and the third an illegitimate son. In a suit brought by the latter for partition of the family estate against his father's brothers' sons:—*Held*, that he was not entitled to a share but only to maintenance. RANOJI v. KANDOJI, 8 M. 557 ... 382

(4) See CIVIL PROCEDURE CODE (XIV OF 1882), 8 M. 75.

——13.—Religious Endowment.

Religious institution—Succession in religious houses and among ascetics—Civil Procedure Code, ss. 44, 146, 147, 539—*Suits in respect of religious and charitable trusts—Joinder of claim for moveable and immoveable property—Form of decree not indicated in the plaint but indicated by the issues—Limitation Act*, 1877—*Act XV of* 1877, s. 10—*Act V of* 1843—*Spiritual slavery of a pupil to his Guru.*—This was a suit brought in 1881 with no written consent of the Advocate-General by the head of an Adhinam for declarations that a Mutt was subject to his control: that he was entitled to appoint a manager: that the present head of the Mutt was not duly appointed and his nomination by his predecessor was invalid; and for delivery of possession of the moveable and immoveable properties of the Mutt to a nominee of the plaintiff. The claim extended also to religious establishments at Benares and elsewhere connected with the Mutt. The Mutt was founded by a member of the Adhinam. Many previous heads of the Mutt had agreed to be "slaves" of the head of the Adhinam, but for over 60 years the head of the Adhinam had exercised no management over the endowments belonging to the Mutt: and in a suit (compromised) of the year 1854 the present pretensions of the head of the Adhinam had been denied *in toto*. The defendant had succeeded in 1880 to the management of the Mutt under the will of his predecessor, dated the same year, and was not a disciple of the Adhinam:—*Held*, (1) that the Mutt is affiliated to the Adhinam, but the head of the Adhinam is not entitled to appoint to the office of head of the Mutt and is not entitled to an order for delivery of the property of the Mutt to himself or to his appointee; (2) that on the evidence as to the usage in the establishments in question, the head of the Mutt is entitled to appoint his successor, but his election is limited to members of the Adhinam; and the head of the Adhinam is entitled to enforce this rule though he is bound to invest a disciple properly nominated by the head of the Mutt; (3) that the defendant not being a disciple of the Adhinam, his appointment is invalid and the head of the Adhinam is entitled to see that a competent member of the Adhinam was appointed in his stead; (4) that the plaintiff is entitled to declarations based on the two last mentioned findings since they were comprised in the issues framed under ss. 146 and 147 of the Code of Civil Procedure, although the appropriate form in which the decree should be passed was not indicated with precision in the plaint itself; (5) that the suit was barred by limitation in respect of the personal claim to manage the endowments as to which no claim had been put forward for 50 years; (6) that the suit was not barred by limitation in respect of the claim to set aside the appointment of the defendant (who entered into possession in 1880 under a will, dated in the same year), or to see that a competent Dharmapuram man be appointed, in spite of the total denial of the claims of the head of the Adhinam in 1854; (7) that the consent of the Advocate-General to the suit is not required: the suit having been instituted under the Civil Procedure Code of 1877 and the cause of action not being an alleged breach of trust; (8) that there is nothing irregular in seeking to recover moveable and immoveable property in the same suit if the cause of action is the same in respect of both; (9) that the agreement of the head of the Mutt to become the "slave" of his *guru* could have no legal operation since 1843, and that the adverse possession of the defendant from that year is fatal to any claim of the plaintiff under such agreement. GIYANA SAMBHANDHA PANDARA SANNADHI v. KANDASAMI TAMBIRAN, 10 M. 375 ... 1015

——14.—Reversioner.

Sale by widow in excess of power—Suit by reversioners for share of land sold on payment of proportionate amount of sum properly lent—Decree for redemption.—The widow of a Hindu sold to the defendants a portion of

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her husband's estate for less than its market value and for a sum in excess of what she was justified in raising by sale. The plaintiffs, two of three reversioners entitled to the estate, sued, on the death of the widow, to recover from the purchasers two-thirds of the land sold upon payment of two-thirds of the sum which the widow was justified in raising:—*Held*, that the plaintiffs were entitled to the relief claimed. SUBRAMANYA v. PONNUSAMI, 8 M. 92 ... 64

——15.—Self—Acquisition.

(1) *Burden of proof.*—Where waste land was taken up and cultivated by the father of an undivided Hindu family and the question was whether it was family property or self acquired:—*Held* that the burden of proof lay on those who asserted that it was self-acquired. *Quære.*—Whether under Hindu Law, a father has power by a nuncupative will to dispose of self-acquired immoveable property to the complete disinherison of a son. SUBBAYYA v. CHELLAMMA, 9 M. 477 ... 727

(2) *Self-acquired immoveable property—Nuncupative will—Disinherison of an undivided son.*—Under Hindu law, a father has power by a nuncupative will to dispose of self-acquired immoveable property as he pleases and to the complete disinheriting of an undivided son. A, a Hindu, took up some abandoned waste land and brought it into cultivation:—*Held*, that the true test as to whether the land is his self-acquired property or not, is whether it was brought under cultivation by family or self-acquired funds, and the *onus probandi* lies upon those who alleged the latter. SUBBAYA v. SURAYYA, 10 M. 251 ... 928

——16.—Stridhanam.

See HINDU LAW (PARTITION), 8 M. 214.

——17.—Succession.

Converts—See SUCCESSION ACT (X OF 1865), 10 M. 69.

——18.—Widow.

(1) *Attempt to control the descent of property*—Res judicata.—Two brothers having divided their family estate, each took a share consisting of villages which they held separately, agreeing in the instrument of partition that "the villages of the shares of both of us should in future descend only to the sons and grandsons, and so on of us both, but must not go to any others." On the death of one brother leaving a widow and daughters, the widow obtained possession of the villages which formed her husband's share, and a suit brought against her by the other brother to recover them was dismissed on the ground that the divided shares descended according to law. The widow then transferred the villages to her elder daughter, whose right to the possession, as against the brother, was declared in the present suit on the ground that, as between the widow and the brother, the question of the widow's title was *res judicata*. VENKATADRI APPA RAU v. PEDA VENKAYAMMA, 10 M. 15 (P.C.) ... 760

(2) *Widow—Alienation—Pious purposes—Spiritual necessities.*—Although pilgrimages and sacrifices performed by a Hindu widow may be indirectly beneficial to her deceased husband, they are not ceremonies indispensable for his spiritual benefit. A sale by a Hindu widow to raise money for pious acts, not in the nature of spiritual necessities, unless such sale is reasonable in the circumstances of the family and the property sold is but a small portion of the property inherited from her husband, is invalid. RAMA v. RANGA, 8 M. 552=9 Ind. Jur. 383 ... 378

(3) *Widow's estates—Alienation—Moveable property.*—The restriction placed by the Hindu law on a widow's power of alienation of her husband's estate extends to moveable as well as immoveable property. NARASIMHA v. VENKATADRI, 8 M. 290=9 Ind. Jur. 144 ... 199

(4) *Widow's estate—Alienation—Moveables—Release by widow, suit to set aside—Duress—Coercion—Fraud—Grounds on which relief is granted.*—B.R., the widow of a zamindar, having for valuable consideration released all her claims on her husband's estate in favour of V.S., her husband's brother, by a deed executed five days after the death of her husband, brought a suit against V.S. to set aside the deed of release on the ground

Hindu Law—18.—Widow—(Concluded). PAGE.

that it was obtained by threats and fraud, and to recover the estate:—*Held*, that it was not sufficient to find that the consent given by the plaintiff was not caused by coercion, as defined in the Indian Contract Act, nor by duress, as known to the English Law; but that the questions to be decided were (1) whether undue advantage had been taken of the plaintiff's position; (2) whether the plaintiff had been sufficiently informed as to her rights or had proper advisers; (3) whether the contract was an unconscionable or "Catching" bargain. A Hindu widow is not at liberty to defeat the rights of reversioners by alienating or wasting moveable property inherited from her husband. BUCHI RAMAYYA v. JAGAPATHI, 8 M. 304 ... 209

(5) See CIVIL PROCEDURE CODE (XIV OF 1882), 8 M. 348.

Hypothecation Bond.

See CIVIL PROCEDURE CODE (XIV OF 1882), 10 M. 169.

Illatam Custom.

See HINDU LAW (CUSTOM), 9 M. 114.

Improvements.

See MALABAR LAW (MORTGAGE), 8 M. 415.

Inam Commissioner's Title-deed.

See HEREDITARY VILLAGE OFFICE, 8 M. 249.

Insolvency.

See CIVIL PROCEDURE CODE (XIV OF 1882), 9 M. 112.

Insolvency Act, 11 and 12 Vict., C. 21.

(1) *S. 7—Vesting order—Civil Procedure Code, s. 276—Attachment before judgment—Official Assignee's title.*—Where a vesting order has been made under 11 and 12 Vict., c. 21, s. 7, after attachment and before decree, the title of the Official Assignee takes effect and prevents the attaching creditor from obtaining satisfaction of his decree by a sale. SADAYAPPA v. PONNAMA, 8 M. 554 ... 380

(2) *S. 19—Rule 14 of Insolvent Court—Official Assignee — Commission.*— The right of Official Assignee to commission under 11 and 12 Vict., c. 21, s. 19, does not arise until there are in his hands funds realized and available for distribution among the creditors. If at such time the adjudication is annulled the right to commission subsists. OFFICIAL ASSIGNEE v. RAMALINGA, 8 M. 79 ... 55

(3) *Ss.* 47, 51.—By an order made under the provisions of 11 & 12 Vict., c. 21, it was directed that an insolvent-debtor was entitled to his discharge as to all the debts mentioned in his schedule, save and except the debt due to a certain creditor and as to such debt that the insolvent should be entitled to be discharged as soon as he had been in custody at the suit of the creditor for six months, and it was further ordered that the insolvent be committed to custody in respect of this debt for six months.—*Held*, that the order of committal was within the power given to the Court by ss. 47 and 51 of 11 & 12 Vict., c. 21. NIXON v. CHARTERED MERCANTILE BANK, 8 M. 97 ... 68

(4) See CIVIL PROCEDURE CODE (XIV OF 1882), 8 M. 276.

Instalment Bond.

See CONTRACT, 9 M. 276.

Intention.

See PENAL CODE (ACT XLV OF 1860). 8 M. 5.

Intimidation.

See PENAL CODE (ACT XLV OF 1860), 8 M. 140.

Jenm Right.

See MALABAR LAW (MORTGAGE), 10 M. 189.

Joinder of Parties.

See HINDU LAW (IMPARTIBLE ESTATE), 10 M. 1.

Jurisdiction. PAGE

(1) *Act IX of* 1861—*Civil Procedure Code, ss.* 11, 15—*Parent and child—Suit for recovery of minor by parent.*—Act IX of 1861 does not debar a District Munsif's Court from entertaining a suit by Hindu father to recover possession of his minor son alleged to be illegally detained by the defendant. KRISHNA v. READE, 9 M. 31 ... 418

(2) *Cause of action—Suit to set aside order of Revenue Court directing ejectment*—Res judicata.—A Revenue Court having ordered, a tenant to be ejected under s. 10 of the Rent Recovery Act on the ground that he had refused to accept a patta as directed by the Court, the tenant brought a suit in the Civil Court to set aside the order of the Revenue Court:—*Held* that the suit would not lie. RAGAVA v. RAJAGOPAL, 9 M. 39=9 Ind. Jur. 459. 424

(3) *Complaint against Governor and Council of Madras*—21 *Geo. III*, c 70, s. 5; 39 & 40 *Geo. III*, *c.* 79, *s.* 3; 4 *Geo. IV*, *c.* 71, *s.* 17.—S. 3 of 39 & 40 Geo. c. 70, which provides that the Governor and Council at Madras shall enjoy the same exemption and no other from the authority of the Supreme Court at Madras as is enjoyed by the Governor-General and Council from the jurisdiction of the Supreme Court at Calcutta, did not confer on the Supreme Court at Madras a jurisdiction over the Governor and Council of Madras similar to that conferred by 21 Geo. III, c. 21, s. 5, on the Supreme Court at Calcutta over the Governor-General and Council. *In re* WALLACE, 8 M. 24 **(F.B.)** ... 18

(4) *Suit to eject trustee—Valuation—Specific Relief Act, s.* 42.—By an agreement between S and M, members of the same Hindu family, it was arranged that certain immoveable property dedicated to charitable uses by the family should be managed by M, subject to the supervision of S, and that M should render accounts to S and observe certain other conditions. S sued M in the Court of the District Munsif and prayed for a decree for the removal of M as manager and for the appointing of himself as manager of the property. M objected that the Court had no jurisdiction, because the property exceeded in value the pecuniary limits of the jurisdiction of the District Munsif's Court as fixed by s. 12 of the Madras Civil Courts Act, 1873:—*Held*, that S was not entitled to sue for the removal of M without praying for his ejectment from the property, and that, as the property exceeded in value Rs. 2,500, the District Munsif had no jurisdiction. SONACHALA v. MANIKA, 8 M. 516 ... 353

(5) See ACT XI OF 1865 (SMALL CAUSE COURT), 9 M. 110; 9 M. 206.

(6) See ACT III OF 1873 (CIVIL COURTS ACT, MADRAS), 8 M. 235; 9 M. 208.

(7) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 8 M. 548; 10 M. 152.

(8) See VALUATION OF SUIT, 10 M. 371.

Jury.

Assessors—Verdict—See CRIMINAL PROCEDURE CODE (X OF 1882), 9 M. 42.

Karnam.

(1) *Regulation XXIX of* 1802, *s.* 7—*Office of karnam in a zamindari village—Succession to—Female claimant—Incapacity of next heir.*—The karnam of a zamindari village having died, leaving a widow his heir, the zamindar appointed her to the office of karnam. The nearest male sapinda of the deceased karnam (from whom he was divided) sued to establish his right to the office of karnam:—*Held* (1) that a woman cannot hold the office of karnam:—*Held* further, (2) that when the immediate heir is incapacitated, the nearest male sapinda of the deceased karnam is entitled to succeed to the office. CHANDRAMMA v. VENKATRAJU, 10 M. 226=11 Ind. Jur. 332 ... 910

(2) *Rights of* de facto—A filed a plaint on 28th June 1882 for a declaration of his title as karnam of a village and for arrears of dues payable to him as such, including those for fasli 1288, which accrued due on 1st July 1879. His family had held the office and discharged its duties for three generations, but there was no evidence of any formal appointment of A or his ancestors:—*Held*, that the plaintiff was entitled to the dues as *de facto* karnam, and his claim was not barred in respect of any of the arrears claimed. GANAPATHI v. SITHARAMA, 10 M. 292 ... 957

Karnam—(*Concluded*). PAGE

(3) See HEREDITARY VILLAGE OFFICE, 8 M. 249.

(4) See REGULATION XXIX OF 1802, 9 M. 214.

Labis.

Ravuthans—See CUSTOM, 8 M. 464.

Landlord and Tenant.

(1) *Forfeiture—Waste—Planting a mango tope on dry land.*—In the absence of local custom, tenants are not entitled to convert land under cultivation into a mango grove. Tenants from year to year are not at liberty to change the usual course of husbandry without the consent of the landlord. LAKSHMANA v. RAMACHANDRA, 10 M. 351 ... 998

(2) *Hindu Law—Wells dug with consent of Landlord—Compensation.*—Where tenants from year to year, with permission of the landlord, sank a well in the land demised :—*Held*, that they were not entitled under Hindu law to any compensation therefor from the landlord after the determination of the tenancy. VENKATAVARAGAPPA v. THIRUMALAI, 10 M. 112 ... 828

(3) *Service tenure—Resumption—Notice.*—Where land held on service tenure is resumable at the will of the grantor, the holder cannot be ejected before a reasonable notice to surrender the land has been given. LAKSHMI v. CHENDRI, 8 M. 72=8 Ind. Jur. 670 ... 50

(4) *Tenant on sufferance—Limitation Act*, 1877, *sch. II, arts.* 139, 140.—Although the English rule of law as to the nature of the possession of a tenant for a term of years, who holds over, has been adopted in British India, the rule of limitation prescribed by 3 & 4 Will. IV, c. 27, by which time begins to run against the landlord from the date of his right of entry, has not been adopted in the Indian Limitation Act, 1877. If a tenant for years holds over in British India, time does not begin to run against the landlord until the tenancy on sufferance has been determined. ADIMULAM v. PIR RAVUTHAN, 8 M. 424=9 Ind. Jur. 309 ... 291

(5) *Unregistered lease—Proof of tenancy ejectment—Occupancy rights.*—If a contract of lease is, for want of registration, ineffectual, the landlord is not debarred from giving other evidence of a tenancy and requiring the Court to adjudicate on his right to eject. VENKATAGIRI ZAMINDAR v. RAGHAVA, 9 M. 142 ... 496

(6) See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 8 M. 576, 9 M. 479.

Letters Patent, Madras, 1865.

(1) S. 10—See COUNSEL, 10 M. 28.

(2) S. 15—*Civil Procedure Code, ss.* 629, 632—*Indian Councils' Act*, 1861, *s.* 22, *High Courts' Act, s.* 9.—S. 15 of the Letters Patent for the High Court of Judicature at Madras, which allows an appeal to the High Court from the judgment of one Judge of that Court, is controlled by s. 629 of the Code of Civil Procedure, which provides that an order of a Civil Court rejecting an application for review of judgment shall be final. ACHAYA v. RATNAVELU, 9 M. 253=10 Ind. Jur. 59 ... 573

(3) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 9 M. 447.

Limitation.

(1) See ACT II OF 1864 (REVENUE RECOVERY, MADRAS), 10 M. 62.

(2) See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 8 M. 196, 9 M. 479.

(3) See ADVERSE POSSESSION, 10 M. 189.

(4) See DECREE, 8 M. 137.

(5) See FOREST LAND, 9 M. 175.

Limitation Act (IX of 1871).

(1) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 8 M. 506.

(2) See FOREST LAND, 9 M. 175.

Limitation Act (XV of 1877).

(1) Ss. 2, 28—See FOREST LAND, 9 M. 175.

(2) S. 5—DECREE, 9 M. 450.

(3) *Ss.* 5, 6.—*Period of limitation—Power to excuse delay.*—Delay in preferring an appeal under the Madras Forest Act beyond the period prescribed by

***Limitation Act** (XV of 1877)—(Continued).* PAGE

s. 14 of that Act, may be excused under s. 5 of the Indian Limitation Act, 1877. REFERENCE UNDER FOREST ACT V OF 1882, 10 M. 210 ... 899

(4) S. 6.—See REGULATION IV OF 1816, 9 M. 118.

(5) *S.* 10—*Allegation of holding in trust.*—By Act XV of 1877, s. 10, where property has become vested in a person in trust for a specific purpose, a suit to follow such property in his hands is not barred by lapse of time. Acting under Regulation V of 1804, the Court of Wards took charge of an impartiable zamindari, on the death of the zamindar leaving minor sons, of whom the eldest was afterwards recognized as heir and received possession on attaining full age. Upon a subsequent adjudication of forfeiture against him under Regulation VII of 1808, the Government obtained possession of the zamindari :—*Held*, that the Government was not placed in the position of a person in whom property had become vested for a specific purpose, and that the above section was not applicable to prevent the operation of the law of limitation under XV of 1877, which barred the suit brought by another of the sons, alleging title to the zamindari. VIZIARAMARAZU v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, 8 M. 525 (**P.C.**) = 12 I. A. 120 = 9 Ind. Jur. 275 = 4 Sar. P.C.J. 644 ... 359

(6) S. 10—See HINDU LAW—RELIGIOUS ENDOWMENT, 10 M. 375.

(7) *S.* 12.—A filed a plaint on 28th June 1882 for a declaration of his title as karnam of a village and for arrears of dues payable to him as such, including those for fasli 1288, which accrued due on 1st July 1879. His family had held the office and discharged its duties for three generations, but there was no evidence of any formal appointment of A or his ancestors :—*Held*, that the plaintiff was entitled to the dues as *de facto* karnam, and his claim was not barred in respect of any of the arrears claimed. GANAPATHI v. SITHARAMA, 10 M. 292 ... 957

(8) *S.* 12, *sch, II, art.* 154—*Criminal Procedure Code, ss.* 419, 420—*Appeal by prisoner—Limitation—Time necessary to obtain copy of judgment—Presentation of petition to officer in charge of jail.*—In computing the period of limitation prescribed for an appeal from a sentence of a Criminal Court by art. 154 of sch. II of the Indian Limitation Act, 1877, the time taken in forwarding an application by a prisoner for a copy of the judgment and in transmitting the same from the Court to the jail must be excluded. In the case of such appeal, presentation of the petition of appeal to the officer in charge of the jail is, for the purpose of the Limitation Act, equivalent to presentation to the Court. QUEEN-EMPRESS v. LINGAYA, 9 M. 258 = 1 Weir 789 ... 576

(9) *S.* 12, *sch. II, art.* 177—*Period of limitation for admission of an appeal to Privy Council.*—On a petition for leave to appeal to the Privy Council presented on the 8th April, it appeared that the period of six months from the date of the decree to be appealed against had expired on the 23rd of March, if the time occupied by the petitioner in getting a copy of the decree was to be computed in that period :—*Held*, that the petition was barred by limitation LAKSHMANAN v. PERYASAMI, 10 M. 373 ... 1013

(10) S. 15—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 8 M. 229.

(11) *S.* 19, *sch. II, art.* 85—*Acknowledgment—Mutual, open and current accounts.*—A acted as commission agent for B and C. A furnished a debit and credit account in February 1878. The account was disputed and the matter was referred to an arbitration : for which purpose in March 1880 a "memorandum of items to be settled " was drawn up and signed by B and C, in which they denied that any balance would be found due to A, but acknowledged that accounts must be taken and that they would be liable if any balance were found due to A. In June 1880 B signed and supplied to the arbitrator an account on behalf of himself and C. The arbitrator made an award which was set aside. A filed a suit against B and C in September 1882 for a balance due to him :—*Held* that the accounts were mutual, open and current accounts ; that B and C had made an acknowledment of their debt to A.; and that the suit was not barred by limitation. SITAYYA v. RANGAREDDI, 10 M. 259 ... 934

(12) *S.* 20—*Part-payment of principal of debt—Endorsement of cheque by debtor.*—Where the only evidence in the handwriting of the debtor of the part-payment of the principal of a debt was the endorsement of a cheque to

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the creditor :—*Held* that such endorsement did not satisfy the conditions of s. 20 of the Indian Limitation Act so as to give rise to a new period of limitation from the date of such endorsement. MACKENZIE v. THIRUVENGADATHAN, 9 M. 271 ... 585

(13) *Sch. II, art.* 11.—An order rejecting a claim petition under s. 335 of the Civil Procedure Code, not being appealed against within one year acquires the force of a decree. ACHUTA v. MAMMAVU, 10 M. 357 ... 1002

(14) Sch. II, arts. 11, 13—See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 8 M. 134.

(15) Sch. II, arts. 11, 13—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 8 M. 82.

(16) Sch. II, art. 12—See ADVERSE POSSESSION, 9 M. 460.

(17) Sch. II, arts. 12, 13—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 9 M. 57.

(18) Sch. II, arts. 12, 95—See ACT II OF 1864 (REVENUE RECOVERY, MADRAS), 9 M. 457.

(19) *Sch. II, art.* 85—*Mutual current accounts—Reciprocal demands.*—A employed B as his agent. B alone kept written debit and credit accounts. A sued B for a balance due on the account between them:—*Held*, that the debit and credit account showed reciprocal demands between plaintiff and defendants, and that the account was a mutual open and current account within the meaning of Limitation Act, 1877, sch. II, art. 85. LAKSHMAYYA v. JAGANNATHAM, 10 M. 199 ... 891

(20) *Sch. II, arts.* 91, 120—*Suit for declaration of title—Incidental relief—Setting aside instrument.*—The period of limitation for suits to declare title is six years from the date when the right accrued, under Indian Limitation Act, 1877, sch. II, art. 120; and this period is not affected by art. 91, though the effect of the declaration is to set aside an instrument as against the plaintiff. PACHAMUTHU v. CHINNAPPAN, 10 M. 213 ... 901

(21) *Arts.* 131, 132, 140, 144—*Claim for arrears of revenue by grantee from Government.*—The right to the revenue on certain land having been granted to the trustees of a mosque, the said grant was confirmed by Government in 1866. In 1883, a suit was brought to recover arrears of revenue from the owners of the land. It was found that no payment of revenue had ever been made by the defendants to the plaintiff and the suit was dismissed as barred by limitation under art. 144, sch. II of the Limitation Act :—*Held*, that the suit was not barred and that the plaintiff was entitled to recover 12 years' arrears of revenue. ALUBI v. KUNHI BI, 10 M. 115 ... 831

(22) *Sch. II, arts.* 132—*Registered hypothecation bond—Personal remedy barred after six years.*—Art. 132 of sch. II of the Indian Limitation Act, 1877, by which a period of 12 years is allowed to enforce payment of money charged on immoveable property, refers only to suits to enforce payment by sale of the property charged and not to a claim to enforce the personal remedy on a registered bond by which immoveable property is pledged as security for the debt. SESHAYYA v. ANNAMMA, 10 M. 100=11 Ind. Jur. 59 820

(23) *Sch. II, arts.* 132, 147—*Hypothecation.*—In 1884 N sued A to recover the principal and interest due on a registered bond executed in 1870. It was stipulated that the amount should be repaid with interest in 1871, and certain immoveable property was hypothecated as security for repayment of the debt :—*Held*, that the suit did not fall under art. 147 of sch. II of the Indian Limitation Act, which allows sixty years to a mortgagee to sue for foreclosure or sale from the date the money becomes due, but under art. 132 of the same schedule, which allows twelve years to enforce a payment of money charged on immoveable property. ALIBA v. NANU, 9 M. 218=10 Ind. Jur. 182 ... 549

(24) *Sch. II, arts.* 132, 147—*Transfer of Property Act—Act IV of* 1882, *ss.* 58, 100—*Hypothecation bond.*—The period of limitation for suits upon hypothecation bonds, which contain no power of sale, or effect no transfer of property, executed before the Transfer of Property Act came into operation, is 12 years under sch. II, art. 132 of the Limitation Act of 1877. *Per* Muttusami Ayyar, J.—"The transaction in suit appears to be of the kind described in s. 100 of the Transfer of Property Act, which defines

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how a charge is created ;" but "it seems to me that the Transfer of Property Act does not invest all prior hypothecations with the rights and liabilities arising from simple mortgages, whether or not those transactions satisfy the requirements of the definition it contains of simple mortgages." RANGASAMI v. MUTTUKUMARAPPA, 10 M. 509=11 Ind. Jur. 452 ... 1106

(25) Sch. II, arts. 139, 140—See LANDLORD AND TENANT, 8 M. 424.

(26) *Sch. II, art.* 144—*Adverse possession—An outside person claiming an interest in an estate together with an undivided family—Inheritance to such owners.*—In a family of three undivided brothers, an estate was purchased by the eldest as manager, on whose application a fourth party, a sister's husband, was recorded in the revenue records as a co-proprietor with them. The latter, even if he by joining in the purchase had become entitled to an undivided fourth share in the estate, did not thereby become a member of the undivided family ; and the members of it would not have had a right to succeed to his fourth share, which would have descended to his own heirs ; the other three-fourths which he would not have inherited going by survivorship among the members of the family. A son of the eldest brother obtained, by the deaths of the father and uncles, sole possession of the whole estate :—*Held*, that he did not take the one-fourth share above mentioned by any right of inheritance, and that, in the absence of proof that his possession of it was by authority of the fourth recorded co-proprietor, his possession must be presumed to have been adverse to the latter and to any one claiming through him. It followed that a suit to obtain from those claiming through the son, who was now dead, the one-fourth share, brought more than twelve years after possession taken by the son, by a purchase, relying on a title through the fourth co-proprietor, was barred by limitation under art. 144 of the second schedule of Act XV of 1877. RAMALAKSHAMMA v. RAMANNA, 9 M. 482 (**P. C.**)=13 I.A. 147=4 Sar. P.C.J. 728=10 Ind. Jur. 425 ... 731

(27) *Sch. II, art.* 144—*Adverse possession of limited interest in land.*—The Manager of a Nambudri family in Malabar having demised certain land on kanam in 1868, was removed from his possession as manager in 1875. In 1883 his successor sued to eject the kanam-holders :—*Held*, that the suit was barred by limitation. MADHAVA v. NARAYANA, 9 M. 244=10 Ind. Jur. 61 ... 567

(28) Sch. *II*, art. 174—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 8 M. 99.

(29) *Sch. II, art.* 178—*Application for Certificate to collect debts of deceased person.*—Art. 178 of sch. II of the Indian Limitation Act, 1877, does not affect an application under Act XXVII of 1860 for a certificate to collect debts due to the estate of a deceased person. JANKI v. KESAVULU, 8 M. 207 ... 143

(30) *Sch. II, arts. A, B, C* ; 178.—*Per Curiam* (Kernan, J., dissenting). An application by an appellant to make the representative of a deceased respondent party to the appeal does not fall under art. 171-B, but under art. 178 of sch. II of the Indian Limitation Act, 1871. LAKSHMI v. SRI DEVI, 9 M. 1 (**F.B.**) ... 397

(31) *Sch. II, arts.* 178, 179—*Decree—Execution—Attachment set aside—Time occupied in suing to declare property liable to attachment not excluded from computation.*—An application for execution of a decree having been made in 1880, certain land was attached as being the property of the judgment-debtor (deceased). His children thereupon claimed the land and the attachment was raised. Upon this, the judgment-creditor sued to establish his right to sell the land in execution and obtained a decree in 1882, which was confirmed on appeal in 1883. In 1885, the judgment-creditor again applied for attachment and sale of the same land :—*Held*, that the application was barred by limitation. NARAYANA v. PAPPI BRAHMANI, 10M. 22 766

(32) *Sch. II, arts.* 178, 179 (3)—*Civil Procedure Code, s.* 583—*Application for refund of moneys levied under decree reversed on appeal—Review rejected—Time not excluded from computation.*—Where a review of judgment has been applied for, and, after notice to the other side, refused, the period during which such application was pending cannot be excluded, in computing the period of limitation for execution of the decree under art. 179 (3)

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of sch. II of the Indian Limitation Act. *Semble.*—An application for refund of moneys levied in execution of a decree subsequently reversed on appeal is not governed by art. 179 but by art. 178 of sch. II of the Limitation Act. KURUPAM ZAMINDAR v. SADASIVA, 10 M. 66 ... 797

Lingaits.

See HINDU LAW—MARRIAGE, 8 M. 440.

Lis Pendens.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 9 M. 92.

Madras Boat Rules.

Act IV of 1842—Act IX of 1846—Jurisdiction of Magistrates—Liability of owner under r. 7—Burden of proof.—Under Act IX of 1846, the Madras Government is authorised to make, in respect of ports in the presidency, such regulations for the management of boats and such other matters as are provided for by Act IV of 1842 in respect of the Madras roads, being similar in principle to the provisions of the said Act, but varying in detail as local circumstances may require. Act IV of 1842, s 24, empowers a Justice of the Peace of the town of Madras to hear and determine all pecuniary forfeiture and penalties had or incurred under or against that Act:—*Held*, that it was competent to the Government of Madras to provide that cases cognizable under the rules passed in accordance with Act IX of 1846 should be heard and determined by Magistrates not being Justices of the Peace. Under r. 7 of the amended rules for the better management of boats, &c., plying for hire at the out-ports of the Madras Presidency, dated 1st October 1867, the owner of a boat is liable to fine on proof of his allowing his boat to ply without the requisite complement of men:—*Held*, that where it was proved that a boat was plying without its proper crew, the absence of prof by the prosecutor that the owner was aware of the fact was no bar to his conviction. ROUTHAKONNI, *In re*, 9 M. 431=1 Weir 852 ... 695

Maintenance.

(1) See CRIMINAL PROCEDURE CODE (X OF 1882), 8 M. 70.

(2) See HINDU LAW—MAINTENANCE, CASES UNDER.

Malabar Law.

1.—DEBTS.
2.—INHERITANCE.
3.—KARNAVAN.
4.—MORTGAGE.

——1.—Debts.

Brahmans—Numbudris—Mussads—Hindu Law, how far applicable—Liability of sons for father's debt in Hindu Law, not applicable.—The principle of Hindu Law, which imposes a duty on a son to pay his father's debt, contracted for purposes neither illegal nor immoral, is not applicable to the Malabar Brahmans called Nambudris and Mussads. NILAKANDAN v. MADHAVAN, 10 M. 9 ... 757

——2.—Inheritance.

(1) *Issue of parents governed by different systems of law.*—Where a woman belonging to a Malabar tarwad governed by the Marumakatayam law (succession by nephews) has issue by a man who is governed by the Makatayam law (succession by sons), such issue are *prima facie* entitled to their father's property in accordance with the Makatayam law and to the property of their mother's tarwad in accordance with the Marumakatayam law. CHATHUNNI v. SANKARAN, 8 M. 238 ... 165

(2) *Nambudris — Inheritance—Sarvasvadhanam marriage—Rights of son.*—Among Nambudris in Malabar, the son of a daughter given in the sarvasvadanam form of marriage does not inherit in the family of his father so long as other heirs exist. KUMARAN v. NARAYANAN, 9 M. 260 ... 578

——3.—Karnavan.

(1) *Decree against karnavan and senior anandravan not binding on junior members—Civil Procedure Code, s. 13, Expl. 5, s. 30.*—A decree having been

Malabar Law—3.—Karnavan—(Continued). PAGE

obtained against the karnavan and senior anandravan of a Malabar tarwad whereby the tarwad was dispossessed of certain land, the junior members of the tarwad who had not been impleaded in the suit sued to recover the land :—*Held*, that the plaintiffs were entitled to recover upon proof that the decree in the former suit was not substantially correct, and that they were not bound to prove *mala fides* on the part of their karnavan in defending the former suit as a condition precedent to recovery. SRIDEVI v. KELU ERADI, 10 M. 79 ... 805

(2) *Karnavan, Decree against—Execution against tarwad property—Sale—Right of purchaser*—Res judicata—*Right of junior member of tarwad not impleaded to contest sales of tarwad property in execution of decree against karnavan sued as such.*—When the karnavan of a Malabar tarwad has not been impleaded as such in a suit, and there is nothing on the face of the proceedings to show that it was intended to implead him in his representative character, tarwad property cannot be attached and sold in execution of the decree, even though it is proved that the decree was obtained for a debt binding on the tarwad. Although the property of a tarwad may be attached and sold in execution of a decree when the karnavan is sued as representative of the tarwad, members of the tarwad who are not parties to the proceedings and have not been represented in the manner prescribed by the Code of Civil Procedure are not estopped from showing that the debt for which the decree was passed was not binding on the tarwad. ITTIACHAN v. VELAPPAN, 8 M. 484 (F. B.) ... 331

(3) *Karnavan—Decree against—Female not incapable of managing the affairs of a tarwad*—Res judicata.—The senior female member of a Malabar tarwad, who managed its affairs, instituted a suit on behalf of the tarwad and in the capacity of karnavan:—*Held*, (1) that a female is not precluded from managing the affairs of her tarwad when there is no male member in her family capable of performing the duties of a karnavan ; and (2) that the junior members of the tarwad were, in the absence of fraud shown, constructively parties to the suit, and were accordingly bound by the decree. SUBRAMANYAN v. GOPALA, 10 M. 223 .. 908

(4) *Karnavan—Powers restricted by family arrangement—Redemption of kanam—Repayment of renewal fee, improperly received by karnavan—Amount to be ascertained before decree—Value of improvements to be ascertained before decree—Jenmi—Right to deduct arrears of rent due from sum payable.*—The ordinary powers of the karnavan of a Malabar tarwad can be restricted by a family agreement to which he is a party, and if in breach of such agreement, the karnavan makes an alienation to a stranger who has notice of the agreement, the tarwad is not bound by the alienation. When a decree is passed for recovery of land demised on kanam on payment of the amount received as renewal fee, the amount must be ascertained at the trial and inserted in the decree. On taking an account between the jenmi (mortgagor) and kanam-holder (mortgagee), the former, on redemption, has by custom a right to deduct all arrears of rent due to him from the sum which he has to pay to the latter, before recovering possession of the land. KANNA PISHARODI v. KOMBI ACHEN, 8 M. 381 ... 261

(5) *Personal decree against karnavan—Civil Procedure Code, s. 335.*—A sued for possession of certain shops belonging to a Malabar tarwad, which had been attached in execution of a personal decree passed against a karnavan in a suit on a private debt. In the execution proceedings, an objection petition was put in, stating that the shops were sridhanam and was rejected ; and the order of rejection was not appealed against for one year. Respondents Nos 1 to 4, the husbands of the persons who put in the objection petition, were in possession and were now sued for possession. The plaintiff was assignee of the purchaser at the execution sale :—*Held*, that upon the facts found, the plaintiff acquired nothing under the Court sale. ACHUTA v. MAMMAVU, 10 M. 357 ... 1002

(6) *Sale of tarwad property—Powers of karnavan—Assent of members of tarwad, how far necessary.*—There is no rule of Malabar Law that the assent of every member of a tarwad is necessary to render valid the alienation of tarwad property. KALLIYANI v. NARAYANA, 9 M. 266. ... 582

(7) *Suit against karnavan and senior female member of a tarwad—Evidence of intention to sue defendants as representatives of the tarwad.*—The karnavan

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and senior female member of a Malabar tarwad executed a hypothecation bond, on which a suit was brought against them asking for the sale of the tarwad property. The defendants had represented the tarwad in other suits, but were not in this case expressly sued in representative capacity. The plaintiff obtained a decree :—*Held*, that the decree was binding on the tarwad. SUBRAMANYAN v. KALI, 10 M. 355 ... 1000

(8) *Suit by anandravans to set aside sale in execution of decree against their karnavan—When maintainable.*—The plaint lands being the jenm of a devasvam were sold in execution of a decree obtained by defendant No. 1 against the uralars. Plaintiffs being the anandravans of the uralars sued to set aside the sale, alleging that the debt was not contracted for devasvam purposes and that the decree was collusive :—*Held*, that the decree was binding on the plaintiffs unless it had been obtained by fraud and collusion. KELU v. PAIDAL, 9 M. 473. ... 725

———— *4.—Mortgage.*

(1) *Civil Procedure Code, s. 30—Joinder of parties—*Res judicata*—Cancellation of deeds —Declaratory suit—Withdrawal of part of claim.*—A and B, junior members of a Malabar tarwad sued to cancel certain mortgages executed by their karnavan and senior anandravan, on the ground that the secured debt was not binding on the tarwad, and to appoint A, to the office of karnavan. The last part of the prayer was withdrawn. The mortgages were executed to secure a decree-debt, the decree having been passed *ex parte* against the late karnavan of the tarwad. No fraud was alleged, but the Lower Courts found that the karnavan had been guilty of fraud in allowing the decree to be passed *ex parte.* The plaintiffs had not been parties to the decree, and the other junior members of the tarwad who had been joined were exempted from liability :—*Held*, that the nature of the debt was not *res judicata*, and that the plaintiffs were entitled to a declaration that the mortgages in question were invalid as against them :—*Held*, further, *Per cur.*—All the members of the plaintiff's tarwad should have been joined actually or constructively; but (*Kernan, J.*, *dissenting*), the objection as to non-joinder is not essential, but merely formal, and weight should not be attached to it when it is first taken on second appeal. MOIDIN KUTTI v. KRISHNAN, 10 M. 322... 978

(2) *Kanam — Construction of redemption clause— Time for redemption.*—The primary intention that a kanam is to be redeemed only after 12 years, can be negatived either expressly or by implication by a special clause. AHMED KUTTI v. KUNHAMED, 10 M. 192 ... 886

(3) *Kanam tenure—Improvements— Trees of spontaneous growth—Redemption suit —Costs of ascertaining value of improvements.*—According to Malabar custom, kanams (mortgages) must, on the expiry of the term, either be discharged or renewed. On redemption of a kanam, the kanam-holder (mortgagee) is not entitled to claim under the head of improvements the value of trees of spontaneous growth. In suits to redeem land demised on kanam tenure, on payment of the value of improvements, the costs of the adjudication necessitated by the refusal of either party to accept the terms of compensation offered or demanded by his opponent should, when those terms are reasonable, be charged on the party refusing. NARAYANA v. NARAYANA, 8 M. 284 ... 195

(4) *Kanam tenure—Redemption on terms of admitted demise—Improvements—Local custom—Jenmi's right to a moiety—Arrears of rent—Jenmi's right to deduct from amount payable by him.*—In a suit brought against A and B for redemption of land alleged to have been demised to A on kanam tenure in 1874, and to be held by B under A, it was found that the demise of 1874 was invalid because it had been executed fraudulently, but inasmuch as B admitted that he was in possession under a similar demise of 1855 it was *held* that the plaintiff was entitled to redeem on the terms of the demise admitted by B. Local usage of Ernad, by which the jenmi on redemption of a kanam takes credit for one-half of the value of improvements effected by the kanamdar, upheld. The right of a jenmi to deduct arrears of rent from the amount payable by him on redemption of a kanam, being a customary incident of the tenure, is not affected by the three years' period of limitation for recovery of arrears of rent. UNNIAN v. RAMA, 8 M. 415 ... 284

Malabar Law—4.—Mortgage—(Concluded). PAGE

(5) *Kanam. rights under a—Denial of jenm right by kanamdar—Adverse possession—Limitation—Declaration of escheat.*—A demised certain lands on kanam to B, in 1853. B, afterwards committed an offence under the Mapilla Act and the lands were handed over for the benefit of his representative to C. Government subsequently without making A a party to their proceedings, declared the lands to have escheated, and in 1863 sold them to C. A's representatives now sued to recover the lands from C's representatives who set up an adverse title and alleged that the suit was time-barred:—*Held*, that C was, at the time of the escheat, in the position of a manager for mortgagees; that the escheat proceedings of which the mortgagor had no notice did not affect his rights; that denial by the mortgagee in possession of the mortgagor's right to redeem is not sufficient to convert such possession into adverse possession. MUSSAD v. THE COLLECTOR OF MALABAR, 10 M. 189 ... 884

(6) *Otti tenure—Right to make further advance—Second mortgage to stranger without notice to otti holder invalid.*—R having conveyed certain land to P on otti tenure (mortgage) in 1852 executed a deed of further charge (otti kampuram) in 1873 to P's widow, and, in 1879, conveyed the jenm (equity of redemption) to her. Between 1873 and 1879, R mortgaged the same land to A by jenm panayam deed. In a suit by A to enforce his mortgage:—*Held*, that inasmuch as R had not given notice to the otti holder, nor given her the option of making the further advance made by A, A had no claim against the land. AMBU v. RAMAN, 9 M. 371 ... 654

Mapillas.

(1) *Adoption of Hindu Law—Presumption as to joint property.*—Although Mapillas in Malabar ordinarily follow the Hindu custom of holding family property undivided, yet, as they are not subject to the same personal law as the Hindus, their claims cannot be governed by the legal presumption of joint ownership. AMMUTTI v. KUNJI KEYI, 8 M. 452 ... 309

(2) See MALABAR LAW—MORTGAGE, 10 M. 189.

(3) See MUHAMMADAN LAW—GIFT, 10 M. 196 = 11 Ind. Jur. 185.

Marriage.

See PENAL CODE (XLV OF 1860), 9 M. 9.

Married Woman.

Imprisonment for debt.—Married woman, against whom personal decrees for debt have been made, are not exempt from arrest or imprisonment in execution of such decrees under the Code of Civil Procedure. LAKSHMANA v. KULLAMMA, 9 M. 99. ... 466

Matrimonial Suit.

See DIVORCE, 9 M. 12.

Merger.

(1) See CIVIL PROCEDURE CODE (Act XIV OF 1882), 10 M. 160.

(2) See MORTGAGE—REDEMPTION, 8 M. 478.

Minor.

(1) *Contract by—Ratification by acquiescence.*—A sued in 1885 to recover certain estates from B, alleging claim under his adoption which took place in 1865. A suit to recover the same estate had been filed on behalf of A, by his next friend and had been dismissed for default in 1872. In 1875 A, being still a minor, relinquished his claim to the estates for Rs. 12,000 under exhibit B; but now alleged that he thought he was relinquishing it only in favor of the defendant's predecessor in title who died in 1883, having been in possession of the estates since 1867. The plaintiff attained his majority in 1878:—*Held*, that the claim was *res judicata*, the plaintiff having failed to prove fraud on the part of his next friend; that whether the cause of action arose in 1865 or 1867, it was equally barred from 1879: that assuming the plaintiff was a minor of 15 years of age at the date of the deed of relinquishment, it is not likely he would not have understood its effect, or that he failed to ascertain it when he attained his majority in 1878. VENKATACHALAM v. MAHALAKSHMAMMA, 10 M. 272 ... 943

Minor—(*Concluded*).

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(2) *Custody of—Guardian—Change of religion—Act IX of* 1875, *s.* 2, *cl.* (*b*).—A Brahman boy, 16 years of age, having left his father's house went to and resided in the house of a missionary, where he embraced Christianity and was baptized. In a suit by the father to recover possession of his son from the missionary :—*Held*, that the question whether the boy was a minor was to be decided not according to Hindu Law, but by Act IX of 1875 ; (2) that the claim was not affected by s. 2. cl. (*b*), of that Act ; (3) and that the father was entitled to a decree that his son should be delivered into his custody. READE v. KRISHNA, 9 M. 391=10 Ind. Jur. 370... 668

(3) See JURISDICTION, 9 M. 39

Miscarriage.

See PENAL CODE (ACT XLV OF 1860), 9 M. 369.

Misjoinder.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 8 M. 361.

Mistake.

See CONTRACT ACT (IX OF 1872), 9 M. 441.

Mohatad.

See ACT III OF 1864 (ABKARI, MADRAS), 9 M. 97.

Mortgage.

1.—GENERAL.
2.—BY CONDITIONAL SALE.
3.—PRIORITY.
4.—REDEMPTION.
5.—SALE.

——***1.—General.***

(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 9 M. 57.

(2) See STAMP ACT (I OF 1879), 8 M. 104.

——***2.—By Conditional Sale.***

See REGULATION XXXIV OF 1802, 8 M. 185.

——***3.—Priority.***

First mortgage paid off by third mortgagee in ignorance of second mortgage—Registration—Notice—Intention to keep alive first mortgage presumed.—S mortgaged land to P. G subsequently obtained a decree. by consent, against S creating a charge on the same, and other, land and registered the decree. A, in ignorance of G's decree, paid off P's mortgage, but took no assignment thereof, and took a mortgage from S of all the land covered by G's decree. In a suit by G against S and A to enforce payment of his mortgage debt :—*Held*, that A, not having had notice of G's decree, was entitled to stand as first incumbrancer in respect of the money paid to discharge P's mortgage, and that, even if registration was legal notice, an intention to keep alive P's mortgage was to be presumed in favour of A, in accordance with the ruling of the Privy Council in *Gokul Doss Gopal Doss* v. *Rambux Seochand* (L.R. 11 I.A. 126). GANGADHARA v. SIVARAMA, 8 M. 246=9 Ind. Jur. 146 ... 170

——***4.—Redemption.***

(1) *Decree for redemption—Second suit to redeem—Civil Procedure Code, ss.* 13, 244.—A decree obtained by a mortgagor, which declared that the mortgagee should deliver up possession on payment of the sum found due to him, not having been executed for three years, a purchaser of the equity of redemption sued the mortgagee to redeem :—*Held*, that this suit was not barred by the former decree and that the plaintiff was entitled to redeem. KARUTHASAMI v. JAGANATHA, 8 M. 478 ... 327

(2) *Of seven parcels of land—Sale of equity of redemption of two parcels—Second mortgage of six parcels and redemption of one by mortgagor—Transfer of Property Act. s.* 60—*Redemption by purchaser of two parcels on payment of proportionate amount of debt decreed.*—In 1873 R mortgaged to S seven parcels of land (items 1—7) for Rs. 300. In 1880, M purchased R's rights in

***Mortgage—4.—Redemption—*(Concluded).** PAGE

items 1 and 2. In 1881 R redeemed item 5 on payment of Rs. 30 and executed a second mortgage of the rest to S for Rs. 200 :—*Held*, that M was entitled to redeem items 1 and 2 on payment of a proportionate amount of the first mortgage debt. SUBRAMANYAN v. MANDAYAN, 9 M. 453 ... 710

(3) See MALABAR LAW—KARNAVAN, 8 M. 381.

(4) See MALABAR LAW—MORTGAGE, 8 M. 415, 10 M. 192.

(5) See RES JUDICATA, 10 M. 102.

——5.—Sale.

(1) Effect of sale of mortgaged property in execution of a money decree for interest due—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 10 M. 169.

(2) *Pledge of mortgage bond—Fraudulent sale by mortgagor—Suit to enforce mortgage against* bona fide *purchaser.*—A prior encumbrancer will not be postponed to a subsequent encumbrancer, unless he has been guilty of gross negligence. A mortgaged land to B. B having bought certain land from C pledged his mortgage deed to C to secure the unpaid purchase money. C gave the bond to A who was his brother-in-law. A representing to D that the mortgage was redeemed, sold the land to him giving him the bond as a title-deed. In a suit by B against D to recover the mortgage amount by sale of the land :—*Held*, that D, even although a *bona fide* purchaser, could not resist the claim. MUTHA v. SAMI, 8 M. 200 ... 138

See HINDU LAW—JOINT FAMILY, 8 M. 388.

Muhammadan Law—Gift.

Mapillas—Gift to take effect at an indefinite future time.—Gifts to take effect at an indefinite future time are void under Muhammadan law. CHEKKONEKUTTI v. AHMED, 10 M. 196=11 Ind. Jur. 185 ... 889

Muhtarafa.

Trade-tax, zemindar's right to collect—Regulation XXV of 1802, *s.* 4—*Regulation XXV of* 1832.—The right of collecting the muhtarafa or trade-tax from artisans in his zamindari has not been delegated by Government to the zamindar of Karvaitnagar and cannot be legally exercised by his assignees. *Quære*: Whether it was competent for Government to delegate the collection of the muhtarafa to the zamindars for their own use. VEDANTA v. KANNIYAPPA, 9 M. 14 (**F.B.**) ... 406

Mulageni lease.

See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 10 M. 266.

Mutual current accounts.

See LIMITATION ACT (XV OF 1877), 10 M. 199.

Native Christian.

(1) *Hindu Law—Marriage—Consummation—Succession Act*, 1865.—According to Hindu Law, a marriage between Brahmans is binding, although the consummation ceremony or consummation never takes place. If a Hindu becomes a convert to Christianity and dies intestate, succession to his estate is governed by the Indian Succession Act, 1865. A. K., a Brahman, went through a Hindu marriage ceremony with S, a Brahman girl of eight years of age in 1850. The marriage was never consummated nor was the consummation ceremony performed. In 1851 A.K. was converted to Christianity. S refused to live with him, because he was an outcaste and in 1857 S renounced all claims on him or his estate. In 1858, A.K. went through a Christian form of marriage with M. In 1881, A.K. died intestate, and possession was taken of his estate by the Administrator-General. S claimed the estate from the Administrator-General. Her suit was dismissed on the ground that A.K. having died an outcaste and degraded, and his degradation not atoned for under Hindu Law, no right of inheritance remained to her. Before judgment was delivered S died and the suit abated. In a suit filed by the Administrator-General to have the estate administered by the Court, the claimants were (1) the father of A.K. (2) the brother of A.K. undivided from his father, and (3) the executor of M :—*Held*, that S was the wife of A.K. when he went

Native Christian—(_Concluded_). PAGE

through the form of marriage with M, and that, but for the fact that S had relinquished her rights, S would have been entitled on the death of A.K. to such portion of his estate as the law assigned to her as his widow. —_Held_, also that under s. 35 of the Indian Succession Act, 1865, the father of A.K. was entitled to the whole of the estate. ADMINISTRATOR-GENERAL OF MADRAS v. ANANDACHARI, 9 M. 466 ... 720

(2) See MINOR, 9 M. 391.

(3) See PENAL CODE (ACT XLV OF 1860), 10 M. 255.

(4) See SUCCESSION ACT (X OF 1865), 10 M. 69.

Negligence.

See MORTGAGE—SALE, 8 M. 200.

Notice.

(1) See MORTGAGE—PRIORITY, 8 M. 246.

(2) See REGISTRATION ACT (III OF 1877), 8 M. 167.

Notice to Quit.

See LANDLORD AND TENANT, 8 M. 72.

Objections.

See HINDU LAW—PARTITION, 8 M. 214.

Official Assignee

See INSOLVENCY ACT (11 AND 12 VIC. CH. 21), 8 M. 79.

Onus Probandi.

(1) See ACT III OF 1871 (TOWNS' IMPROVEMENTS, MADRAS), 8 M. 64.

(2) See ADVERSE POSSESSION, 9 M. 460.

(3) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 8 M. 75.

(4) See FOREST LAND, 9 M. 175.

(5) See HINDU LAW—SELF ACQUISITION, 9 M. 477.

Parent and Child.

Act IX of 1861—Civil Procedure Code, ss. 11, 15—Suit for recovery of minor—See JURISDICTION, 9 M. 31.

Partnership.

See CONTRACT ACT (IX OF 1872), 9 M. 492.

Pauper.

(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 8 M. 501, 9 M. 447, 10 M. 193.

(2) See HINDU LAW—PARTITION, 8 M. 214.

Penal Code (Act XLV of 1860).

(1) _Ss._ 22, 378, 379—_Theft—Moveable property._—A dug up and immediately carried away, without any authority or right, several cart-loads of earth, part of unassessed lands of village:—_Held_, that A was not guilty of theft. QUEEN-EMPRESS v. KOTAYYA, 10 M. 255=1 Weir 413 ... 931

(2) _Ss._ 24, 378—_Theft of joint property by co-parcener._—Theft of joint property may be committed by co-parcener if he takes it from joint possession and converts such possession into separate possession. QUEEN-EMPRESS v. PONNURANGAM, 10 M. 186=1 Weir 408 ... 882

(3) S. 65—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 10 M. 165.

(4) _S._ 75—_Trial of prisoner of offence under Ch. XII or XVII after previous conviction._—If a prisoner is to be tried for an offence punishable under s. 75 of the Indian Penal Code, a separate charge under that section must be framed and recorded. QUEEN-EMPRESS v. DORASAMI, 9 M 284=2 Weir 266 ... 595

(5 _Ss._ 103 _and_ 494—_Native Christian—Marriage by relapsed convert._—A was baptized in infancy into the Roman Catholic Church, but subsequently relapsed, with the rest of her family, into Hinduism and was married to a Hindu. Her Hindu husband since discarded her, and alleged that he would

Penal Code (*Act XLV of 1860*)—(*Continued*). PAGE

not have married her if he had known that she had been baptized. A was subsequently re-admitted into the Roman Catholic Church and married by B, a priest, to a Roman Catholic during the lifetime of her Hindu husband. *Held*:—that A's marriage with the Hindu was subsisting and valid at the time of her Christian marriage; that she was guilty of the offence of bigamy: and that B was guilty of abetting that offence. MILLARD, *In re*, 10 M. 218=1 Weir 566 ... 905

(6) *Ss.* 190, 503, 508—*Intimidation—Excommunication by Roman Catholic priest—Criminal proceedings stayed until complainant established the illegality of the priest's acts in a Civil Court.*—Where the exercise of ecclesiastical jurisdiction is plainly *ultra vires*, or otherwise unsanctioned by the ordinances of a religious society, or where such ordinances controvert the general law, and, in either case, consequences result which the criminal law was intended to restrain, the Criminal Courts are not at liberty to decline jurisdiction. A Roman Catholic complained to a Magistrate that he had been threatened with an illegal sentence of excommunication and had been ex-communicated by the ecclesiastical authorities, with a view to prevent him from asserting his legal rights in defending a civil suit concerning the property of a church:—*Held*, that, under the circumstances, the proper course was for the Magistrate to postpone the trial till the complainant proved in a Civil Court the illegality of the action of the ecclesiastical authorities. *In re* DECRUZ, 8 M. 140=2 Weir 249 ... 97

(7) S. 213—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 9 M. 101.

(8) *S.* 286—*Probable danger to human life—Loaded gun left in open place.*—C having returned to his house after dawn from watching his crops at night with a loaded gun, and finding his house door locked, placed the gun, loaded, with the hammer down on the cap, on a cot outside his house and went for a short time to a neighbouring house. A, the child of a neighbour, four years' old, was killed by the gun exploding. C was convicted under s. 286 of the Penal Code for negligently omitting to take order with the gun sufficient to guard against probable danger to human life:—*Held*, that the conviction was bad in law. QUEEN-EMPRESS v. CHENCHUGADU, 8 M. 421=9 Ind. Jur. 463=1 Weir 233 ... 288

(9) *Ss.* 295, 297—*Defiling a place of worship—Trespass on a place of sepulture.*—R, a Hindu, had sexual intercourse with a woman within an enclosure surrounding the tomb of a Muhammadan fakir. He was convicted under s. 295 of the Indian Penal Code:—*Held*, that, in the absence of proof, that the place was used for worship or otherwise held sacred, the conviction was bad, and that it should be altered to a conviction under s. 297 of the said Code. RATNA MUDALI, *In re*, 10 M. 126=1 Weir 256 ... 839

(10) *S.* 309—*Attempt to commit suicide—Intention*—Locus pænitentiæ.—R, with the intention of committing suicide by throwing herself into a well, ran to the well, where she was arrested. She was convicted under s. 309 of the Indian Penal Code of having attempted to commit suicide:—*Held*, that the conviction was illegal. QUEEN-EMPRESS v. RAMAKKA, 8 M. 5 =1 Weir 330 ... 4

(11) *S.* 312—*Miscarriage—With child—Stage of pregnancy immaterial.*—A woman is with child within the meaning of s. 312 of the Indian Penal Code as soon as she is pregnant.—*Held*, therefore where a woman was acquitted on a charge of causing herself to miscarry, on the ground that she had only been pregnant for one month, and that there was nothing which could be called even a rudimentary foetus or child, that the acquittal was bad in law. QUEEN-EMPRESS v. ADEMA, 9 M. 369=1 Weir 331 ... 653

(12) *S.* 498—*Marriage—Proof.*—S and G having been convicted of enticing away the wife of the complainant, the conviction was quashed on appeal, on the ground that strict proof of marriage being necessary for a conviction under S 498 of the Indian Penal Code, the evidence adduced (*viz.*, of the complainant, the woman, and her mother, who swore to the fact of the marriage) was not sufficient to enable the Court to form an opinion whether the marriage took place as a fact, and if it did take place, whether it was according to law. The accused did not cross-examine the witnesses as to the fact or validity of the marriage or otherwise impugn it.—*Held*, that the marriage was sufficiently proved. QUEEN-EMPRESS v. SUBBARAYAN, 9 M. 9=9 Ind. Jur. 464=1 Weir 572 ... 403

Penal Code (Act XLV of 1860)—(Concluded). PAGE

(13) S. 500—*Defamation—Newspaper libel—Act XXV of* 1867, *ss.* 5, 7—*Burden of proof—Statutes—*38 *Geo. III, c.* 78. *s.* 14—6 *&* 7 *Vict, c.* 96, *s.* 7.—On the prosecution of the editor of a newspaper for defamation under s. 500 of the Indian Penal Code by publishing a libel in his paper, an attested copy of a declaration made by the editor under s. 5 of Act XXV of 1886 to the effect that he was the printer and publisher of the newspaper, was produced in evidence by the complainant. The editor having been convicted by the Magistrate, the Sessions Court on appeal quashed the conviction on the ground that there was no evidence that the editor was the writer of the libel or permitted its publication :—*Held*, that in the absence of proof to the contrary, the declaration was *prima facie* proof of publication by the editor :—*Held*, also, that it would be a sufficient answer to the charge if the editor proved that the libel was published in his absence and without his knowledge and that he had in good faith entrusted the temporary management of the newspaper during his absence to a competent person. RAMASAMI v. LOKANADA, 9 M. 387 = 1 Weir 375 ... 665

(14) Ss. 500, 504—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 9 M. 439.

(15) S. 504—*Intent to provoke a breach of the peace.*—A abused B to such an extent as to reduce B to a state of abject terror :—*Held*, that A having given to B such provocation as would under ordinary circumstances have caused a breach of the peace was guilty of an offence under s. 504 of the Penal Code. QUEEN-EMPRESS v. JOGAYYA, 10 M. 353 = 1 Weir 620 ... 999

Penalty.

See CONTRACT ACT (IX OF 1872) 10 M. 203.

Plaint.

(1) See ACT VIII OF 1865 (RENT RECOVERY, MADRAS), 8 M. 411.

(2) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 8 M. 62, 361.

Pleader.

Officer of Court—See CIVIL PROCEDURE CODE (XIV OF 1882), 10 M. 111.

Prescription.

(1) See FISHERY, 8 M. 467.

(2) See FOREST LAND, 9 M. 285.

Presidency Small Cause Courts Act (XV of 1882).

S. 18—*Suits for maintenance cognizable.*—Presidency Small Cause Courts, constituted under Act XV of 1882, are not debarred from entertaining suits for maintenance not based on contract or declaratory decree. POKALA v. MURUGAPPA, 10 M. 114. (F.B.) ... 830

Presumption.

(1) See FOREST LAND, 9 M. 175.

(2) See HINDU LAW—PARTITION, 8 M. 214.

Privilege.

See COUNSEL, 10 M. 28.

Privy Council.

Practice—Re-hearing—Infancy of party at the time of the hearing of appeal—" Res noviter " *not itself a ground for a re-hearing.*—There may be exceptional circumstances which will warrant the Judicial Committee in allowing, even after an order of Her Majesty in Council has issued upon their report, a re-hearing at the instance of one of the parties. But this is an indulgence with a view mainly to doing justice when by some accident, without any blame, the party has not been heard, and an order has been made, inadvertently, as if he had been heard. In one of two appeals in suits relating to the same estate, judgment was given by the Judicial Committee after a hearing on the merits. In the other, judgment was given to the same effect as in the first, it being conceded between the parties that the questions in both suits were the same. After both judgments had been reported to Her Majesty, and confirmed by her orders in Council, a petition for a re-hearing was presented :—*Held*, that even assuming that a case of the *res noviter* had been made out (which was not, however, the fact), the orders were final, and the petition must be rejected. APPA RAO, *In re*, 10. M. 73 (P.C.) = 13 I. A. 155 = 4 Sar. P.C.J. 755 ... 802

Promissory Note. PAGE

See STAMP ACT (I OF 1879), 8 M. 87.

Purchaser Bona fide.

See MORTGAGE—SALE, 8 M. 200.

Rating.

See ACT I OF 1884 (CITY OF MADRAS MUNICIPAL), 10 M. 38.

Receipt.

See STAMP ACT (I OF 1879), 8 M. 11, 9 M. 140, 10 M. 64, 85.

Receiver.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 8 M. 229, 418, 10 M. 179.

Reciprocal Demands.

See LIMITATION ACT (XV OF 1877), 10 M. 199.

Registration Act (III of 1877).

(1) *S.* 17—*Unregistered conveyance—Covenant to pay money contingent on ejectment—Suit for money dismissed.*—By an unregistered document A stipulated that B should enjoy certain land for a term of years in order that a debt and interest might be liquidated by receipt of profits, estimated at a fixed sum, and it was provided that, if B's possession was disturbed in the meantime, A should pay the balance of the principal then due and interest from the date of the loan. B having been ejected, sued A upon the covenant to pay:—*Held*, that as the covenant to pay depended on the principal contract, which could not be proved for want of registration, B could not recover. VENKATRAYUDU v. PAPI, 8 M. 182 ... 126

(2) S. 41—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 10 M. 154.

(3) *S.* 48—*Constructive possession in pursuance of oral agreement to sell land.*—When a vendor in pursuance of an oral agreement to sell certain land directed the tenants of the land to pay, and the tenants agreed to pay, rent to the purchaser:—*Held*, that such possession was given to the purchaser as would satisfy the condition of s. 48 of the Indian Registration Act, and enable him to resist the claim of subsequent registered purchaser. PALANI v. SELAMBARA, 9 M. 267 ... 583

(4) *Ss.* 49. 50—*Notice—Fraud—Optionally registrable sale-deed, unregistered, competing with similar deed registered.*—R sold land to S in 1873 for Rs 54 and put S in possession. In 1879 R sold the same land to N for Rs. 24-8-0. N registered his sale deed. The sale-deed of S was not registered. In 1879 S sued N to have N's sale-deed cancelled on the ground of fraud. The Lower Courts held that N's sale-deed was executed collusively and fraudulently and decreed the claim:—*Held*, on second appeal, that as there were grounds, apart from notice and knowledge of possession, for holding N's sale-deed to have been executed collusively, the decision was correct. NARASIMULU v. SOMANNA, 8 M. 167 ... 116

(5) *S.* 50—*Conflict between an unregistered hypothecation bond and subsequently registered conveyance—Notice—Decree on hypothecation bond.*—Land was hypothecated to plaintiff by an unregistered bond, dated 20th May 1878, and afterwards sold to the defendant by a registered conveyance, dated 29th June 1879, which recited the previous hypothecation. In a suit brought by the plaintiff to enforce his charge:—*Held*, that there was no conflict between the instruments, and hypothecation bond was enforceable though unregistered. RAMACHANDRA v. KRISHNA, 9 M. 495=10 Ind. Jur. 456=11 Ind. Jur. 139 ... 740

(6) *S.* 50—*Registered purchaser—Notice of prior contract to sell.*—The words "former part of this section" used in the second paragraph of s. 50 of the Registration Act, 1877, refer to the whole preceding portion of the section:—*Held*, therefore, that a registered purchaser of land, who bought with notice of a prior unregistered contract by his vendor to convey to the plaintiff, could not resist a suit for specific performance on the plea of registration. KADAR v. ISMAIL, 9 M. 119 ... 480

(7) See MORTGAGE—PRIORITY, 8 M. 246.

Regulation (II of 1802).

See FOREST LAND, 9 M. 175.

Regulation (XXV of 1802). PAGE

(1) *S. 3—Inam—Grant by zemindar—Tenancy not determinalbe at will of grantor's successor—Admission.*—Regulation XXV of 1802, s. 3, imposes restrictions on alienations only to secure the interests of the public revenue, and under it the zamindar has no power to disturb grants otherwise valid made by his predecessor, or titles to inams acquired by prescription. An inam, existing under grant made in 1811, became in 1863 the subject of arrangement between the zamindar who has succeeded the grantor in the zemindari, and the inamdars. This resulted in what was either a confirmation of the original grant on terms more favourable to the zamindar, or a new grant of an estate in all respects, save as to the rent, similar to the previously existing estate, which was a tenancy in perpetuity. To a suit brought by certain mortgagees against the inamdars, to enforce mortgage rights, existing since 1842, the defence was made that possession taken of the inam lands by the Collector in 1845 had determined the original inam rights therein, as well as the lien of the mortgagees. The present zamindars, son and successor of the grantor of 1863, now claiming that be had determined the tenancy by a notice to quit.—*Held*, that the above did not operate as any estoppel as between the plaintiff and the inamdars, the zamindars not having been a party to the suit, but was only an admission and not conclusive—*Held*, also, that the tenancy was not determinable by such notice. VIZIANAGARAM MAHARAJA v. SURYANARAYANA, 9 M. 307 (P.C.) = 13 I.A. 32 = 4 Sar. P.C.J. 696 = 10 Ind. Jur. 193 ... 610

(2) S. 4—See MUHTARAFA, 9 M. 14.

Regulation (XXIX of 1802).

(1) *S.* 7.—The office of karnam in a zamindari village having been held by three brothers jointly in hereditary rights, the zamindar, on the death of one brother, did not fill up the vacancy, considering that the work could be well conducted by the two survivors. On the death of the survivors their sons succeeded to the office. The zamindar subsequently desiring to reappoint a third karnam, nominated an outsider to the joint tenancy of the office :—*Held*, that as there were heirs of the last holders in existence, the appointment was invalid. VENKAYYA v. SUBBARAYUDU, 9 M. 283 ... 594

(2) *S. 7—Karnam—Incapacity of next heir—Minority—Appointment by landholder of successor without proof before Zilla Court of incapacity of heir.*—A karnam in a zamindari village having died leaving a minor son, the landholder appointed the brother of the late karnam to the office. In a suit brought by the son, after attaining majority, to establish his right to the office and to recover its emoluments :—*Held*, that under the provisions of Regulation XXIX of 1802, he was not entitled to recover. S 7 of the Regulation provides that in filling the office of karnam, the heirs of the preceding karnam shall be chosen by the landholders, except in cases of incapacity, on proof of which before the Judge of the zilla the landholders shall be free to exercise their discretion in the nomination of persons to fill vacancies :—*Held*, that where the incapacity arose from minority about which there was no dispute an appointment by a landholder made without proof before the Court of the incapacity of the heir was valid. VENKATANARAYANA v. SUBBARAYUDU, 9 M. 214 = 10 Ind. Jur. 94 ... 546

(3) S. 7—See KARNAM, 10 M. 226.

Regulation (XXXIV of 1802).

Mortgage by way of conditional sale—Muhammadan mortgagor.—In 1832 a muhammadan mortgaged certain land with possession on condition that if the money lent was not repaid within eight years, the land should be enjoyed by the mortgagee after that period as if conveyed by sale. In 1883 a suit was brought to redeem :—*Held*, that the title of the mortgage become absolute by virtue of the terms of the contract on default of payment within the time specified. The obligation cast by Regulation XXXIV of 1802 upon a mortgagee to account for profits does not prevent a mortgage by way of conditional sale from becoming, after the period for redemption has elapsed, an absolute sale where no account has been rendered by the mortgagee. The rule laid down in *Pattabhiramier's case* (13 M.I.A., 560) applied to a mortgage executed by a Muhammadan. MALLIKARJUNUDU v. MALLIKARJUNUDU, 8 M. 185 = 9 Ind. Jur. 23 ... 128

Regulation (V of 1804). PAGE

(1) See LIMITATION ACT (XV OF 1877), 8 M. 525.

(2) S. 14 (4), s. 20—See REGULATION (X OF 1831), 10 M.

Regulation (I of 1805).

See ACT I OF 1882 (SALT LAWS AMENDMENTS, MADRAS), 8 A. 342.

Regulation IV of 1816.

(1) *Village Munsif—Jurisdiction—Power to transfer suit.*—In a suit under Regulation IV of 1816 the defendant having objected to the Village Munsif trying the suit on the ground of personal hostility, the Munsif transferred the suit to another Village Munsif:—*Held*, that this transfer was illegal. Per *Hutchins, J.*—*Semble:*—In such a case the Village Munsif should report the facts to the District Court, and the District Judge should transfer the case for trial to another Village Munsif. LAKSHMAKKA v. BALI, 8 M. 500 ... 342

(2) *S.* 5—*Village Munsif—Civil jurisdiction—Limitation of suits—Limitation Act*, 1877, *s.* 5.—S. 5 of Regulation IV of 1816, which prohibits Village Munsifs from trying any suit cognizable by them, unless (*inter alia*) the cause of action has arisen within twelve years previous to the institution of such suit, does not exclude such suits from the operation of the Indian Limitation Act, 1877. ERAJABI v. MAYAN, 9 M. 118 ... 479

(3) *Ss.* 29, 35—*Remedy confined to parties to suit.*—The remedies provided by s 35 of Regulation IV of 1816 against Village Munsifs are confined to persons who are parties to suit before such village Munsifs. RAMAN v. PAKRICHI, 9 M. 385 (F.B.) = 10 Ind. Jur. 291 ... 663

(4) *S.* 30—*Personal property only liable to attachment in execution of Village Munsif's decree.*—Under Regulation IV of 1816 the decrees of Village Munsifs cannot be executed against other than personal property. Such decrees can be executed by a transfer of the decree and against the representative of a deceased judgment debtor. KALANDAN v. PAKRICHI, 9 M. 378 (F.B.) ... 659

Regulation VII of 1816.

See REGULATION XII OF 1816, 8 M. 569.

Regulation XII of 1816.

District panchayat—Regulation VII of 1816—*Act III of* 1873.—Neither the total repeal of Regulation VII of 1816 by Act III of 1873 (Madras Civil Courts Act) nor the partial repeal of Regulation XII of 1816, so far as it contained words of reference to regulation VII of 1816 abolished the jurisdiction of district panchayats. A Collector cannot order a reference to a district panchayat under Regulation XII of 1816 unless there has been (1) an inquiry as to whether the parties will submit to the jurisdiction of a village panchayat; (2) an objection from either party to such reference, and a request in writing by one of the parties that the matter be referred to a district panchayat. CHIKATI ZAMINDAR v. PEDDAKIMEDI ZAMINDAR, 8 M. 569 ... 390

Regulation II of 1818.

See ACT I OF 1882 (SALT LAWS AMENDMENT, MADRAS), 8 M. 342.

Regulation IX of 1822.

S. 5—*Sale of land to recover fine imposed by Collector—Title of purchaser.*—A sale of land under the provisions of s. 5 of Regulation IX of 1822 does not convey to the purchaser a title free from prior incumbrances. RAMAN v. HASSEN, 9 M. 247 = 10 Ind. Jur. 63 ... 569

Regulation IV of 1831.

See HINDU LAW—IMPARTIBLE ESTATE, 10 M. 1.

Regulation VI of 1831.

See HEREDITARY VILLAGE OFFICE, 8 M. 249.

Regulation X of 1831.

Ss. 1, 2, 3—*Regulation V of* 1804, *s.* 14 (4), *s.* 20—*Sale for arrears of revenue of mitta held by tenants in common during minority of some of the owners—*

***Regulation X of 1831*—(*Concluded*).** PAGE

Minority no bar to sale—Civil Procedure Code, s. 32.—A mitta held by tenants in common was sold for arrears of revenue at a time when the owners of a moiety thereof were minors. In a suit brought by the mother of these minors on their behalf against the Collector to set aside the sale, the District Court held that Regulation X of 1831, s. 2, absolutely debarred the Collector from selling the estate of the minors during their minority and set aside the sale so far as their interests were concerned: *Held*, on appeal, that the minors not being sole proprietors, their estate was not one of which the Court of Wards could assume the management, and, therefore, s. 2 of Regulation X of 1831 did not affect the sale. In the above-mentioned suit the plaintiffs impleaded also the other previous owners, of whom one was the purchaser at the sale. Two others, in their written statement, pleaded that the purchase had been made in fraud of their rights, and claimed to be still entitled to their shares in the mitta on the ground that the purchaser must be held to have purchased for their benefit (Indian Trusts Act, 1882, s 90). They further claimed that should the sale be set aside so far as the plaintiff's interest were concerned, the sale of their interests also should be held to be null and void. Before the suit came on for hearing the District Judge *suo motu* ordered that these two defendants should be made plaintiffs in the suit under s. 32 of the Code of Civil Procedure. At the date when this order was made, the claim of these defendants, had they sued to set aside the sale in their own interest, was barred by limitation: *Held*, that the order was illegal. KRISHNA v. MEKAMPERUMA, 10 M. 44 ... 781

Regulation XXV of 1832.

See MUHTARAFA, 9 M. 14.

Religion.

Change of—See HINDU LAW—MARRIAGE, 8 M. 169.

Residence.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 8 M. 205.

Res judicata.

(1) In 1883, plaintiff sued to recover certain land from the defendant on a demise of 1856, which he alleged was a renewal of a prior demise of 1835. The suit was dismissed on the ground that the demise of 1856 was not proved. Plaintiff then sued to recover the same land on the demise of 1835 and on title: *Held*, that the decree in the former suit was no bar to this suit. KANDUNNI v. KATIAMMA, 9 M. 251 ... 572

(2) It is by the decree and not by the judgment that a question of *res judicata* must be decided. In 1881 A sued and K and others claiming a declaration of his title to certain land and an injunction against interference with his possession. K claimed part of the land by purchase from M. The Munsif decreed for A and this decree was confirmed on appeal by the District Judge, but in his judgment the District Judge recorded that K's claim was not adjudicated upon and that he should bring a fresh suit if he had any claim. In 1883 K sued A to recover the land, which he claimed by purchase from M. A pleaded that the claim was *res judicata* by virtue of the decree in the former suit. The District Munsif and, on appeal, the District Judge held that the claim was not *res judicata* and decreed for K: *Held*, on appeal to the High Court, that as no reservation was made in the decree of K's right to bring another suit, the plea of *res judicata* was good, but that, under the circumstances, an opportunity should be given to K to apply to the District Court to have the decree in the former suit brought into conformity with the judgment. This having been done, the decree of the lower Courts was confirmed. AVALA v. KUPPU, 8 M. 77 ... 53

(3) *Civil Procedure Code, s. 13—Decree of competent Court.*—In 1875, P sued in a Munsif's Court to eject a tenant from a house and to recover arrears of rent. S intervened and claimed the house under a deed of gift. The value of the property comprised in the deed of gift exceeded the limit of the pecuniary jurisdiction of the Munsif's Court. The suit was dismissed. But on appeal the claim of S under the deed of gift was adjudicated upon and rejected, and P obtained a decree for the land. In 1882, S sued P to recover all the property comprised in the deed of gift: *Held*, that, S

***Res judicata*—(*Concluded*).** PAGE

was estopped by the decree in the former suit from claiming the house. It was contended by P that the deed of gift was invalid: *Held*, that as to validity of the deed of gift, the decree of the Munsif's Court was not the decree of a competent Court within the meaning of s. 13 of the Code of Civil Procedure, 1882, and, therefore, that S was not estopped from showing that the deed was valid, and claiming the rest of the property comprised therein. PATHUMA v. SALIMAMMA, 8 M. 83 ... 58

(4) *Estoppel.*—V sued to eject K, from certain land, alleging that K having entered under a lease held as a trespasser. K pleaded that he held as mortgagee It was found that K obtained possession under a mortgage deed for Rs. 1,000, which had not been registered, and that he held also a second mortgage for Rs. 50, and it was held on second appeal that K was entitled to defend his possession by virtue of the mortgage for Rs. 50 and, as V, had not offered to redeem the charge but had sued on false averments the suit was dismissed. V then sued K to recover the land on payment of Rs. 50. In his plaint V stated that, though the mortgage deed for Rs. 50 was fabricated, the High Court had decided that he was bound to pay Rs. 50 before recovering the land from K. The District Court on appeal dismissed the suit on the ground, *inter alia*, that as V denied the genuineness of the mortagage, he could not sue for redemption: *Held*, that V was entitled to redeem VARATHAYYANGAR v. KRISHNASAMI, 10 M. 102=11 Ind. Jur. 102 ... 821

(5) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 10 M. 272.

(6) See CIVIL PROCEDURE CODE (ACT X OF 1877), 8 M. 219.

(7) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 8 M. 348, 8 M. 496.

(8) See HINDU LAW—WIDOW, 10 M. 15.

(9) See JURISDICTION, 9 M. 39.

(10) See MALABAR LAW—KARNAVAN, 8 M. 484.

(11) See MORTGAGE--REDEMPTION, 8 M. 478.

Res noviter.

See PRIVY COUNCIL, 10 M. 73.

Resumption.

See LANDLORD AND TENANT, 8 M. 72.

Revenue.

See LIMITATION ACT (XV OF 1877), 10 M. 115.

Review.

(1) See COURT FEES ACT (VII OF 1870), 9 M. 134.

(2) See PRIVY COUNCIL, 10 M. 73.

Sanction.

(1) To institute suit—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 10 M. 185.

(2) To presecute—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 9 M. 224.

Sarvasvadhanam Marriage.

See MALABAR LAW—INHERITANCE, 9 M. 260.

Service Tenure.

See LANDLORD AND TENANT, 8 M. 72.

Settlement.

See STAMP ACT (I OF 1879), 8 M. 453.

Slander.

See DEFAMATION, 8 M. 175.

Small Cause Court.

(1) *Act* XI *of* 1865—*Jurisdiction—Water-cess—Payment by landholder—Implied contract by tenant to recoup.*—If a landholder pays to Government water-cess which his tenant is legally bound to pay, a Small Cause Court constituted under Act XI of 1865 has jurisdiction to decide a suit brought by the landholder against the tenant to recover the amount so paid by the landholder. VENKATRAMYA v. VIRAYA, 8 M. 4 ... 3

(2) See ARMY ACT OF 1881, 44 AND 55 VIC., CH. 58, 10 M. 319.

Specific Relief Act I of 1877. PAGE

(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 8 M. 36.

(2) S. 27 —See REGISTRATION ACT (III OF 1877), 9 M. 119.

(3) *S.* 42—*Suit by reversioners of Hindu widow.*—The plaintiffs, uncle's sons of R a deceased Hindu, brought a suit as reversioners of R for a declaration that certain alienations made by M, the widow of R, were not binding beyond the lifetime of M. The District Judge held on the strength of *Greeman Singh* v. *Wahari Lall Singh*, 8 Cal. 12, that the suit would not lie under s. 42 of the Specific Relief Act. *Held*, that the suit would lie. GANGAYYA v. MAHALAKSHMI, 10 M. 90 ... 813

(4) S. 42 —See JURISDICTION, 8 M. 516.

Stamp.

See COURT FEES ACT (VII OF 1870), 10 M. 187.

Stamp Act (I of 1879).

(1) *S.* 3, *cl.* 4 (*b*)—*Bond.*—A executed a document, by which he promised to pay on demand Rs. 16 to B. The writer of the document signed the document as writer, for the purpose of attesting A's signature: *Held*, that the document was liable to stamp duty as a bond. REFERENCE UNDER STAMP ACT, S. 49, 10 M. 158 (**F.B.**) ... 861

(2) *S.* 3 (10)—*Unduly stamped—Rule* 5 (*e*) *of the Government of India*, 3*rd March* 1882 (*attestations of plain sheets subjoined to stamped documents*), ultra vires.—Of the rules, dated 3rd March 1882, issued by the Governor-General in Council, under ss. 9, 15, 17, 32, 51 and 56 of the Indian Stamp Act, 1879, rule 5 (*e*) requires that the part of an instrument which is written on plain sheets of paper attached to the stamped paper must be attested by the parties executing, and by the witnesses to, the document: *Held*, by Kernan, Muttusami Ayyar and Brandt, JJ. (Turner, C.J., dissenting), that the rule is *ultra vires* and inoperative for the purpose of declaring an instrument, written contrary to the provisions thereof, unduly stamped within the meaning of s. 3 (10) of the Act. *Per* Turner, C.J.—An instrument not written in accordance with the directions in rule (*e*) is not duly stamped. REFERENCE UNDER STAMP ACT, S. 46, 8 M. 532 (**F.B.**) ... 364

(3) *S.* 3 (17), *sch.* II, 15 (*b*)—*Receipt—Consideration—Barrister's fee, Honorarium not merces.*—A receipt given by a Barrister for a fee is exempted from stamp duty by art. 15 (*b*) of sch. II of the Indian Stamp Act, 1879. REFERENCE UNDER STAMP ACT, S. 46, 9 M. 140 (**F.B.**) ... 494

(4) *S.* 4 (*c*), *sch.* I, *art.* 5—*Court Fees Act, sch.* II, *art.* 1 (*b*)—*Petition to withdraw suit—Agreement—Bond.*—A petition, stamped as an agreement, having been presented to a District Court by the parties to a suit, informing the Court that they had entered into an agreement, whereby, *inter alia*, the defendant was bound to deliver to the plaintiff certain wood, and requesting that the suit might be removed from the file, the District Judge impounded it, levied a sum for insufficient stamp-duty and a penalty, on the ground that it was a bond, and forwarded it to the Collector. Upon a reference made by the Board of Revenue at the instance of the Collector: *Held*, that the duty leviable was a Court fee stamp under art. 1 (*b*) of sch. II of the Court Fees Act, 1870. REFERENCE UNDER STAMP ACT, S. 46, 8 M. 15 (**F.B.**) ... 11

(5) *Ss.* 34, 50.—Where a document has been admitted in evidence as duly stamped, such admission can only be called in question by the Appellate Court under s. 50 of the Indian Stamp Act. REFERENCE UNDER STAMP ACT, S. 46, 8 M. 564 (**F.B.**) ... 387

(6) *Ss.* 61, 64—*Receipt—Acknowledgment by letter.*—Where the receipt of money exceeding 20 rupees, in satisfaction of a debt, is acknowledged by letter without a receipt stamp being affixed, the writer is liable to punishment under s. 61 of the Indian Stamp Act, 1879. REFERENCE UNDER STAMP ACT, S. 46, 8 M. 11 (**F.B.**) = 1 Weir 902 ... 8

(7) *S.* 67.—The second clause of s. 67 of the Indian Stamp Act, 1879, is not controlled by the first clause of the section, which refers only to bills of exchange and promissory notes, but applies to all cases in which a document is executed with intent to defraud the Government of stamp duty. REFERENCE UNDER STAMP ACT, S. 46, 9 M. 138 (**F.B.**) ... 493

Stamp Act (I of 1879)—(*Concluded*). PAGE

(8) *Sch.* I, *art.* 11—*Promissory note—Bond—Impressed label—Impressed sheet—Rule* 9 (*a*) *of the Rules of Government of India of* 26*th February* 1881.—By a document, dated 8th March 1882, which purported to be a promissory note attested by three witnesses and written on an impressed label of two annas, A promised to pay B before a certain date Rs. 135: *Held*, that the document was a bond and must be treated as unstamped for the purposes of s. 34 of the Indian Stamp Act, 1879. By a document, dated 23rd June 1880, stamped with an adhesive stamp of one anna, purporting to be a promissory note attested by two witnesses, A promised to pay Rs. 56 to B or order, on demand: *Held*, that the document was not a bond but a promissory note. REFERENCE UNDER STAMP ACT, S. 46, 8 M. 87 (**F.B.**) 61

(9) *Sch.* I, *art.* 27; *sch.* II, *art* 11 (*a*)—*Vakil—Entry on roll of advocates—Exemption from duty.*—By art. 11 (*a*) of sch. II of the Indian Stamp Act, 1879 (which exempts from duty the entry of an advocate, vakil or attorney on the roll of any High Court when he has previously been enrolled in a High Court established by royal charter), a vakil on the roll of the High Court, Madras, who applies to be entered on the roll of advocates, is exempted from the duty prescribed by art. 27 of sch. I of the said Act. *In re* PARTHASARADI, 8 M. 14 (**F.B.**) ... 10

(10) *Sch.* I, *art.* 44 (*b*)—*S.* 3 (13), *sch.* I, *art.* 29; *art.* 5 (*c*)—*Mortgage—Assignment of growing coffee.*—By an agreement made the first day of September 1884, A, in consideration of Rs. 1,000 to be advanced to him by B, assigned to B the whole crop of coffee then growing upon a certain estate upon trust, *inter alia*, to secure the repayment of the sum advanced. It was stipulated that A should cultivate the crop till maturity and deliver it to B: *Held*, that this document was a mortgage liable to duty under art. 44 (*b*) of sch. I of the Indian Stamp Act, 1879. REFERENCE UNDER STAMP ACT, S. 46, 8 M. 104 (**F B.**) ... 73

(11) Sch I, art. 50 (*b*)—See COURT FEES ACT (VII OF 1870), 9 M. 146.

(12) *Sch.* I, *art.* 50, *cl.* (*b*)—*Court Fees Act, sch.* II, *art.* 10 (*a*)—*Vakalatnama—Power-of-attorney.*—A document was given to P by thirty-six persons jointly interested in a certain sum of money authorizing him to appear before a certain officer and receive payment thereof: *Held*, that the document was a power-of-attorney, and that consequently the proper stamp duty was one rupee, leviable under the Indian Stamp Act, 1879, sch. I, art. 50 (*b*). REFERENCE UNDER STAMP ACT, S. 46, 9 M. 358 (**F.B.**) ... 645

(13) *Sch.* I, *art.* 57—*Settlement—Stamp duty.*—Under art. 57 of sch. I of the Indian Stamp Act, 1879, stamp duty on a settlement is to be calculated on the value of the property settled as set forth in such settlement: *Held*, that these terms do not mean the value of the interest or interests created by the settlement, but refer to the value of the property settled, which, it was intended by Legislature, should be set forth in the settlement. REFERENCE UNDER STAMP ACT, S. 46, 8 M. 453 (**F B.**) ... 310

(14) *Sch.* II, *cl.* 2 (*a*)—*Agreement for, or relating to, the sale of goods.*—By an agreement in writing the vendor agreed to sell, and the purchaser to buy, certain salt for a price to be paid at a future date. The salt was to be at purchaser's risk from the date of the execution of the agreement, and, if not removed within a certain time, to revert to, and become the property of, the vendor: *Held*, that this document was exempt from duty under sch. II, cl. 2 (*a*), of the Indian Stamp Act, 1879. REFERENCE UNDER STAMP ACT, S. 46, 10 M. 27 (**F.B.**) ... 769

(15) *Sch.* II, *art.* 15 (*a*)—*Receipt—Endorsement of payment on mortgage-deed.*—An endorsement on a mortgage, acknowledging the receipt of the sum thereby secured is exempt from stamp duty under sch. II, art. 15 (*a*) of the Indian Stamp Act, 1879. REFERENCE UNDER STAMP ACT, S. 46, 10 M. 64 (**F.B.**) ... 795

(16) *Sch.* II, *art.* 15 (*b*)—*Receipt given by Secretary of Club to a Member for Club bill.*—Where a receipt in writing is given by the Secretary or other Manager of a Club to a Member acknowledging a payment above Rs. 20 on account of a Club bill, it is liable to stamp duty. REFERENCE UNDER STAMP ACT, S. 46, 10 M. 85 (**F.B.**) ... 809

Statute 21 Geo. III, c. 70. PAGE

S. 5 - See JURISDICTION, 8 M. 24.

Statute 38 Geo. III, c 78.

S. 14—See PENAL CODE (ACT XLV OF 1860), 9 M. 387.

Statute 39 & 40 Geo. III, c. 79.

See JURISDICTION, 8 M. 24.

Statute 4 Geo. IV, c. 71.

See JURISDICTON, 8 M. 24.

Statute 6 & 7 Vict., c. 96.

S. 7—See PENAL CODE (ACT XLV OF 1860), 9 M. 387.

Statute 11 & 12 Vict., c. 21.

(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 3 M. 276.

(2) See INSOLVENCY ACT (11 AND 12 VIC., C. 21), 8 M. 79. 8 M. 97, 8 M. 554.

Statute 23 & 24 Vict., c. 151.

S. 22—See MADRAS BOAT RULES, 9 M. 431.

Statute 24 & 25 Vict., c. 67 (Indian Council's Act).

S. 22—See LETTERS PATENT, MADRAS, 1865, 9 M. 253.

Statute 24 & 25 Vict., c. 104 (High Court's Act).

S. 9- See LETTERS PATENT, MADRAS, 1865, 9 M. 253.

Statute 34 & 35 Vict., c. 62.

S. 3-See CIVIL PROCEDURE CODE (ACT XLV OF 1882), 9 M. 256.

Statute 44 & 45 Vict., c. 58.

(1) Ss. 144, 151, 156-See ARMY ACT OF 1881, (44 & 45 VIC., C. 58), 10 M. 108, 10 M. 319.

(2) S. 145—See ARMY ACT OF 1881, (44 AND 45, VIC., C. 58), 8 M. 365.

(3) S. 151 (3)- See ARMY ACT OF 1881, 9 M. 170.

Street.

See ACT III OF 1871 (TOWNS' IMPROVEMENTS, MADRAS), 8 M. 64.

Succession Act (X of 1865).

(1) *Effect of, on estates of Native Christians previously following Hindu Law.*— A and J brothers, Native Christians, descendants of Brahmans, were living in coparcenary and owned certain land on the date when the Indian Succession Act, 1865, came into force. In 1872, no partition having been made, A died; *Held*, that J did not take the whole estate on the death of A by survivorship. TELLIS v. SALDANHA, 10 M. 69 ... 799

(2) S. 4—See DIVORCE, 9 M. 12.

(3) Ss. 35, 331- See NATIVE CHRISTIAN, 9 M. 466.

Tax.

Suit to recover-See ACT XI OF 1865 (SMALL CAUSE COURTS), 9 M. 110.

Theft.

See PENAL CODE (ACT XLV OF 1860), 10 M. 186.

Tidal River.

See FISHERY, 8 M. 467.

Trade-mark.

User in foreign market—Abandonment—Estoppel by conduct.—Such possession and use of a trade-mark in one market as to constitute a right in it, establishes in the owner thereof an exclusive right to that trade-mark in other markets, although the owner may not have used it in such markets. To constitute a mark, a trade-mark it must have been adopted as a symbol devised to distinguish a particular class of goods as the goods of that class manufactured or selected by a particular manufacturer or merchant. Where the plaintiffs by their conduct led the defendant to believe that they claimed no right to a certain trade-mark, and that it was open to the defendant to adopt it as his own, and the defendant did adopt it, and

Trade-mark—(*Concluded*). PAGE

by his industry secured a wide popularity for it in the Indian market: *Held*, that the plaintiffs were estopped from denying the defendant's right to use the trade-mark in the Indian market. LAVERGNE v. HOOPER, 8 M. 149 ... 104

Trade Tax.

See MUHTARAFA, 9 M. 14.

Transfer of Property Act (IV of 1882).

(1) *Ss.* 2, 99—*Attachment of property mortgaged prior to* 1882.—In 1884, a mortgagee obtained a decree for arrears of interest due under a mortgage deed of 1879 and in execution of the decree attached and applied for the sale of the land mortgaged:—*Held*, that by reason of s. 99 of the Transfer of Property Act, 1882, the land could not be sold otherwise than by a suit instituted under s. 67 of the said Act. KAVERI v. ANANTHAYYA, 10 M. 129 =11 Ind. Jur. 138 ... 841

(2) S. 2, cl. (*a*), s. 53—See REGISTRATION ACT (III of 1877), 9 M. 119.

(3) *Ss.* 58, 100—*Hypothecation bond.*—The period of limitation for suits upon hypothecation bonds, which contain no power of sale, or effect no transfer of property, executed before the Transfer of Property Act came into operation, is twelve years under sch II, art. 132, of the Limitation Act of 1877. —*Aliba* v. *Nanu* (I.L.R., 9 Mad. 218) followed. *Per* Muttusami Ayyar, J. —"The transaction in suit appears to be of the kind described in s. 100 of the Transfer of Property Act, which defines how a charge is created; but "it seems to me that the Transfer of Property Act does not invest all prior hypothecations with the rights and liabilities arising from simple mortgages, whether or not those transactions satisfy the requirements of the definition it contains of simple mortgages" RANGASAMI v. MUTTUKUMARAPPA, 10 M 509=11 Ind. Jur. 452 ... 1106

(4) S. 59—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 9 M. 103.

(5) S. 60—See MORTGAGE (REDEMPTION), 9 M. 453.

(6) S. 85—See HINDU LAW (JOINT FAMILY), 9 M. 343.

(7) *Ss.* 131, 135—*Notice—Assignment of actionable claim—Rights of transferee for value.*—A sued for principal and interest due on a mortgage assigned to him for value by the mortgagee. No notice of the assignment was given to the mortgagors before the plaintiff's demand. The sum sued far exceeded the amount paid by the plaintiff for the assignment and reasonable interest on it; but such amount was not paid or tendered to the plaintiff: *Held*, that the plaintiff was entitled to a decree for the whole amount due on the assigned mortgage. SUBBAMMAL v. VENKATARAMA, 10 M. 289 ... 955

Trust.

See WILL, 9 M. 325.

Trusts Act (II of 1882).

S. 91—See REGISTRATION ACT (III OF 1877), 9 M. 119.

Vakil.

See STAMP ACT (I OF 1879), 8 M. 14.

Valuation of Suit.

(1) *Court Fees Act*, s. 6, *sch. II, art.* 17.—In a suit on a mortgage bond, a decree was passed for payment of principal and interest, and in default for sale of the mortgaged property. Some of the defendants filed a memorandum of appeal against so much of the decree as declared the liability of the property, affixing a stamp of Rs. 10 only: *Held*, that the proper stamp to be paid was not Rs. 10 as in the case of a declaratory decree, but on the value of the debt not exceeding the value of the property. VENKAPPA v. NARASIMHA, 10 M. 187 ... 882

(2) *Jurisdiction of District Munsifs—Suit for declaration of title to paid offices—Withdrawal of claim to some of the offices—Office still claimed involving the right to the others.*—In a suit to declare title to four paid offices in a temple, the plaintiffs asked that the issues with regard to three of them should not be tried, but on cross-examination asserted right to them: *Held*, that the plaintiffs were not shown to have relinquished their claim on the three

***Valuation of Suit*—(*Concluded*).** PAGE

offices for the purposes of the suit. On findings that the fourth office carried with it the right to the other three and that united value of the four offices exceeded the jurisdiction of the District Munsif: *Held*, that the District Munsif had no jurisdiction to entertain the suit and that the plaint should be returned for presentation in the proper Court. SUNDARA v. SUBBA, 10 M. 371 ... 1012

Vendor and Purchaser.

Fraudulent concealment by vendor of defect of title—Damages.—In 1881 a Hindu executed a sale-deed of a house in the mufussal. The deed contained no covenant for title. The purchaser having been ejected from a portion of the house under a decree, of which the vendor was aware at the time of the sale, sued the vendor for damages. The Munsif decreed the claim on the ground that the vendor had fraudulently concealed the existence of the decree. On appeal the District Judge reversed this decree, holding that, as the purchaser had not insisted on a covenant for title, he must be held to have accepted all risks: *Held*, that, if there had been fraudulent concealment as alleged, the purchaser was entitled to damages. GAJAPATHI v. ALAGIA, 9 M. 89=9 Ind. Jur. 419 ... 459

Village Munsif.

See REGULATION IV OF 1816, 8 M. 500, 9 M. 118.

Village Police.

See ACT III OF 1864 (ABKARI, MADRAS), 9 M. 97.

Waste.

See LANDLORD AND TENANT, 10 M. 351.

Waste Land.

Hindu Law—Rights of Crown and Occupier. See FOREST LANDS, 9 M. 175.

Water-cess.

See SMALL CAUSE COURT, 8 M. 4.

Will.

Construction—Trust—Uncertainty—A Hindu by his will, after appointing certain persons executors for the purpose of managing his estate after his death, gave them the following directions:—"You should give my brothers, their wives and children, according to your wishes:" *Held*, that no trust created by these words. KUMARASAMI v. SUBBARAYA, 9 M. 325 ... 622

Witness.

(1) *Privilege—Cause of action—Suit for damages caused by false statement of witness in a suit.*—No action will lie against a witness for making a false statement in the course of a judicial proceeding. CHIDAMBARA v. TRIRUMANI, 10 M. 87 ... 811

(2) See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 9 M. 83.

Words and Phrases.

(1) "Allowed by law."—See CRIMINAL PROCEDURE CODE, 1882, 10 M. 166.

(2) "Ammunition."—See ACT XI OF 1878 (ARMS), 8 M. 202.

(3) "Court."—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 10 M. 154.

(4) "Decree holder."—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 10 M. 57.

(5) "Former part of this section."—See REGISTRATION ACT (III OF 1877), 9 M. 119.

(6) "Further enquiry."—See CRIMINAL PROCEDURE CODE, 1882, 8 M. 336.

(7) "Inferior."—See CRIMINAL PROCEDURE CODE, 1882, 8 M. 18.

(8) "Law in force."—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 9 M. 454.

(9) "Payment of wages in liquor."—See ACT III OF 1864 (ABKARI, MADRAS), 9 M. 141.

(10) "Police Officer."—See ACT III OF 1864 (ABKARI, MADRAS), 9 M. 97.

(11) "Subordinate."—See CRIMINAL PROCEDURE CODE, 1882, 8 M. 18.

(12) "Timber."—See ACT V OF 1882 (FOREST, MADRAS), 9 M. 373.

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